CUMULATIVE HARDSHIP

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INTRODUCTION

Imagine this scenario: A large manufacturing corporation, "ABC Manufacturing Corp.," (intended as a fictitious name) has about two hundred employees working in its corporate headquarters, and about twenty-five plants across the country. One department, the accounts receivable department, has twelve employees and is managed by Eli Smith, who is a vice president with the company. Over a period of about three months, four different employees ask Eli for a reduced-hours schedule.

The first employee, Amy, asks to come in at 11:00 a.m. and leave at 5:00 p.m. every day to better manage the effects of the medication she takes for her multiple sclerosis ("MS"). This medication, which helps to lower the number of relapses experienced by individuals who have the relapsing-remitting form of MS, causes flu-like symptoms at night, which causes Amy to not sleep well. Thus, not only does she have a hard time waking up early for work, but she also is just generally more fatigued, either from the effects of the medication or the effects of the disease itself (or both). Eli approves Amy's request. He understands that he has an obligation under the Americans with Disabilities Act ("ADA")[1] to provide reasonable accommodations,[2] and he believes this schedule modification is a reasonable accommodation.[3]

Two weeks later, a second employee, Brooke, also asks for a reduced-hours schedule because of fatigue. But her fatigue is related to the serious

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[*] Professor of Law, University of Toledo College of Law. I would like to thank participants at the Discussion Group: *Top Developments in Disability Law and Policy*, SEALS Annual Meeting in August 2016 (including, but not limited to, Jessica Roberts, Elizabeth Pendo, Ani Satz, and Paul Secunda); participants at the Eleventh Annual Colloquium on Scholarship for Labor and Employment Law, Seattle, Washington in September 2016 (including, but not limited to, Charlotte Garden, Joseph Slater, Michael Green, Susan Bisom-Rapp, and Fiona McQuarrie); and participants at the Ohio Legal Scholars Workshop in Toledo, Ohio, June 2017 (including Kara Bruce, Eric Chaffee, Shelley Cavalieri, and Lee Strang). Thank you to the University of Toledo College of Law for providing summer research support. Finally, thank you to my husband and colleague, Bryan Lammon, for supporting me personally and professionally.

[1] 42 U.S.C. §§ 12101–12701 (2012).

[2] *Id.* § 12112(b)(5)(A) (defining discrimination as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

[3] *See id.* § 12111(9) (defining "reasonable accommodation[s]" to include "part-time or modified work schedules"). *But see* Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 71–78 (2014) (discussing how employers are often unwilling to accommodate employees' requests for accommodations to the "structural norms" of the workplace, including hours, schedules, shifts, etc.—when and where work is performed).

depression she is experiencing. She has a difficult time getting started in the morning and wants the same schedule that Amy is working. Brooke's psychiatrist submits a note verifying that Brooke is under his care for clinical depression and that the later schedule will allow her to better manage the fatiguing effects of her depression. Eli is a little more skeptical about Brooke's need for the reduced hours, but because she has mentioned Amy's reduced-hours schedule, Eli is worried that if he does not give Brooke this accommodation, she could claim discrimination because he gave the accommodation to Amy.[4] So, Eli agrees to Brooke's accommodation request.

Eli manages to run his department with these two schedule changes by leaning on all of the employees in the department to work a little bit harder to accomplish what they need to accomplish. Amy and Brooke are happy to work harder because they are getting the benefit of the reduced hours, but some of the other employees are grumbling a bit. Eli is not too sympathetic because he knows that employees waste some time on social media platforms or socializing in the break room.

However, after about a month of Amy and Brooke working their reduced-hours schedules, a third employee in Eli's department, Carl, is having a hard time adjusting to his schedule after having taken three weeks off to recover from a skiing accident where he injured his back. Sitting or standing for more than four hours at a time causes him excruciating pain. He asks Eli if he can work two three-hour periods with a two-hour break in the middle so that he can go home (he lives close to work) and lay down to rest his back. His doctor submits paperwork supporting his need for this schedule, and although the doctor is not sure how long Carl's back pain will last, he does not think it will be permanent. Eli agrees to this request as well. Shortly thereafter, he notices that his department is falling behind on the work they need to accomplish. Although these three employees have taken a reduction in pay, it is not enough to allow Eli to hire another full-time employee, and he is reluctant to spend the time and money to hire someone permanently because all three of these schedule changes may only be temporary, rather than permanent.

Just as Eli is contemplating what to do, one of his employees, Dave, gets devastating news. Dave just found out that he has kidney failure and he must have kidney dialysis three times a week while he waits and hopes for a kidney transplant. Without the dialysis or kidney transplant, Dave would die. His dialysis schedule is set for 4:00 p.m. Monday, Wednesday, and Friday. On those days, he will need to leave work at 3:00 p.m. to get to the dialysis center in time. His doctor warns him that he will be very fatigued the day after his dialysis so he should not plan on working extra hours those days. Thus, Dave

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[4] In fact, Eli might be wrong. Discrimination claims based on intra-class discrimination are not very common. When they are successful, the ruling is often in favor of the individual with the more severe disability. *See* Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 435–36 & nn.19–21 (2010).

asks Eli if he can work 9:00 a.m. to 3:00 p.m. every day, until a matching kidney donor is found.

Eli considers his options. He is obviously very sympathetic to Dave's situation. Eli talks to ABC Manufacturing Corp.'s Human Resources Manager, Faith, about the situation. They agree that Dave should be entitled to a reasonable accommodation; that the schedule change and reduced hours would both be reasonable accommodations under normal circumstances; and that if Dave had been the first in Eli's department to ask for this schedule change, Eli certainly would have given it to him. But his department is already falling behind, and with Dave's reduced hours, that problem will be exacerbated. Faith raises the issue of whether Dave's accommodation causes an "undue hardship," which she knows is a possible defense under the ADA.[5] They discuss the fact that, even though Dave's accommodation request alone would not cause much of a hardship, together with the other employees who have requested similar accommodations, it might now rise to the level of an undue hardship when the other accommodations are viewed cumulatively.

Now imagine you are the attorney that Eli and Faith call to figure out what their legal obligations are regarding Dave. What do you tell them? The undue-hardship defense to the ADA provides that employers are not required to accommodate employees with disabilities if those accommodations cause an undue hardship to the employer.[6] An undue hardship is defined as "an action requiring significant difficulty or expense"[7] when considered in light of the following factors:

> (i) the nature and cost of the accommodation . . . ;
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> (ii) the overall financial resources of the facility . . . ; the number of persons employed . . . ; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity. . . .[8]

Despite what might seem like very detailed factors, there is actually very little consensus on what constitutes an undue hardship, in large part because

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[5] 42 U.S.C. § 12112(b)(5)(A) (stating that employers are required to accommodate the known disabilities of an otherwise qualified applicant or an employee "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business").

[6] *Id.*

[7] *Id.* § 12111(10)(A).

[8] *Id.* § 12111(10)(B).

it rarely gets litigated.[9] But that is likely to change. The reason why there are relatively few cases (and no Supreme Court cases) interpreting the undue-hardship defense under the ADA is in part because, before the ADA was amended in 2008, plaintiffs in ADA cases had a very difficult time proving that they were disabled, so most cases did not survive employers' motions for summary judgment.[10] Not only did most of these plaintiffs lose at the summary judgment stage, but courts often did not even get past the issue of whether the plaintiffs' conditions met the definition of disability, thereby falling into the ADA's protected class.[11] Now that the ADA Amendments Act of 2008 has dramatically increased the number of individuals who are considered "disabled" under the ADA, many more cases are getting past the issue of coverage and into the merits of the case.[12] The merits of an ADA employment case often include issues of whether an employee is qualified for the job and whether the employer is obligated to provide a reasonable accommodation to the employee.[13] These issues will inevitably lead to questions about the limits on an employer's obligation to provide a reasonable accommodation. That limit is the undue-hardship provision.[14]

Although there are plenty of cases that mention the undue-hardship provision under the ADA, there are relatively few cases where the undue-hardship provision is outcome-determinative or even discussed in depth.[15] To complicate matters further, the Author of this Article could find no case where the court discussed the issue of cumulative hardship in the ADA context.[16] This Article explores this issue and arrives at possible solutions for how this issue should be resolved when it arises.

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[9] STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, DISABILITY LAW: CASES AND MATERIALS 186 (2016).

[10] RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 71–84 (2005) (pointing to one study where employers prevailed in ninety percent of ADA cases filed in court). Many scholars referred to the courts' narrowing definition of disability as a "backlash against the ADA." Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 64–65 (Linda Hamilton Krieger ed., 2006); *see also* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1268 (2009); *accord* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 200–01 (2010).

[11] *See* Porter, *supra* note 3, at 18.

[12] Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2046, 2065 (2013).

[13] *See id.* at 2066.

[14] 42 U.S.C. § 12112(b)(5)(A) (2012).

[15] For instance, a Westlaw search (as of January 30, 2019) of "ADA /s 'undue hardship'" resulted in 1,935 results. Of those, only about 120 actually discussed the issue in much depth, and the undue-hardship provision dictates the outcome in a very small portion of them.

[16] There are a few cases discussing cumulative hardship in the religious-accommodation context, *see infra* Section III.A., but none directly discussing it in the ADA context. Only one case even mentions the potential of a cumulative hardship argument. *See* Stone v. City of Mount Vernon, 118 F.3d 92, 100–01 (2d Cir. 1997).

This Article proceeds in four parts. Part I gives an introduction to the ADA and the undue-hardship provision. Part II gets to the heart of the matter—providing the analysis and proposed factors for how courts should decide issues of cumulative hardship, and discussing what employers should consider when confronted with multiple reasonable accommodation requests. Part III expands this analysis of cumulative hardship into a closely analogous issue—other accommodation issues that implicate intra-class rivalries. Finally, this Article briefly concludes that prioritizing employability of individuals with disabilities, as demonstrated in Part III's hypothetical and analysis, can help resolve issues of cumulative hardship.

I. INTRODUCTION TO THE ADA AND THE UNDUE-HARDSHIP PROVISION

This Part introduces Title I of the ADA and the undue-hardship provision. After providing a brief overview of the structure of the ADA's statutory provisions that are applicable to this Article, this Part explores how the Supreme Court narrowly interpreted the definition of disability, which prompted Congress to pass the ADA Amendments Act of 2008 ("ADAAA" or "the Amendments"). As many scholars predicted, the ADAAA has made it much more likely that courts will address the merits of Title I cases,[17] which makes it more likely that the "cumulative hardship" problem presented in this Article will come to fruition. This Part also provides some background on the undue-hardship provision, including the legislative history and highlights from some of the court cases addressing its interpretation.

A. *Statutory Provisions and Regulations*

Title I of the ADA prohibits discrimination in employment. Specifically, the main antidiscrimination provision states:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[18]

The term "discriminate" has several definitions, but the one most important for the purposes of this Article is the reasonable accommodation provision, which states that discrimination includes:

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[17] *See* Porter *supra* note , at 18 n.120.

[18] 42 U.S.C. § 12112(a) (2012).

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity.[19]

The undue-hardship defense provides the outer limit of an employer's obligation to provide reasonable accommodations under the ADA. It is defined in the statute as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[20] Subparagraph (B), in turn, provides the factors to be considered:

> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
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> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[21]

The Equal Employment Opportunity Commission ("EEOC") has provided guidance on the undue-hardship provision. The regulations basically mimic the factors listed in the statute but with one additional factor: "The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[22] The appendix elaborates on the regulations. It states that undue hardship refers to any accommodation that would be "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[23] The EEOC makes clear in the appendix that the evaluation includes more than just cost when determining undue hardship. If an employer can demonstrate that the provision of an accommodation would be "unduly disruptive to its other employees or to the functioning of its business," that accommodation would constitute an undue hardship.[24] However, the EEOC also notes that an

19 *Id.* § 12112(b)(5)(A) (emphasis added).

20 *Id.* § 12111(10)(A).

21 *Id.* § 12111(10)(B).

22 29 C.F.R. § 1630.2(p)(2)(v) (2014).

23 *Id.* pt. 1630 app. § 1630.2(p), https://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol4/xml/CFR-2014-title29-vol4-part1630.xml.

24 *Id.* § 1630.15(d).

"employer would not be able to show undue hardship if the disruption to its employees were the result of those employees [*sic*] fears or prejudices toward the individual's disability" or "by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs."[25]

B. *The ADA's Narrowed, Then Expanded, Protected Class*

As previously mentioned, part of the reason the undue-hardship provision remains underdeveloped is because courts (including the Supreme Court) had narrowly interpreted the definition of disability in the years leading up to the passage of the ADAAA.[26] The statute defines disability as "a physical or mental impairment that substantially limits one or more major life activities."[27] Although one Supreme Court case arguably interpreted the definition of disability broadly,[28] the Supreme Court soon after began narrowly construing the ADA's protected class.

For example, in the *Sutton* trilogy of cases, the Court held that, when considering whether a person's impairment substantially limits a major life activity, courts should consider any mitigating measures the individual uses, such as medication or assistive devices.[29] *Sutton* involved twin sisters who were severely nearsighted.[30] They applied for positions as global airline pilots for United Airlines.[31] The sisters were rejected because United Airlines required applicants for the pilot position to have uncorrected vision of at least 20/100, and the Sutton sisters could not meet that criterion.[32] The Court held that the sisters did not have a disability because a determination of who is disabled under the ADA must take into consideration mitigating measures, including, in this case, the sisters' corrective eyewear.[33]

The Court decided two other cases on the same day as *Sutton* (hence the moniker "the *Sutton* trilogy"). In *Murphy v. United Parcel Service, Inc.*,[34] the plaintiff was a mechanic for UPS who had high blood pressure.[35] Due to his high blood pressure, he failed the medical exam required for U.S. Department

25 *Id.*

26 *See* Porter, *supra* note 3, at 13–14.

27 42 U.S.C. § 12102(1)(A) (2012).

28 *See* Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (holding that asymptomatic HIV is a disability under the ADA because it substantially limited the major life activity of reproduction).

29 Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).

30 *Id.*

31 *Id.*

32 *Id.* at 476.

33 *Id.* at 488–89.

34 527 U.S. 516 (1999), *superseded by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

35 *Id.* at 519.

of Transportation ("DOT") certification, which was necessary because his mechanic job required him to occasionally drive the trucks he was repairing.[36] The Court applied the mitigating measures rule it had just announced in *Sutton* and held that, in determining whether the Plaintiff had a disability under the ADA, he should be viewed in his mitigated state, which meant that he should be viewed considering the medication he took to lower his blood pressure.[37] Because his medication lowered his blood pressure, the Court held that he was not disabled.[38]

In the third of the trilogy of cases, *Albertson's, Inc. v. Kirkingburg*,[39] the Court considered whether the plaintiff's monocular vision was a disability under the ADA.[40] Similar to the plaintiff in *Murphy*, the plaintiff here had a job that required DOT certification.[41] During his examination, the doctor noted that his monocular vision precluded him from obtaining the DOT certification.[42] Even though he did not have eyeglasses or other assistive devices to help with his vision, the Court elaborated on its earlier mitigating-measures rule, stating that courts should consider not only artificial assistive devices but also how the plaintiff's brain can mitigate his vision impairment by developing techniques to cope with his monocular vision.[43]

After the *Sutton* trilogy, the lower courts began applying the mitigating-measures rule quite vigorously. Impairments such as monocular vision, diabetes, cancer, multiple sclerosis, hypertension, learning disabilities, AIDS, epilepsy, cerebral palsy, and others were all found not to be disabilities under the ADA.[44]

Three years after the *Sutton* trilogy, the Court struck a final blow against ADA plaintiffs in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[45] In this case, the Court again narrowly construed the definition of disability. The Court had been called upon to interpret the meaning of the terms "substantially limits" and "major life activity" in the definition of disability.[46] In determining whether a limitation on performing "manual tasks" was sufficient to qualify as a disability, the Court held that, in order to qualify as a disability, the manual tasks had to be "of central importance to most people's daily lives."[47] The Court also defined "substantially limits," stating: "We therefore hold that to be substantially limited in performing manual tasks, an

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36 *Id.*

37 *Id.* at 521.

38 *Id.*

39 527 U.S. 555 (1999).

40 *Id.* at 562 n.8.

41 *Id.* at 558–59.

42 *Id.* at 559.

43 *Id.* at 565–66.

44 Porter, *supra* note 3, at 11 (citing cases).

45 534 U.S. 184 (2002).

46 *Id.* at 195–97.

47 *Id.* at 197–98.

individual must have an impairment that *prevents* or *severely restricts* the individual from doing activities that are of central importance to most people's daily lives."[48] The courts have combined the mitigating-measures rule announced in *Sutton* and the stringent test in *Toyota* to deem many impairments not to be disabilities.[49]

In many of these cases, the courts simply granted the employer's motion for summary judgment without further analyzing the merits of the case. An often-cited study demonstrates that employers prevailed in ninety-two percent of ADA cases filed in court in the first decade of the ADA.[50] Some scholars (including the Author of this Article) have argued that federal courts narrowly construed the definition of disability in part because they wanted to avoid the difficult reasonable-accommodation issues, which might also implicate the undue-hardship provision.[51]

Congress was unhappy with the Supreme Court's narrow interpretation of disability and wanted to bring the ADA in line with the high expectations of the original statute;[52] thus, on September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008.[53] The goal of the Amendments was to overturn the Court's restrictive interpretations of the definition of disability.[54]

The Amendments do not change the basic definition of disability.[55] Instead, the Amendments include several rules of construction to help courts interpret the definition in existence.[56] First, the Amendments make clear that the definition of disability should be given a broad—not narrow—construction.[57] The Amendments state that the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted,"[58] thus overruling the Supreme Court's holding

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48 *Id.* at 198 (emphasis added).

49 Porter, *supra* note 3, at 11.

50 COLKER, *supra* note 10, at 71.

51 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, 228 (2008) ("One of the more persuasive explanations as to why the federal courts initially made it so difficult for ADA plaintiffs to qualify as having a disability is that the courts sought to avoid having to deal with complex and messy reasonable accommodation issues."); Porter, *supra* note 3, at 13–14.

52 *See* Long, *supra* note 51, at 217–18.

53 *Id.* at 217; *accord* Pub. L. No. 110-325, 122 Stat. 3553 (2008).

54 Pub. L. No. 110-325 § 2(a)(4)–(6), 122 Stat. 3553 (2008) (disagreeing with the *Sutton* trilogy of cases and the *Toyota* decision, stating that as a result of these decisions, "lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities").

55 42 U.S.C. § 12102(1) (2012).

56 *Id.* § 12102(4).

57 *Id.* § 12102(4)(A).

58 *Id.*

in *Toyota*, which stated that the ADA needs to be strictly construed to "create a demanding standard for qualifying as disabled."[59]

Second, the Amendments expressly overrule *Sutton*'s mitigating measures rule, stating that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[60]

Third, the Amendments address the meaning of "substantially limits."[61] As previously mentioned, the Court in *Toyota* defined "substantially limits" as "prevents or severely restricts."[62] Congress ultimately declined to define "substantially limits," instead deferring to the EEOC to do so, advising that the term "substantially limits" should be "interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."[63] Pursuant to this mandate, the EEOC issued regulations further elaborating on the definition of disability generally, and the "substantially limits" standard, specifically.[64] The regulations state that "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA."[65] Furthermore, it is not meant to be a "demanding standard."[66] The Amendments also state that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[67]

Fourth, Congress broadened the definition of "major life activity."[68] Under the original ADA, the term "major life activities" was defined only in the regulations and not the statute itself.[69] Thus, parties frequently debated whether an activity qualified as a major life activity.[70] In the Amendments, Congress provided a non-exhaustive list of major life activities, including several that were not listed in the EEOC's prior definition.[71] Here is the new list with additions in italics: "caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, *standing*, *lifting*, *bending*,

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59 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

60 42 U.S.C. § 12102(4)(E)(i). However, the Amendments do allow courts to consider the ameliorative effects of "ordinary eyeglasses or contact lenses." *Id.* § 12102(4)(E)(ii). Thus, even though correctable vision will continue not to be considered a disability under the ADA as amended, the Amendments do state that if an employer uses a qualification standard based on *uncorrected* vision, the employer must justify the standard as being job related and consistent with business necessity. *Id.* § 12113(c).

61 *Id.* § 12102(4)(B).

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

63 42 U.S.C. § 12102(4)(B).

64 29 C.F.R. § 1630.2(j)(1)(i) (2014).

65 *Id.*

66 *Id.*

67 42 U.S.C. § 12102(4)(D).

68 *See id.* § 12102(2).

69 *See* 42 U.S.C. § 12102(3) (1990).

70 Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEX. TECH L. REV. 321, 323–24 (2002).

71 42 U.S.C. § 12102(2)(A) (2012).

speaking, breathing, learning, *reading*, *concentrating*, *thinking*, *communicating*, and working."[72]

Even more significant than this expanded list of major life activities, Congress defined "major life activity" to include "the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[73] These bodily functions correspond to many of the impairments that lower courts had held were not disabilities under the original ADA: impairments such as diabetes (endocrine), HIV (immune system), cancer (normal cell growth), neurological (multiple sclerosis), and circulatory (high blood pressure).[74]

All of these changes have affected lower courts' interpretation of what it means to be an individual with a disability. As this Author explained in another work, courts have followed Congress's mandate to broadly interpret the definition of disability under the ADA.[75] Many plaintiffs who would have had their cases dismissed before the Amendments based on the coverage question (whether the plaintiff is an individual with a disability) are now able to survive summary judgment, leading to the merits of their cases being decided.[76] Because so many cases involve the issue of whether and when an employer is obligated to provide a reasonable accommodation, it is expected that the limitation on an employer's obligation to provide a reasonable accommodation—the undue-hardship defense—will be litigated more frequently.

C. *The Undue-Hardship Provision*

The ADA provides an exception to the reasonable-accommodation requirement by allowing employers to invoke and prove that a reasonable accommodation causes an undue hardship. This section provides the legislative history surrounding the undue-hardship provision before turning to undue-hardship cases that were decided under the precursor to the ADA—the Rehabilitation Act. Finally, it explores some undue-hardship cases that were decided under the ADA and explains the high standard the courts have imposed on employers in demonstrating undue burden.

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72 *Id.* (emphasis added).

73 *Id.* § 12102(2)(B).

74 Porter, *supra* note 3, at 16.

75 *See id.* at 19.

76 *Id. But see* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019) (discussing a surprising number of cases from the years 2014–19 that erroneously held that the plaintiffs were not disabled).

1. Legislative History

Because there is relatively little case law under the undue-hardship provision,[77] it is helpful to examine the legislative history of the ADA to determine what Congress thought the undue-hardship provision meant. As stated by one commentator, "[t]he undue hardship standard was one of the most controversial elements of the ADA during its consideration in Congress."[78] Originally, the ADA called for a higher standard than what currently exists: an accommodation would have to threaten the continued existence of the employer's business to meet the undue-hardship standard.[79] Proponents called it the "bankruptcy provision," but it was subsequently altered to the current standard in the spirit of compromise.[80] Still, the legislative history indicates that the undue-hardship provision is a high bar. For instance, Senator Lowell Weicker stated that "the costs associated with this bill are a small price to pay for opening up our society to persons with disabilities."[81]

We know that Congress intended the duty to accommodate disabilities to be greater than the duty to accommodate religious observances under Title VII, where anything more than a de minimis cost is considered an undue hardship.[82] But aside from that, Congress left its intent regarding the meaning of the standard unclear.[83] One Member of Congress pressed the need for a "concrete formula," and another emphasized that businesses should have some way of predicting their obligations when it comes to accommodating individuals with disabilities.[84] But the legislature's two attempts to provide a more concrete formula failed. The first attempt was to limit an employer's "expenditures to five percent of annual net profit for businesses with gross annual receipts of $500,000 or less."[85] This amendment failed by a large margin.[86] The other amendment proposed would have capped the cost of an

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77 *See infra* Section II.C.3.

78 Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448 (1991).

79 Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927 (1989) (citing S. REP. NO. 101-116, at 90 (1989)).

80 *Id.*

81 Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes Undue Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 422–23 (1995) (quoting 134 Cong. Rec. S5109 (daily ed. Apr. 28, 1988)).

82 *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 68 (1990) (stating that the undue-hardship standard is a significantly higher standard than the one used in *Hardison* and that this is "necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities"); S. REP. NO. 101-116, at 34 (1989).

83 In fact, one scholar described it "as a standard so vague as to amount to no standard at all." Cooper, *supra* note 78, at 1450.

84 Epstein, *supra* note 81, at 426.

85 *Id.*

86 *Id.*

accommodation at ten percent of the disabled employee's annual salary.[87] This amendment failed by a vote of 11–25 in the Senate and 187–213 in the House.[88]

Here is what *is* known from the legislative history. First, in determining whether a particular accommodation would impose an undue hardship on an employer, Congress intended for courts to consider the net cost of providing the accommodation, not the gross cost.[89] So if an employer receives tax credits or other benefits for the accommodation, these would offset the accommodation's cost.[90] Second, Congress intended that "the courts must take into account the number of employees, presently and in the future, who will benefit from the proposed accommodation."[91] Thus, an accommodation that might cause an undue hardship if it will be used for only one employee might not cause an undue hardship if it could be shared by five employees with disabilities, or if non-disabled employees might also benefit from the accommodation.[92] Third, the legislative history indicates that courts need to distinguish costs to a particular facility from costs to the entity as a whole.[93] As previously discussed, an accommodation can pose an undue hardship without threatening the existence of the employer's business as a whole.[94] But with respect to the undue hardship in relationship to a particular facility, Congress did not want an entity to shut down a marginal facility instead of absorbing the cost of a proposed accommodation at that particular facility.[95] And yet, as one commentator noted, this does suggest that Congress was willing to place fairly high costs on an entity as long as a particular facility was not threatened with closure or job loss.[96]

We also know that Congress did expect that the accommodation mandate would be a significant obligation. Some evidence of this includes the fact that the legislative history references readers and interpreters several times, both of which are very costly accommodations.[97] The legislative history also mentions personal attendants, stating that the determination of whether a personal attendant should be required to help a disabled employee when traveling for work or to help with other job-related functions should be decided on a case-by-case basis.[98]

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87 *Id.*

88 *Id.* at 426–27.

89 H.R. REP. NO. 101-485, pt. 2, at 69 (1990).

90 Cooper, *supra* note 78, at 1450 (citing H.R. REP. NO. 101-485, pt. 2, at 69 (1990)).

91 *Id.* at 1451 (citing H.R. REP. NO. 101-485, pt. 2, at 69 (1990)).

92 *Id.*

93 *Id.*

94 *See* Epstein, *supra* note 81, at 423.

95 Cooper, *supra* note 78, at 1452.

96 *Id.* at 1451–52.

97 *E.g.*, S. REP. NO. 101-116, at 30–31 (1989).

98 *Id.* at 30.

2. Undue-Hardship Cases under the Rehabilitation Act

Much of the early scholarship about the ADA was critical of two aspects of the undue-hardship provision—the vagueness of the standard and the potentially high costs of complying with the reasonable-accommodation provision, given that the definition of undue hardship, a "significant difficulty or expense," seemed to create a fairly high bar.[99]

For instance, one commentator stated that he believed the ADA would be very costly for employers, costing as much as several billion dollars annually.[100] The statute and regulations make clear, stated one scholar, "that undue hardship is something more than a de minimis expenditure—one which is significant, unduly costly, extensive, substantial, or disruptive in light of the nature and resources of the business where the employee with a disability is to work."[101] This commentator thought it was naïve for Congress to assume that the accommodation mandate in the ADA would not be expensive, responding to a Senate Report which noted that the costs to business were expected to be less than $100 per worker for thirty percent of workers needing accommodations, and the cost for fifty-one percent of those needing an accommodation would be nothing at all.[102] The commentator's response was that it was unrealistic to believe that the population of unemployed individuals with disabilities would not need significant accommodations; thus, "although accommodation costs prior to the ADA may have been 'no big deal,' accommodation costs under the ADA—particularly for those disabled citizens pulled into the employment sector for the first time—may be a very big deal indeed."[103]

The commentator also complained about the vagueness of the standard.[104] His central thesis was that Congress should not have adopted such a vague standard because it fails to inform covered entities and their disabled employees of the nature of the employer's obligations and the rights of the employees.[105] This commentator stated that a vague standard will cause employers to feel forced into giving accommodations to avoid being wrong in litigation, and it will create "tense, if not hostile, relations between employers and employees."[106] His argument was that it was wrong "to impose liability on an employer for failure to comply with an obligation that Congress has

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[99] Epstein, *supra* note 81, at 396.

[100] Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 4 (1990).

[101] Epstein, *supra* note 81, at 405.

[102] *Id.* at 428 (citing S. REP. NO. 101-116, at 30–31 (1989)).

[103] *Id.* at 430.

[104] *See id.* at 396.

[105] *Id.* at 397.

[106] *Id.*

consciously decided not to define clearly."[107] He deemed it unfair to require employers to spend money to obtain clarity through the litigation process.[108] He also argued that the vague standard puts "applicants and employees in the awkward position of not knowing what accommodations they can rightfully demand from their . . . employers."[109]

In response to arguments that the undue-hardship provision was too vague and indefinable, Congress pointed to cases that had been decided under the predecessor to the ADA—the Rehabilitation Act of 1973.[110] However, several scholars complained that those cases did not provide a consistent standard.[111] Others pointed out that there were not that many cases compared to the number of cases that would get filed under the ADA.[112] Another complaint was that these Rehabilitation Act cases involved large public employers whose budgets were largely comprised of taxpayer revenue.[113] Therefore, applying the lessons from these cases to private employers would be difficult.[114] Nevertheless, for what it is worth, this Article will next discuss some of the undue-hardship cases brought under the Rehabilitation Act.

In one of the most frequently cited undue-hardship cases under the Rehabilitation Act, *Nelson v. Thornburgh*,[115] three blind income maintenance workers with the Pennsylvania Department of Public Welfare ("DPW") requested readers to allow them to perform their jobs.[116] Because their jobs entailed extensive paperwork, they had to use readers on a part-time basis to help them fill out the paperwork necessary for performing their job functions.[117] They had hired and paid for the readers themselves, but in their

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107 Epstein, *supra* note 81, at 440–41.

108 *Id.* at 441.

109 *Id.* at 442.

110 *See, e.g.*, Julie Brandfield, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 114 (1990) ("The ADA's legislative history states that federal agencies applying the reasonable accommodation and undue hardship language should do so consistently with interpretations under the Rehabilitation Act."); Crespi, *supra* note 100, at 13.

111 *See, e.g.*, Brandfield, *supra* note 110, at 114; Steven F. Stuhlbarg, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311, 1334 (1991).

112 Epstein, *supra* note 81, at 433–34. Only 265 lawsuits were filed under section 504 of the Rehabilitation Act from 1973 to 1990. *Id.* at 433. After the ADA went into effect, approximately thirty thousand charges were filed in the first year, and approximately one-quarter of those involved reasonable-accommodation issues. *Id.* at 433–34. Professor Epstein argues that those 265 cases "could not possibly have provided a large enough database to sufficiently clarify an issue" that is litigated much more under the ADA, especially considering that only a handful of the cases addressed whether an accommodation would impose an undue hardship, and only two focused on financial costs. *Id.* at 434.

113 *Id.* at 438.

114 *See id.*

115 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

116 *Id.* at 370.

117 *Id.*

lawsuit they claimed that the defendant's refusal to accommodate them by providing readers or some other mechanical device to allow them to read was discrimination within the meaning of Section 504 of the Rehabilitation Act.[118] The defendant argued that the cost of the readers or mechanical devices would be an undue hardship.[119] In exploring the cost of the readers, the court noted that the provision of a full-time reader was not necessary because the workers could conduct the determination and redetermination interviews without the reader with them and then use the reader to prepare the forms required.[120] Thus, the court concluded that a reader was necessary only for four hours per day or less.[121] During the rest of the day, a person who could serve as a reader should be "on call."[122] At the time of the case, a clerk who would perform the job as a reader would earn $13,276 per year.[123] The court reasoned that because the plaintiffs could perform the essential functions of their job if they were each supplied with a half-time reader, the cost of accommodation would be approximately $6,638 per year for each plaintiff.[124]

In determining whether this accommodation constituted an undue hardship for the defendant, the court reviewed the factors promulgated in the implementing regulations for the Rehabilitation Act.[125] Those factors were very similar to the factors listed under the ADA: "(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed."[126] The Court also cited the illustrations in the Appendix to the regulations:

> The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.[127]

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118 *Id.* at 370–71.

119 *Id.* at 371.

120 *Id.* at 376.

121 *Nelson*, 567 F. Supp. at 376.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 379.

126 *Id.* at 379–80 (citing 45 C.F.R. § 84.12(c)(1)–(3) (1982)).

127 *Nelson*, 567 F. Supp. at 380 (citing Appendix A—Analysis of Final Regulations, 45 C.F.R. § 84.12(b)) (emphasis omitted).

Applying these regulations, the court held that, in light of the defendant's $300 million administrative budget, the "modest cost" of providing readers, and the feasibility of adopting the accommodation without disrupting the employer's services, DPW had not met its burden of demonstrating an undue hardship.[128]

In *Arneson v. Sullivan*,[129] the plaintiff was an employee at a Social Security Administration ("SSA") office.[130] He had a neurological disorder called apraxia, which caused "difficulty in bringing ideas together, difficulties in writing, distractibility, [and] motor awkwardness."[131] He especially had trouble in noisy, stressful environments.[132] He performed satisfactorily in one location, where he had a semi-private office space, but once he was transferred to a different location, he began to have trouble performing.[133] The employer terminated the plaintiff for alleged performance difficulties.[134] The plaintiff sued, arguing that he could have performed his job adequately with the following accommodations: (1) a hands-free telephone headset; (2) a quiet workspace to minimize distractions; and (3) a clerk to check his work.[135] Although the SSA agreed to the first request, it claimed that it could not find him a quiet workspace and that providing clerical assistance would mean the SSA would have to hire another employee capable of doing the plaintiff's job, the equivalent of hiring two people to perform one job.[136] The employer argued that these accommodations were not reasonable and would have caused an undue hardship, and the district court agreed.[137]

In the first opinion by the Eighth Circuit, the court disagreed with the district court's conclusion that the employer had offered the plaintiff reasonable accommodations and that the plaintiff was not qualified.[138] The court stated that the district court had not given enough attention to the possibility of transferring the plaintiff back to his original location where he had a semi-private workspace, and further did not give enough consideration to the possibility of providing some clerical assistance.[139] The court stated that it did not appear that these options were well-examined in an effort to determine

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128 *Id.* at 380.

129 946 F.2d 90 (8th Cir. 1991).

130 *Id.* at 91.

131 *Id.*

132 *Id.*

133 *Id.*

134 Arneson v. Heckler, 879 F.3d 393, 395 (8th Cir. 1989). This is an earlier opinion involving the same case.

135 *Id.* at 397.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

the financial and other impacts of the accommodations on the employer's operation.[140]

> For example, further development is necessary to ascertain what duties this assistant would have to perform in order to have some impact on [plaintiff's] job performance, what the cost of such an assistant would be and whether additional funding may be available to offset the cost to the SSA. Obviously, it is beyond the expectations of the Rehabilitation Act that the SSA be required to hire another person capable of actually performing [plaintiff's] job. On the other hand, [plaintiff] claims that he would only need someone to proofread his work and that this person would only need to know how to read. And, presumably, the necessary proofreading could be accomplished by a part-time worker, such as a college student.[141]

The court also stated: "We strongly feel that the federal government should be a model employer of the handicapped and should be required to make whatever reasonable accommodations are available."[142] The court remanded the case to the district court, which again rendered judgment for the defendant.[143]

In the Eight Circuit's second opinion, the court again reversed the holding of the district court, concluding that the plaintiff was qualified and that the SSA refused to make reasonable accommodations as required by law.[144] Specifically, the court noted that "very little was done to attempt to accommodate [plaintiff] and to, thus, preserve him as a contributing employee of the SSA. He is now on disability, receiving a government pension when he can very likely adequately perform services as a social security claims representative."[145] The court also noted that the duties of the claims representative had since been automated, thus negating the need for a clerical assistant.[146] With regard to the reduced-distraction workspace, the court noted that the agency never looked into providing a private workspace at the new location and that no one knew how much it would cost.[147] Thus, the court reversed the district court's holding and remanded, directing the district court to enter an order reinstating the plaintiff and ordering the SSA to give him computer training on the new system and to spend a reasonable amount to provide him with a distraction-free environment.[148] The court also awarded back pay.[149] And again, the court directed that, if necessary, the employer should provide a "reader" to the plaintiff.[150] The court noted that this did not need to be

140 *Arneson*, 897 F.3d at 397.

141 *Id.* at 397–98.

142 *Id.* at 398.

143 Arneson v. Sullivan, 946 F.2d 90, 90 (8th Cir. 1991).

144 *Id.* at 92–93.

145 *Id.* at 92.

146 *Id.*

147 *Id.*

148 *Id.* at 92–93.

149 *Arneson*, 946 F.2d at 93.

150 *Id.*

someone "who is an alternate claims representative, only an individual who, upon reading the paper printed by the computer at the work station, can assist [plaintiff] in his efforts to satisfactorily complete his assigned tasks."[151]

These two cases under the Rehabilitation Act are ones where the courts set a fairly high bar for the employer's ability to prove undue hardship. But in other Rehabilitation Act cases, the courts did not require expensive, burdensome accommodations. For instance, in *Gardner v. Morris*,[152] the plaintiff, a civil engineer with the U.S. Army Corps of Engineers, was diagnosed as a manic depressive.[153] His employer rejected his application for promotion and transfer to Saudi Arabia because the local medical facilities were incapable of accommodating plaintiff's condition, and the nearest physician was a one-hour flight or a thirteen-hour drive away.[154] The court concluded that the only accommodation that would have worked would have been for the Corps to set up a medical facility in Saudi Arabia sufficient to treat plaintiff's condition, and this accommodation would impose an undue hardship.[155] This case provides some insight on how an employer can reach the high burden of showing an undue hardship.

3. Undue Hardship Cases Under the ADA

Despite the concern expressed in early scholarship that the vagueness of the undue-hardship provision would lead to a great deal of litigation, the reality is that the provision is rarely litigated and very rarely outcome-determinative. This subsection does not try to discuss or even cite every undue-hardship case under the ADA. Instead, it highlights some popular and/or interesting cases. In other work, the Author of this Article analyzes the body of undue-hardship cases in much more depth.[156]

One of the earliest cases did not really discuss the issue of "how much is too much," but it did provide some guidance on the court's early attempts to determine the appropriate burdens of proof for the reasonable-accommodation obligation and the undue-hardship provision. The following is one of the most cited ADA cases: *Vande Zande v. Wisconsin Department of Administration*.[157] Scholars and courts have identified this case as most known for

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151 *Id.*

152 752 F.2d 1271 (8th Cir. 1985).

153 *Id.* at 1274.

154 Epstein, *supra* note 81, at 419; *accord Gardner*, 752 F.2d at 1275, 1277.

155 Epstein, *supra* note 81, at 419.

156 Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121 (2019).

157 44 F.3d 538 (7th Cir. 1995). Westlaw reveals that there are 2,606 citing references to this case. This opinion was authored by the well-known Judge Posner, and Judge Easterbrook was also on the panel, which likely contributed to the case's popularity.

its statement about how to determine whether an accommodation is reasonable[158]—by using a cost–benefit approach. The Seventh Circuit stated:

> It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.[159]

The court's reason for so defining the reasonable-accommodation provision was its concern that the undue-hardship provision would make it difficult for an employer to raise a cost-based defense to an accommodation, especially if the employer is large or, like the employer in this case, a government employer.[160] The court stated:

> Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead "undue *hardship,*" it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee. If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history.[161]

Next, in trying to determine how to define "undue hardship," the court stated that undue hardship is a term of relation: The court "must ask, 'undue' in relation to what? Presumably (given the statutory definition and the legislative history) in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources."[162] Thus, putting this all together, the court stated that costs should be considered at two points in the reasonable-accommodation analysis:

> The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.[163]

Applying its cost–benefit approach to one of the accommodations requested, which was a lower sink in the kitchenette so that the plaintiff could

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158 *Id.* at 542 (stating that the word "reasonable" weakens the word "accommodation," "in just the same way that if one requires a 'reasonable effort' of someone this means less than the maximum possible effort").

159 *Id.*

160 *Id.*

161 *Id.* at 542–43.

162 *Id.* at 543.

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

reach it from her wheelchair, the court stated that even though it would have cost only $150 to lower the sink, given the proximity of the bathroom sink,

> we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions "stigmatizing." That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.[164]

The second (chronologically) well-known case was brought under the Rehabilitation Act but decided in 1995, after the ADA went into effect, and it is frequently cited in other ADA reasonable-accommodation and undue-hardship cases.[165] In *Borkowski v. Valley Central School District*,[166] the plaintiff was a library teacher who served at two elementary schools.[167] In addition to her duties in the library, she taught library skills to students.[168] She suffered major head trauma and serious neurological damage, which caused difficulties with memory and concentration, and she had trouble dealing with simultaneous stimuli.[169] An unannounced visitor to one of her classes found that she was having difficulty controlling the class—"students had talked, yelled, and whistled without being corrected."[170] As a result, the school district denied her tenure.[171]

In determining the burdens of proof in deciding reasonable-accommodation and undue-hardship issues, the Second Circuit held that the plaintiff bears the burden of production and persuasion on the issue of whether she is qualified for the job in question, which includes whether there is an accommodation that would permit her to perform the job's essential functions.[172] As for how costs come into play, the court held that an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce.[173] Plaintiff's burden with respect to reasonable accommodation is one of production—she must "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[174] Then the defendant has the burden of showing that the

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164 *Id.* at 546.

165 *See, e.g.*, Roberts v. Royal Atl. Corp., 542 F.3d 363, 370–71 (2d Cir. 2008).

166 63 F.3d 131 (2d Cir. 1995).

167 *Id.* at 134.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Borkowski*, 63 F.3d at 137–38.

173 *Id.* at 138.

174 *Id.*

accommodation is unreasonable, and that burden merges with its burden of showing that the accommodation would cause an undue hardship.[175]

The court then undertook a more specific analysis of the undue-hardship factors.[176] But the court stated that the factors do not reveal much because certainly Congress could not have intended that "the only limit on the employer's duty to make reasonable accommodation[s] to be the full extent of the tax base on which the government entity c[an] draw."[177] Thus, undue hardship is a relational term, requiring that courts look at not only the costs to the employer but also the benefits to others that will result.[178] The court also stated that there is no complex formula; instead, courts should undertake a "common-sense balancing of the costs and benefits."[179]

One might read this language of the Second Circuit's opinion as suggesting that the obligation to provide an accommodation is not very great. But in deciding the issue of whether the plaintiff should be allowed a teacher's aide to assist her in managing the classroom as a reasonable accommodation, the court stated there was not enough evidence of undue hardship to decide the issue on summary judgment.[180] Specifically, the court stated that the school district had not presented evidence concerning the cost of providing a teacher's aide, the district's budget, etc.[181] The court also noted that the regulations to the Rehabilitation Act contemplate that employers might be required to assume the cost of providing an aid, absent a showing that the cost would be excessive in light of the factors.[182]

A third case, *Bryant v. Better Business Bureau of Greater Maryland, Inc.*,[183] decided shortly after the ADA became effective, also contains a significant discussion about the meaning of the undue-hardship provision.[184] In *Bryant*, the plaintiff suffered from some (but not complete) hearing loss.[185] She requested and received a transfer to the membership coordinator position from the administrative position she had been serving in.[186] As part of that new job, she had to staff a hotline number and had difficulty hearing the addresses and telephone numbers of the callers with the amplification device she was accustomed to using.[187] She requested a TTY (text telephone) system

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175 *Id.*

176 *Id.* at 139.

177 *Id.*

178 *Borkowski*, 63 F.3d at 139.

179 *Id.* at 140.

180 *Id.* at 141.

181 *Id.* at 142.

182 *Id.*

183 923 F. Supp. 720 (D. Md. 1996).

184 In full disclosure, I also chose this case for the disability law casebook that I co-authored with Steve Befort. *See* BEFORT & PORTER, *supra* note 9, at 187.

185 *Bryant*, 923 F. Supp. at 727.

186 *Id.* at 730.

187 *Id.*

that would allow her to communicate via an operator typing the conversation of the caller and then simply speak back to the caller (she had no difficulty with speech).[188] The cost of the TTY device was $279.[189] The employer ("BBB") denied her request, stating that it would cause an undue hardship.[190]

In explaining the relationship between the reasonable-accommodation obligation and the undue-hardship defense, the court stated that the reasonable-accommodation inquiry asks whether the accommodation would be effective and "would allow the employee to attain an 'equal' level of achievement, opportunity and participation, that a non-disabled individual . . . would be able to achieve."[191] The undue-hardship defense focuses on the effect the accommodation would have on the employer at a particular time.[192] The court said:

> This is a multi-faceted, fact-sensitive inquiry, requiring consideration of: (1) financial cost, (2) additional administrative burden, (3) complexity of implementation, and (4) any negative impact which the accommodation may have on the operation of the employer's business, including the accommodation's effect on its workforce.[193]

Turning to the employer's argument in this case, the employer argued that it had denied the TTY device based on a determination that it "'would slow down the operation of' the membership coordinator."[194] The employer argued it was worried about the volume of calls if they implemented a 900 number as planned, but when pressed at his deposition, the supervisor said that cost was not a factor.[195] Instead, he testified that "it was not the speed with which [the plaintiff] could handle the calls" but rather the accuracy.[196] The employer also relied on the testimony of an expert witness who testified that "BBB's members' awkwardness and unfamiliarity with the system would cause the members who called BBB an 'undue hardship.'"[197]

The court stated that these reasons did not comport with the statutory and regulatory scheme of the ADA.[198] The court stated that the defendant's "arguments based on the imagined awkwardness and unfamiliarity of BBB's members with the . . . system [was] not only inappropriate and patronizing, but offensive."[199] Even assuming that the system was "awkward and

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188 *Id.*

189 *Id.*

190 *Id.* at 731.

191 *Bryant*, 923 F. Supp. at 736 (quoting 29 C.F.R. § 1630.2(o)(1)(i)–(iii)).

192 *Id.* at 737.

193 *Id.*

194 *Id.* at 738 (quoting defendant's memorandum to plaintiff).

195 *Id.*

196 *Id.*

197 *Bryant*, 923 F. Supp. at 739 (quoting witness deposition).

198 *Id.*

199 *Id.* at 740.

unfamiliar," the court noted that the employer had not explained how that would have a negative impact on the operation of the business.[200] Defendant's assumption of an adverse impact on the business was "little more than preconceived discriminatory stereotypes, which are the targets of the ADA in the first place."[201] Thus, the defendant's undue-hardship argument failed.[202]

As this Author has discussed in other work, there are very few undue-hardship cases that involved what one typically expects to see in undue-hardship cases: significant costs.[203] But there are a few. For instance, in *Alabi v. Atlanta Public Schools*,[204] the plaintiff was a schoolteacher with a hearing disability.[205] He requested a full-time interpreter to communicate in the classroom.[206] The employer argued that this would cost too much money because the teacher needed a very skilled sign language interpreter (presumably because of the subject matter taught by the teacher).[207] The school cited the cost of the interpreter as being $62 per hour or $85,000 for the school year, which the school claimed would be an undue financial hardship, especially given the fact that the cost was disproportionate to the plaintiff's salary of $53,000.[208] The court recognized that the cost seemed high but ultimately held that the defendant did not produce sufficient evidence to establish undue hardship.[209] The court reasoned that there was no evidence the school district had attempted to negotiate this rate or see whether it could reassign another interpreter from within the school district.[210] The school district also lacked evidence regarding the impact of the potential translation fees on the school district's fiscal operation or resources.[211]

In another sign language interpreter case, *Searls v. Johns Hopkins Hospital*,[212] the plaintiff was a deaf woman with a nursing degree.[213] When she was offered a nursing job, she requested an interpreter.[214] The evidence revealed that the cost of providing an interpreter proficient in medical terminology was between $40,000 and $60,000 and that the plaintiff would have required "two interpreters with her at all times at an annual cost of

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200 *Id.*

201 *Id.*

202 *Id.* at 741.

203 *See* Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 333 (2007).

204 No. 1:12-cv-0191-AT, 2011 WL 11785485 (N.D. Ga., Sept. 26, 2011).

205 *Id.* at *1.

206 *Id.* at *2.

207 *Id.* at *3.

208 *Id.* at *8.

209 *Id.* at *10.

210 *Alabi*, 2011 WL 11785485, at *10.

211 *Id.*

212 158 F. Supp. 3d 427 (D. Md. 2016).

213 *Id.* at 430.

214 *Id.* at 433.

$240,000."[215] The hospital ultimately determined that it was too expensive to accommodate her and rescinded her offer.[216] When the court discussed the employer's undue-hardship defense, it noted that the defendant had focused on the resources and operations only of the specific unit for which she would be hired, ignoring the question of how providing an interpreter costing $120,000 or 0.007% of the entire operational budget of $1.7 billion could impose an undue hardship.[217] The employer basically argued that it had no money in the budget allocated for reasonable accommodations.[218] The court (sensibly) held that the employer's budget for reasonable accommodations was an irrelevant factor in assessing undue hardship because "allowing an employer to prevail on its undue-hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue to the employer."[219] Finally, the court stated that it was irrelevant that the cost of the interpreter would be twice the salary of the plaintiff.[220]

Interestingly, the most numerous of all of the undue undue-hardship cases the Author of this Article read were cases involving modifications to the "structural norms" of the workplace.[221] Structural norms refer to the hours, shifts, schedules, attendance requirements, and leave-of-absence policies—"basically, when and where work is performed."[222] This is not surprising given that some studies indicate that the most frequently requested accommodation is an accommodation to one of these structural norms.[223]

Several cases involved attendance violations.[224] Many involved the court stating in rather a perfunctory manner that attendance is an essential function of the job and that requiring the employer to accommodate an employee's disability-related erratic attendance is an essential function.[225]

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215 *Id.* at 431. It was not clear why she would need two interpreters with her at all times, and even if she did, it was not clear how the defendant arrived at the $240,000 figure. The court used the figure of $120,000. *Id.* at 438.

216 *Id.* at 432–33.

217 *Searls*, 158 F. Supp. 3d at 438.

218 *Id.* at 438–39.

219 *Id.* (quoting Reyazuddin v. Montgomery Cty., 789 F.3d 407, 418 (4th Cir. 2015).

220 *Id.* at 439.

221 As mentioned, the Author read over 120 cases that discussed the undue-hardship defense, and fifty-three of them involved accommodations to the structural norms of the workplace.

222 Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 963 (2014); Porter, *supra* note 3, at 71.

223 Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 88 (2016) (citing Lisa Schur et al., *Accommodating Employees with and Without Disabilities*, 53 HUM. RESOURCES MGMT. 593, 601 (2014)).

224 *See* Porter, *supra* note 222, at 985.

225 *See, e.g.*, Thomas v. Trane, A Bus. of Am. Standard, Inc., No. 5:05-CV-440(CAR), 2007 WL 2874776, at *8 (M.D. Ga., Sept. 27, 2007) (stating that plaintiff's requested accommodation of a last-minute excused absence whenever he needed time off for his disability would cause an undue hardship because it could cause the assembly line to back up and increase overtime hours for other employees called to fill in); Lu Frahm v. Holy Family Hosp. of Estherville, Inc., No. C95-3011, 1996 WL 33423407,

Therefore, it was surprising to see the court's discussion in the relatively early ADA case *Dutton v. Johnson County Board of County Commissioners*.[226] In this case, the plaintiff worked as a laborer, truck driver, and heavy-equipment operator, and he suffered from migraine headaches, which led to his termination for absenteeism.[227] The plaintiff's requested accommodation was permission to use vacation time for unscheduled absences due to illness even if he had exhausted his available sick leave.[228] The employer argued that this accommodation would be unreasonable and would impose an undue hardship, but the court disagreed and held that the employer had not proved that the plaintiff's proposed accommodation would cause an undue hardship.[229] The court reasoned that the employer had not established that the nature of plaintiff's job was such that regular and predictable attendance was "critical," and the plaintiff had not exceeded his allowed leave banks.[230] Thus, even though the unscheduled absences were disruptive for managers and other employees, the court held that the employer had not established that the plaintiff's unscheduled absences were unduly disruptive.[231] This case is surprising for several reasons. First, it was unusual for migraine headaches to have been considered a disability before the ADA Amendments Act.[232] Second, it is fairly unusual for a court to say that regular and predictable attendance is not important.[233] And third, it seems likely that most courts would have said the disruption caused by plaintiff's frequent unscheduled absences (which often occurred on Mondays and Fridays) *did* cause an undue hardship.[234]

Despite having reviewed over 1 thousand cases, and despite having around 120 cases that included an undue hardship analysis, none of these cases provides any definitive guidance on this issue of cumulative hardship, that is, the potential magnitude of the burden on employers caused by the culmination of multiple accommodations. This Article turns to cumulative hardship next.

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at *6 (N.D. Iowa, Oct. 30, 1996) (stating that attendance is an essential function of the job and that plaintiff's proposed accommodation for flexible scheduling because of her severe migraines would impose an undue hardship on the employer).

226 859 F. Supp. 498 (D. Kan. 1994).

227 *Id.* at 501.

228 *Id.* at 507.

229 *Id.* at 508.

230 *Id.*

231 *Id.*

232 *See, e.g.*, Allen v. Southcrest Hosp., 455 Fed. App'x 827, 832 (10th Cir. 2011).

233 *See, e.g.*, Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1239 (9th Cir. 2012).

234 *See Dutton*, 859 F. Supp. at 501–02.

II. DECIDING ISSUES OF CUMULATIVE HARDSHIP

In attempting to decide issues of cumulative hardship, this Part first summarizes what little case law there is that touches on the issue, including a couple of cases regarding accommodations for religious practices under Title VII. This Part then addresses some obvious ways courts might resolve issues of cumulative hardship. Because these responses do not lead to satisfactory results, this Part explores the factors courts could or should consider in determining issues of cumulative hardship, including severity of the disability, stigma surrounding the disability, whether the disability or its symptoms were caused or exacerbated by choices made by the employee, and the consequences for each employee if she is not accommodated. Finally, this Part argues that, in determining issues of cumulative hardship, courts should prioritize the employability of the affected employees if they ultimately lose their job because of the cumulative hardship of their accommodations.

A. *Existing Discussions Regarding Cumulative Hardship*

Very few courts or commentators have addressed the issue of cumulative hardship. Certainly, the ADA itself does not address this problem.[235] In fact, very soon after the ADA's passage, some commentators expressed concern about the cumulative expenses of making reasonable modifications, "which separately may not be burdensome, but could collectively be devastating."[236]

Some commentators have pointed to cases that they believe address the cumulative-hardship problem but actually involve a series of problems that would arise from having to provide one particular accommodation.[237] For example, in *Dexler v. Tisch*,[238] the plaintiff, who had achondroplastic dwarfism, was denied a job at the United States Postal Service.[239] When the plaintiff brought suit under the ADA, the court held that the plaintiff was unable to perform the essential functions of his job even with an accommodation.[240] The plaintiff proposed a $300 stool for him, which would have enabled him

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235 Stuhlbarg, *supra* note 111, at 1340–41.

236 *Id.* at 1345. Stuhlbarg proposed a "summa" cap for reasonable-accommodation expenses. For instance, a percentage of an employer's net assets or net worth could serve as the cap. "The sum of each reasonable accommodation within a given year would not exceed this percentage without constituting an undue hardship." *Id.*

237 *See, e.g.*, Eric Wade Richardson, *Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act*, 64 U. CIN. L. REV. 189, 208–09 ("[T]he cumulative effect of several slight hardships may constitute an undue hardship on an employer, relieving it of the duty to accommodate the employee.").

238 660 F. Supp. 1418 (D. Conn. 1987).

239 *Id.* at 1419–20.

240 *Id.* at 1422–23, 1425–27.

to reach things he otherwise could not.[241] However, the court determined that carrying and placing the stool would lose time and efficiency.[242] The court was also worried that the plaintiff would be unstable while standing on the stool and might injure himself if he fell.[243] Similarly, the court was worried that placement of the stool in crowded hallways of the post office might have increased the risks to other employees, who might not see it and consequently trip and fall over the stool.[244] Ultimately, the court stated that the combination of these increased risks and the loss of productivity would have resulted in an undue hardship on the post office.[245] As the reader can see, this is not the same "cumulative hardship" issue discussed in this Article but rather the consideration of multiple ways in which one accommodation could cause an undue hardship for an employer.

There is one case under the Rehabilitation Act that arguably addressed issues of cumulative hardship, although those issues are not analyzed with much depth or clarity. *Taylor v. Rice*[246] involved the rejection of Lorenzo Taylor, who was HIV-positive, for a position as a Foreign Service Officer ("FSO") with the United States Department of State.[247] The State Department had a policy whereby it would not hire a new FSO unless he had "worldwide availability," which meant that he had a health clearance to serve in "hardship posts where medical facilities are inadequate."[248] The State Department refused to give health clearance to an applicant infected with HIV, although it would accommodate current employees who became HIV-positive and therefore could not work at all posts.[249]

The district court granted the defendant's motion for summary judgment for several reasons, including its holding that having "worldwide availability" is an essential function of the job.[250] As part of this argument, the court noted that if the State Department waived the "worldwide availability" requirement for Taylor, "it would ultimately be required to do so with respect to *all* applicants who are not available worldwide, which would, over time, dramatically shrink the pool of Foreign Service Officers that is available for worldwide assignment."[251] Similarly, the court held that Taylor's proposed

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241 *Id.* at 1423.

242 *Id.*

243 *Id.*

244 *Dexler*, 660 F. Supp. at 1423.

245 *Id.* at 1428.

246 No. Civ.A. 03-1832(RMC), 2005 WL 913221 (D.D.C. April 20, 2005), *rev'd*, Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006).

247 *Id.* at *1.

248 *Id.*

249 *Id.*

250 *Id.* at *11. The court also held that Taylor posed a direct threat to himself because there would be 32–50% "of hardship posts to which he could not be assigned without posing a significant risk to his own health and safety." *Id.* at *12.

251 *Id.* at *10 (quotation omitted).

accommodation—specifically, accepting him into the Foreign Service, despite his inability to serve in hardship posts around the world—would impose an undue hardship on the State Department.[252] The court stated: "The inevitable impact of such an accommodation would be a *de facto* elimination of worldwide availability as a pre-requisite for all similarly-situated entry-level FSOs."[253] With respect to Taylor's proposed accommodation of allowing him to travel to receive medical care if he were posted at a location without adequate care, the court held that "to allow Mr. Taylor and, as a result, other similarly-situated individuals, to travel to receive medical care on the government's dime would impose a large financial burden on the State Department."[254]

In Taylor's brief on appeal, he criticized the district court because, when it considered the cost of accommodating Taylor, it also considered the costs of accommodating every other "similarly situated" individual, thereby finding an undue hardship.[255] Taylor argued that this analysis "seriously misconstrued the applicable law."[256] Instead, Taylor argued that the undue-hardship inquiry should focus "on the impact which the accommodation would have, if implemented, on the specific employer in question at a particular time."[257] Taylor pointed to Title VII religious-accommodation cases,[258] in which the undue-hardship standard is much easier for employers to meet, yet courts have repeatedly held that undue hardship "must mean present undue hardship, as distinguished from anticipated or multiplied hardship."[259] Taylor argued that the district court should have assessed the financial and administrative burdens of accommodating only the plaintiff and not similarly situated employees who might make similar requests in the future.[260] Taylor said that "[t]he Rehabilitation Act require[d] the Department to assess whether accommodating Mr. Taylor—and Mr. Taylor alone—would be unduly costly."[261] Unfortunately, although the appellate court reversed the district court's grant of summary judgment, it did not address Taylor's argument regarding cumulative hardship.[262]

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252 *Taylor*, 2005 WL 913221 at *16.

253 *Id.* (citing the defendant's reply brief, which stated that waiving the worldwide availability requirement "would over time[] dramatically shrink the pool of FSOs . . . in designated hardship posts").

254 *Id.* at *17.

255 Appellant's Final Opening Brief at 35, Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006) (No. 05-5257).

256 *Id.*

257 *Id.* (quoting Bryant v. Better Bus. Bureau, 923 F. Supp. 720, 737 (D. Md. 1996)).

258 *Id.* at 35–36.

259 *Id.* (quoting Haring v. Blumenthal, 471 F. Supp. 1172, 1182 (D.D.C. 1979)).

260 *Id.* at 36.

261 Appellant's Final Opening Brief at 36, Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006) (No. 05-5257).

262 *See generally* Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006).

Similarly, a few cases address issues of cumulative hardship in the religious accommodation context, and those cases confirm what Taylor argued in his brief—that undue hardship cannot be decided based on abstract, hypothetical, or speculative future cumulative hardship.

For instance, the best discussion of undue hardship based on speculative cumulative hardship can be found in *Brown v. General Motors Corp.*[263] Brown worked on a General Motors ("GM") assembly line on the daytime shift.[264] He joined the Worldwide Church of God, one of whose tenets was that he could not work during the Sabbath, defined as the period between sunset on Friday and sunset on Saturday.[265] Shortly thereafter, there was a workforce reduction on the assembly line, which meant that Brown's seniority was such that he could no longer maintain his position on the day shift and he was transferred to the second shift.[266] Until he was fired, Brown refused to work after sunset on Friday evenings.[267] Brown sued his employer under Title VII for religious discrimination, specifically for failing to accommodate his religious practices.[268] Because there was no collective bargaining agreement that would prohibit Brown from the accommodation of having Friday nights off (after sunset), the only issue was whether such an accommodation would cause the employer an undue hardship.[269]

The district court found that GM employed "extra board men" who were available to replace workers with unscheduled absences.[270] These workers were available without additional costs in wages or overtime pay to take over for the plaintiff after sunset on Fridays.[271] One supervisor testified that plaintiff's absence was a "'drop in the bucket' in terms of lost efficiency," yet the district court granted summary judgment to GM.[272] The court stated that "the cumulative effect of numerous individuals who would desire to also be excused from their forty hour work week for various religious *and personal reasons* would create an 'undue hardship.'"[273] The appellate court disagreed and reversed the district court's judgment. The court stated:

> The general cumulative effect of prior plant problems, which evidently were solved before May 1970, or the projected "theoretical" future effects cannot outweigh the undisputed fact

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263 601 F.2d 956 (8th Cir. 1979).
264 *Id.* at 958.
265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.*
269 *Brown*, 601 F.2d at 958.
270 *Id.* at 959.
271 *Id.*
272 *Id.*
273 *Id.* (quoting the district court).

> that no monetary costs and de minimus efficiency problems were actually incurred during the three month period in which Brown was accommodated.[274]

Similarly, the court rejected the assertion that a cumulative effect would arise if several employees want Friday nights off for various religious and personal reasons.[275] The court noted that

> the record reflect[ed] that only four other Sabbatarians were working on the second shift out of a total work force of 1200–1600 [and that] GM made no attempt to show whether accommodation of these employees would give rise to any costs or what the actual aggregated impact of accommodating these employees would be.[276]

Instead, GM had simply speculated about the possible costs. But the court held that "[s]uch speculation is clearly not sufficient to discharge GM's burden of proving undue hardship."[277] In holding that the defendant had not established an undue hardship, the court agreed with this statement from another court:[278]

> [I]t seems to this court that "undue hardship" must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level.[279]

The case the *Brown* court quoted favorably, *Haring v. Blumenthal*,[280] involved a plaintiff who was a tax law specialist for the IRS.[281] He was not promoted to a higher-level position because he refused to classify as tax exempt abortion clinics and other organizations promoting abortion or homosexuality.[282] He then brought a religious discrimination case under Title VII.[283] Plaintiff alleged that "the types of cases with which he might have a moral or religious problem constitute only a minute percentage of the total volume of applications for exemption processed by a reviewer."[284] Assuming that to be true, the court stated that the applications that plaintiff refused to handle could be processed without an undue hardship.[285] The court then

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274 *Id.* at 960.
275 *Brown*, 601 F.2d at 960.
276 *Id.* at 961.
277 *Id.*
278 Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979).
279 *Brown*, 601 F.2d at 961 (quoting *Haring*, 471 F. Supp. at 1182).
280 471 F. Supp. 1172 (D.D.C. 1979).
281 *Id.* at 1174–75.
282 *Id.* at 1175 & n.4.
283 *Id.* at 1175.
284 *Id.* at 1180.
285 *Id.*

addressed the IRS's cumulative hardship argument.[286] The IRS argued that if the plaintiff were to be promoted notwithstanding his refusal to handle certain types of cases, others would be encouraged to do so also, and soon the IRS would face a multiplied undue hardship.[287]

The court first noted that this appeared to be an issue of first impression and defined the issue as "whether the level of hardship must be measured by the accommodation of the one employee seeking relief or by the precedent-setting effect of the grant of such relief to him and the conceivable actions of others."[288] The court held that "'undue hardship' must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship."[289]

Although not addressed as clearly, one other case seemed to touch on the idea of possible cumulative hardship. In *Niederhuber v. Camden County Vocational & Technical School District Board of Education*,[290] the plaintiff was a member of the Worldwide Church of God and asked to miss six consecutive days of work to observe the church's holy days.[291] The plaintiff's supervisor advised him that the absence could not be approved because "it would start a bad precedent."[292] The plaintiff was eventually terminated for being absent on his religious holidays, and the defendant argued that accommodating plaintiff's religious absences would constitute an undue hardship on the school system.[293] The court noted that his religious holidays would involve only five to ten workdays each year and that the defendant lacked evidence of a substitute teacher shortage.[294] Furthermore, the plaintiff was willing to take his religious holidays without pay.[295] The school district tried to argue that if it gave the plaintiff this leave, it would be obligated to accommodate "numerous other teachers with . . . unpredictable requests for religious holidays," but the court responded that there was no evidence to support that fear.[296] The court stated:

> Clearly, if the mere assertion by employers that accommodating the beliefs of one employee will cause undue hardship by forcing them to accommodate the beliefs of all its employees were sufficient, by itself, to relieve them of the duty of accommodation, then "no employer would ever be required to accommodate any religious belief of any employee."[297]

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286 *Haring*, 471 F. Supp. at 1181.
287 *Id.*
288 *Id.*
289 *Id.* at 1182.
290 495 F. Supp. 273 (D.N.J. 1980).
291 *Id.* at 274–75.
292 *Id.* at 275.
293 *Id.* at 276, 279.
294 *Id.* at 279.
295 *Niederhuber*, 495 F. Supp. at 279.
296 *Id.* at 280 (quotation omitted).
297 *Id.* (quoting Jordan v. N.C. Nat'l Bank, 565 F.2d 59, 72, 78–79 (4th Cir. 1977)).

Two other cases found that employers cannot establish undue hardship in situations where employees ask for a waiver from having to pay union dues because their religious beliefs prohibited paying union dues.[298] For instance, in *McDaniel v. Essex International, Inc.*,[299] the plaintiff was "a Seventh-day Adventist who was discharged by her employer for refusing to pay union dues" in compliance with her religious beliefs.[300] Instead, she had proposed paying an equivalent amount to a charity to be chosen by the employer and union.[301] The district court found that it would be an undue hardship on the union to forego the dues payment from the plaintiff.[302] But the Court of Appeals for the Sixth Circuit stated that there was no evidence for that conclusion and suggested that a claim of undue hardship cannot be based on "hypothetical hardships."[303]

Similarly, in *Anderson v. General Dynamics Convair Aerospace Division*,[304] the Court of Appeals for the Ninth Circuit relied on *McDaniel* and reversed the lower court, which had held that the plaintiff's refusal to pay union dues for religious reasons "would be an undue hardship as a matter of law because [it] would create 'free riders.'"[305] The Ninth Circuit stated that "[u]ndue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."[306]

The exhaustive research on this subject for this Article revealed only one ADA case that even hinted at the issue of cumulative hardship: *Stone v. City of Mount Vernon*.[307] In this case, the employer refused to assign the plaintiff, who was a firefighter, to a light-duty assignment after an off-duty accident left him a paraplegic.[308] There were light-duty positions available in the Fire Alarm Bureau, but the city refused to assign him to one of those positions because it was worried that doing so would set a dangerous precedent.[309] One of the plaintiff's supervisors expressed concern that if the department were forced to hire disabled persons not as well qualified as the plaintiff, or were forced to hire five to ten disabled persons in that light duty

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298 Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978), *rev'd*, 648 F.2d 1247 (9th Cir. 1981); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

299 571 F.2d 338 (6th Cir. 1978).

300 *Id.* at 339.

301 *Id.* at 340.

302 *Id.* at 343.

303 *Id.*

304 589 F.2d 397 (9th Cir. 1978), *rev'd*, 648 F.2d 1247 (9th Cir. 1981).

305 *Id.* at 401.

306 *Id.* at 402.

307 118 F.3d 92 (2d Cir. 1997).

308 *Id.* at 93–94.

309 *Id.* at 95.

position, it would create an undue hardship.[310] The court disregarded this argument, stating:

> Each request for a reasonable accommodation under the federal disability statutes must be decided on the basis of the existing circumstances. To the extent that an employer has needs for a number of persons who have no disability, the number of employees already on staff who had disabilities would be a material factor to be considered. The suggestion that hiring 5–10 disabled persons would be an undue hardship is not a defense when the employer has hired none.[311]

All of this leads to the conclusion that there is at least one rule about the meaning and scope of cumulative hardship—it cannot be based on a speculation of a possible future cumulative hardship. So, for instance, in the hypothetical introduced in this Article's Introduction, when Amy asks for a reduced-hours schedule to help her manage the side effects of the medication she is taking for her MS, ABC Manufacturing Corp. could not justify a refusal of that accommodation by stating that it is concerned that the hypothetical cumulative effects of accommodating other employees in the future who might need reduced hours creates an undue hardship. But this still does not answer the question of what to do with Dave, the fourth person in the department to ask for a reduced-hours schedule because of his kidney dialysis. The following section explores this question.

B. *Possible Responses to the Cumulative Hardship Issue*

In determining how an employer would or should react to the problem presented in the Introduction's hypothetical, there are several possible responses. The following subsections explore those various responses, discussing their pros and cons, both from a legal perspective and from a policy perspective.

1. Employers Can Never Consider Cumulative Hardship

The most employee-friendly response to the cumulative-hardship problem is to simply state that employers can never use the cumulative effects of undue hardship when denying an accommodation. In other words, the employer would have to consider each employee individually and ask whether that employee's accommodation would cause the employer an undue hardship in light of the factors set forth in the statute.

There is some support for this response to the cumulative hardship problem. First, the statute and its regulations focus on the need for an individualized inquiry, not only in determining whether someone is disabled but also

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310 *Id.* at 100–01.

311 *Id.* at 101.

in determining whether someone is qualified to perform the essential functions of the job and whether there is a reasonable accommodation that the employer must provide.[312] Second, it would avoid punishing the last-in-time employee. Referring back to the previously provided hypothetical, it is not Dave's fault that he was diagnosed with kidney failure only after his supervisor had allowed three other employees to have reduced-hours schedules.

But the concern with this response is that it ignores serious problems employers might have with real cumulative-hardship issues. By the time Dave seeks the accommodation of reduced hours, Eli's department is suffering and they have been unable to complete their work on time. If the department cannot consider the cumulative effects of multiple accommodations, it will be required to deal with the difficulties of being under-staffed. Its options are not great. Hiring a full-time worker not only takes time and money, but also, some of the employees who are on reduced hours might return to full-time in the near future, and that will leave the department over-staffed. Depending on the sophistication and difficulty of the work the department does, it might be difficult, if not impossible, to hire a qualified person if the position is only going to be a temporary one.

Finally, as previously mentioned, some of the early scholarship on the undue-hardship provision suggests that employers and courts *should* be able to consider cumulative hardship.[313] For instance, one commentator expressed concern about the cumulative expenses of making reasonable modifications, "which separately may not be burdensome, but could collectively be devastating."[314] Another commentator opined that "the cumulative effect of several slight hardships may constitute an undue hardship on an employer, relieving it of the duty to accommodate the employee."[315]

2. Employers Can Consider Cumulative Hardship and Deny the Hardship-Triggering Accommodation

The opposite of the first response is to allow the employer to consider the cumulative hardship of accommodating more than one employee, and to deny the accommodation of the employee who pushes the hardship over the

[312] *See, e.g.*, Albertsons's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) (discussing the importance of an individualized inquiry in determining whether someone has a disability under the ADA); Keith v. Cty. of Oakland, 703 F.3d 918, 923 (6th Cir. 2013) (discussing the importance of undertaking an individualized inquiry into whether someone is qualified under the ADA); *accord* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 434 (2000) (discussing the emphasis in the ADA on employers and other covered entities making an individualized inquiry).

[313] *See supra* Section II.A.

[314] Stuhlbarg, *supra* note 111, at 1341.

[315] Richardson, *supra* note 237, at 208.

proverbial "undue" cliff.[316] Thus, in this Article's hypothetical, because Dave's request for reduced hours would cause the department to experience an undue hardship, Dave's accommodation request would be denied and he would not have a remedy under the ADA because the employer would be able to establish the undue-hardship defense. This seems to be a simple solution, albeit one with seriously negative consequences. Because of his kidney dialysis schedule, Dave would likely not be able to continue working at the company. He would have to quit or go on long-term disability (if he has such insurance coverage) and the employer would lose a valuable employee and have to undergo the expense of recruiting, hiring, and training a new employee to replace him.

To be clear, even though the employer faced difficulty staffing the department, it is not entirely clear that the employer would be able to prove undue hardship even considering the cumulative effects. First of all, it is possible that the employer could hire a temporary, part-time employee to fill in for the missing work. Putting aside recruiting, hiring, and training costs, this would be fairly inexpensive because the employer had reduced the pay of the employees who were working reduced hours so the savings could be used to pay the temporary employee. The problem, of course, is whether a part-time, temporary employee is feasible. As previously stated, if the work is sophisticated, it might be difficult to find a qualified employee who would be willing to work part-time and on a temporary basis. The department in the Introduction's hypothetical is an accounts receivable department, but it is unclear how difficult it would be to find a qualified part-time, temporary replacement.

If part-time work is not feasible, there remains the question of whether having to hire a full-time employee to replace the lost hours would cause an undue hardship. It is evident that an employer is not required to accommodate someone if doing so means hiring another person to perform the job of the disabled person.[317] But that is not happening here. The full-time employee

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[316] There is some support for this approach. Scholarship written about the undue hardship test under the Rehabilitation Act argues that employers should not be allowed to consider cumulative costs of future, potential accommodations because at the point that accommodations become onerous, they constitute an undue hardship and will not be required. *See* Steven H. Hinden, *A Principled Limitation for Section 504 of the Rehabilitation Act: The Integrity-of-the-Program Test*, 53 FORDHAM L. REV. 1409, 1433 n.152 (1985).

[317] *See, e.g.*, EEOC v. Amego, Inc., 110 F.3d 135, 148 (1st Cir. 1997) (stating that retaining the plaintiff but not allowing her to dispense medications as the job requires would necessitate hiring another person to perform the same job and was therefore not required by the ADA); D'Eredita v. ITT Corp., No. 11-CV-6575-CJS-MWP, 2015 WL 6801828, at *8 (W.D.N.Y. Nov. 5, 2015) (stating that an employer was not required to hire two employees to do the job of one employee); O'Bryan v. Nevada, ex rel. Its Dept. of Conservation & Nat. Res., No. 3:04-CV-00482-RAM, 2006 WL 2711550, at *4 (D. Nev. Sept. 21, 2006) (stating that it was not a reasonable accommodation to require an employer to hire and compensate two employees to perform duties previously performed by one employee).

would not be doing the work of other employees. Presumably, the reduced-hours employees would be taking a cut in pay and that money could be used to pay the replacement employee. But if the full-time employee is not temporary, the employer is going to be in trouble when one or more of the employees who is working reduced hours wants to come back full-time. At some point, this department will have more employees than it needs, which is why it might consider hiring an extra full-time employee to be an undue hardship. This is not to suggest that this is an easy issue, but the employer might be able to convince a court that giving the accommodation to Dave tips the scale in favor of a successful undue-hardship defense, if one views the hardship caused by the accommodations cumulatively.[318]

To be perfectly clear, the Author of this Article is conflicted about whether a cumulative-hardship argument *should* prevail. There is merit to the argument that each accommodation should be judged individually. This Author is also not comfortable with the result discussed in this section where employers are allowed to consider cumulative hardship but simply reject the last-in-time requester. On the other hand, the undue-hardship factors already account for the unique circumstances of each employer. For instance, the factors account for the size of the employer, the type of business (e.g., it is easier for an office building to accommodate a wheelchair than a construction site), and the financial resources of the employer. It seems a little strange to then *not* account for the situation where several employees request the same accommodation. Ultimately, however, this normative issue need not be resolved for the purposes of this Article. In other words, it does not matter whether this Author believes employers *should* be allowed to consider

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[318] Another argument the employer might make is that a reduced-hours schedule is not a reasonable accommodation because it involves the creation of a new position. Several courts have held that full-time employment is an essential function of the job. *See, e.g.*, White v. Standard Ins., 529 Fed. App'x 547, 549–50 (6th Cir. 2013); Lamb v. Qualex, Inc., 28 F. Supp. 2d 374, 379 (E.D. Va. 1998). Even though the statute lists modified schedules as an example of a reasonable accommodation, many courts frame the request for part-time hours not as a modified schedule but as the creation of a part-time position, and then those courts rule that the employer is not required to create a new, part-time position. *See, e.g.*, Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998) (holding that the employer was not required to create a part-time position to accommodate the plaintiff's need for a part-time schedule). To be clear, I do not agree with this argument. As I and others have argued, it is illogical to consider the hours someone works as a "function" of the job. *See, e.g.*, Porter, *supra* note 3, at 79 (citing Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 58–60 (2005)). In fact, the EEOC recommends 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. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 62 (2005). But because courts often do this despite the arguments against it, it is a possible result in this hypothetical case.

cumulative hardship. Rather, this Article predicts that courts *will allow* employers to consider cumulative hardship when this issue arises, and this Article's goal is to determine a more nuanced response than simply rejecting the last-in-time requester's accommodation.

C. *A More Nuanced Response—What Factors Should Courts Consider?*

If one rejects both positions presented above—employers cannot consider cumulative hardship or employers can consider cumulative hardship and refuse to accommodate the last-in-time hardship-tipping employee—one can arrive at a more nuanced response. How should an employer manage this scenario? Should the department take away the accommodations it already provided to Amy, Brooke, or Carl to make room for Dave? If so, how does the employer decide which employee loses the reduced-hours accommodation? What factors should employers consider? The severity of the disability? The stigma surrounding the disability? Does choice play a factor? And by choice, the question is whether the employer should consider whether the disability was caused by reckless or negligent behaviors or lifestyle choices? Should one look at what would happen to these employees if they lost their reduced-hours accommodation? This Section identifies the possible factors courts could consider to resolve this issue, and analyzes how the various factors would affect the outcome in the hypothetical presented by this Article.

A couple of preliminary points are in order. First, this hypothetical was developed to make all the accommodations requested exactly of equal cost or equal burden (considered individually, not cumulatively). But cost is obviously an important factor in determining undue hardship. If one of the accommodations were significantly more expensive or burdensome than the others, that fact should certainly be considered in determining how to handle the problem of cumulative hardship. Second, employers should and probably would figure out how to share the burden equally. For instance, instead of denying one of the four employees in the hypothetical a reduced-hours accommodation (possibly leading to that employee's termination), the employer could ask each of them to work seven hours per day rather than the six hours per day they prefer. This seems like a good compromise. The employer is still making do with fewer hours than when everyone was full-time. The employees can still get their preferred start time or stop time (albeit not both). For example, Amy, who wanted to work from 11–5 would have to work from 11–6. This compromise avoids anyone getting fired and might ultimately be the best solution for everyone. But if a compromise is not workable in a cumulative-hardship situation, it is necessary to figure out how courts should decide these issues.

1. Severity of Disability

Considering the severity of a disability seems obvious. The courts that have allowed intra-class discrimination claims[319] have done so in cases in which the plaintiff has alleged that he has been discriminated against "because his disability is more *biologically severe* than the disabilities of individuals who received superior treatment."[320] For instance, in *Muller v. Hotsy Corp.*,[321] the court rejected the argument that the statute does not apply to intra-class discrimination, stating that, in order for the plaintiff to prove her prima facie case, she must demonstrate that she was either replaced by or "treated less favorably than non-disabled employees, those with lesser disabilities, or those whose disabilities are more easily accommodated."[322] The court elaborated: "If the ADA permitted such substitution of persons with less severe or more easily accommodated disabilities for those with more severe or less easily accommodated ones, it would be creating a scenario wherein employers were permitted to discriminate among members of the ostensibly protected class."[323]

Aside from the intra-class discrimination claims, the legislative history of the ADA also demonstrates that Congress cared deeply about protecting and maximizing the employability of those with biologically severe disabilities.[324] Although the legislative history discusses disabilities such as cancer and diabetes, by far the most frequently discussed disabilities are those thought to be the most biologically severe—individuals whose mobility impairments necessitate the use of wheelchairs, who are missing a limb, or who suffer from blindness, deafness, or intellectual disabilities.[325] And the United States Census is also very much focused on the severity of a disability, judged by limitations on daily activities.[326]

Determining how this factor—the severity of a disability—would apply in this Article's hypothetical situation is not an easy question. How does one judge the severity of various disabilities? Probably the most common way of judging this is to figure out whose disability interferes the most with day-to-day activities. But one could argue that "severity" should be based on whose disability is the most life threatening. Another option when looking at the

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319 To be clear, many courts do not allow intra-class discrimination claims. *See* sources cited in Cox, *supra* note 4, at 435–36 nn.19–21.

320 *See* Cox, *supra* note 4, at 452.

321 917 F. Supp. 1389 (N.D. Iowa 1996).

322 *Id.* at 1410.

323 *Id.* at 1410–11. *See also* Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 395 (N.D. Iowa 1995); Fink v. Kitzman, 881 F. Supp. 1347, 1375–76 (N.D. Iowa 1995).

324 *See* S. REP NO. 101-116, at 2 (1989).

325 *See generally* S. REP NO. 101-116 (1989).

326 *See* UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY DESIGN AND METHODOLOGY 73 (2014), http://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf.

severity of a disability is to consider who is in the most pain. The application of this factor to this hypothetical would vary depending on what standard is used to determine the severity of the disability. For instance, someone with advanced MS probably experiences the most significant day-to-day limitations on activities, as many people with MS cannot walk on their own or even eat on their own. But in this hypothetical, Amy's MS has not advanced and her symptoms are relatively minor. In fact, the medication to treat the disease is likely causing more problems than the actual symptoms of the disease. Thus, it is probably Dave, whose disability would most interfere with day-to-day activities. It is also likely that if one considers whose disability is the most "life threatening" as the standard for determining severity, this would also be Dave, who would die without kidney dialysis or a kidney transplant. But, if severity is based on who suffers the most pain on a day-to-day basis, that might be impossible to determine. It could be Carl, with his back injury. But depression can also cause pain.[327] The uncertainty regarding how we define the severity of a disability demonstrates that determining whose disability is the most biologically severe would be very difficult.

2. Stigma of Disability

Another factor one might consider is the stigma surrounding the disability. In Professor Jeannette Cox's article on intra-class discrimination, she argues that courts should consider the stigma of a disability when determining whether someone has been discriminated against *because of* a disability.[328] There is other evidence to support the idea that the stigma surrounding a disability should be paramount in determining whether an employee should be accommodated.[329] For instance, the legislative history is replete with references to the effects of the stigma surrounding various disabilities.[330] Even as recently as 2014, a report by the Senate Committee on Health, Education,

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327 *See, e.g.*, *Depression and Other Medical Conditions*, MICH. MED. DEPRESSION CTR., https://www.depressioncenter.org/toolkit/im-not-feeling-well/learn-about-it/learn-about-depression/depression-and-other-medical-conditions (last visited Apr. 20, 2019).

328 *See, e.g.*, Cox, *supra* note 4, at 431 ("While a missing limb may appear to be a more biologically severe disability than depression, a person with depression may experience greater social . . . obstacles in the modern workplace . . . ."); *id.* at 434 ("Litigation under the ADA should focus on disability animus and stereotypes rather than the biological severity of various disabilities.").

329 *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 494–95 (1999) (Ginsburg, J., concurring) (stating that the scope of the ADA's protected class should be narrow to protect only those who have been historically disadvantaged because of their disabilities), *superseded by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

330 *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 301–03 (1990) (discussing the testimony of witnesses before Congress who discussed the effects of the stigma surrounding many disabilities).

Labor & Pensions discussed how the enduring stigma of disability affects individuals' abilities to find employment and affects the pay they receive.[331]

Disability law scholar Professor Samuel Bagenstos explained the relevance of stigma for individuals with disabilities.[332] He defines stigma to refer not just to animus and prejudice but more broadly to "undesired differentness."[333] This definition includes animus, stereotypes about individuals with disabilities as well as the idea of benign neglect—attacking all of these is a major goal of the disability rights movement.[334] The way Professor Bagenstos explains it, the initial basis of segregation of individuals with disabilities was animus-based stigma.[335] This turned into a lack of individuals with disabilities living and working among other, non-disabled persons.[336] Thus, when someone is designing a structure available to the public, whether it be a sidewalk or a building, that person is likely not thinking about individuals with disabilities as possible users of that sidewalk or building.[337] This way of thinking about stigma helps one understand how important stigma is in defining disability, as well as in understanding that one of the goals of the ADA is to protect against stigma-based disability discrimination. As Professor Bagenstos summarizes:

> The stigma attached to "disability" thus both represents the legacy of a history of exclusion and reflects a series of broader ideological developments. Whatever the underlying reason for its persistence, however, that stigma can help us to understand the means by which disability-based subordination is transmitted. More importantly, stigma can serve an evidentiary function: It can help us identify cases where impairments are likely to be associated with systematic deprivation of opportunities. Seen in this light, the "disability" category embraces those people who experience impairment-based stigma—that is, those people who, because of present, past, or perceived impairments, are considered by society to be outside of the "norm."[338]

If we consider stigma in determining this issue of cumulative hardship, the next step is to determine which hypothetical employee discussed in this Article has the most stigmatizing disability. Amy's MS could, in the future, become more severe, leaving her possibly unable to walk or even feed herself. These limitations are likely to lead to stigma,[339] but currently, when she

331 COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS, FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 25 (2014).

332 *See generally* Bagenstos, *supra* note 312, at 436–45.

333 *Id.* at 437.

334 *Id.* at 438.

335 *See id.* at 440–41.

336 *Id.* at 441.

337 *Id.*

338 Bagenstos, *supra* note 312, at 444.

339 *See generally* Jonathan E. Cook, Adriana L. Germano & Gertraud Stadler, *An Exploratory Investigation of Social Stigma and Concealment in Patients with Multiple Sclerosis*, 18 INT'L J. MS CARE 78 (2016).

is not experiencing any significant symptoms, hers likely is not the most stigmatized disability of the group. Carl has back pain. Back pain is one of the most commonly pleaded impairments under the ADA.[340] Although there is sometimes suspicion about the severity and/or cause of the back pain, because Carl's back pain was caused by a skiing accident, it is unlikely that his coworkers or boss are suspicious about his pain. The stigma surrounding kidney failure is a bit unclear. Arguably, coworkers are likely to feel some discomfort regarding the fact that Dave will have to remain on dialysis permanently—until he gets a transplant—or he would die. That reminder of mortality is likely to make others uncomfortable around Dave. But it is unclear how much that concern translates into stigma.

It seems likely that Brooke's depression is the most stigmatizing. Much has been written about the stigma surrounding mental illness.[341] Most would agree that the stigma surrounding mental illness is more significant than the stigma surrounding physical disabilities,[342] and some studies reveal that there is even more stigma surrounding mental illness than learning disorders, including intellectual disabilities.[343] Moreover, this stigma is likely to persist even if Amy takes medication to treat the depression because there remains a fear that medication is not always successful in treating the mental illness.[344]

3. Choice or Fault

Another factor that courts might consider is whether the individual with a disability was at fault in causing or contributing to the disability, or if the disability was caused by voluntary lifestyle choices. There is nothing in the statute or legislative history to indicate that this is a factor courts *should* consider when determining whether someone has a disability and whether it should be accommodated. Nevertheless, there are some indications that disabilities that are or are perceived to be caused by choices made by the individual are perceived less favorably.

One indication is that the statute excludes certain conditions, such as pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.[345] Although some of these are addictions (which are

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340 J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 934 (2003) (stating that claims by those with "hidden disabilities," such as back pain, are the most frequently filed claims under the ADA).

341 *See, e.g.*, Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006) ("Social discrimination against people with mental illness is widespread.").

342 *See, e.g.*, Cox, *supra* note 4, at 454 (noting that mental disabilities are more stigmatized that much more biologically severe disabilities).

343 Emens, *supra* note 341, at 404.

344 *See id.* at 405–06.

345 42 U.S.C. § 12211(b) (2012).

beyond the control of the addicted person), many have underlying lifestyle choices that are often viewed as undesirable.[346] The statute also contains separate, more stringent provisions dealing with illegal drug use in the workplace.[347] Finally, before the ADA was amended in 2008, courts often held that health conditions that were likely caused or exacerbated by lifestyle choices were not disabilities. Examples include lung cancer or emphysema caused by smoking,[348] obesity,[349] HIV,[350] high blood pressure,[351] and type-2 diabetes (which is sometimes caused or worsened by lifestyle factors).[352] To be clear, courts did not explicitly state that these conditions were denied coverage under the ADA because they were caused or exacerbated by personal choices.[353] But it seems possible that courts might at least implicitly consider whether a particular condition was caused or exacerbated by factors within the individual's control.

Obesity is the best example of this.[354] As a general rule, in other employment discrimination contexts, the law does not protect traits that are mutable,[355] which is why employers are allowed to have dress codes for their employees.[356] But obesity is viewed differently. There are some cases decided under state disability statutes where the courts held that obesity is not a disability because it was not an immutable condition.[357] Of course, there is

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346 For years, alcoholics were blamed for their alcoholism, viewing it as a weakness rather than a disease. *See* Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 244–45 (2010). We now have a more nuanced understanding of addiction, but in my experience there are still plenty of people who see addiction as a personal shortcoming and a voluntary choice rather than as a disability.

347 42 U.S.C. § 12114 (2012).

348 *See, e.g.*, Boykin v. Honda Mfg. of Ala., 288 Fed. App'x 594, 597 (11th Cir. 2008) (holding that emphysema is not a disability).

349 *See, e.g.*, Greenberg v. Bellsouth Telecomms., Inc., 498 F.3d 1258, 1264–65 (11th Cir. 2007); 29 C.F.R. § 1630.2(j)–(i). *See generally* Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997) (discussing whether obesity should be a disability); Rebecca L. Rausch, *Health Cover(age)ing*, 90 NEB. L. REV. 920, 959 (2012) (stating that generally, being overweight or obese is not covered by the ADA).

350 *See, e.g.*, Long, *supra* note 51, at 218 (discussing cases).

351 Murphy v. United Parcel Serv., 527 U.S. 516, 520–21 (1999), *superseded by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

352 Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002).

353 Korn, *supra* note 346, at 245 (noting that no one requires a person with cancer to prove that they were not the cause of their cancer and that even though lung cancer is often caused by smoking, there are no reported cases where courts held that lung cancer is not a disability because the individual's smoking caused it).

354 *See* Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 161–62 (2013) (discussing the common theme that obesity is caused by personal failures).

355 For instance, if one considers the protected classifications under Title VII of the Civil Rights Act of 1964, most of them are immutable (race, color, sex, national origin); religion is the only outlier.

356 Korn, *supra* note 346, at 237–39.

357 *See, e.g.*, Green v. Union Pac. R.R., 548 F. Supp. 3, 5 (W.D. Wash. 1981) (stating that obesity was not a disability under state law); Mo. Comm'n on Human Rights v. Sw. Bell Tel. Co., 699 S.W.2d 75, 79 (Mo. Ct. App. 1985) (stating that because the plaintiff took no steps to treat her hypertension or

not even a consensus as to whether obesity is caused by factors within the person's control.[358] But even the EEOC in the early days of the ADA took the position that if an individual cannot prove a physiological cause of the obesity, courts should consider it to be caused by personal choice and therefore not covered.[359]

In the Introduction's hypothetical, employing this factor indicates that Carl's disability may reflect a personal choice. Carl had a skiing accident that resulted in his disability. It seems likely that if one considers choice, Carl with his back injury would be the least entitled to the accommodation, because his is the disability most likely caused by voluntary choices he made that might have been reckless or negligent. One can imagine that the employer would at least suspect that Carl might have been skiing beyond his abilities. The other three disabilities—multiple sclerosis, depression, and kidney failure[360]—are not generally thought to be caused by lifestyle factors.

Although this Article suggests this factor because it warrants discussion, ultimately, courts should not consider it. The EEOC has taken the position that voluntariness is not a proper consideration in determining whether a particular health condition is an impairment.[361] The EEOC took this position in part because of the slippery slope of considering voluntariness—those with conditions such as alcoholism, HIV, and diabetes could be considered to have caused their impairments because of the voluntary lifestyle choices they made.[362] Many scholars agree that these choices should not be considered.[363] As Professor Korn has argued, if an employee faces discrimination because of a health condition when that employee is qualified to perform the job (with

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obesity, she was not entitled to protection under state disability law); *accord* Korn, *supra* note 349, at 44 (discussing these and other cases).

358 Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1021 (2010).

359 Korn, *supra* note 346, at 232.

360 *But see Kidney Failure (ESRD) Causes, Symptoms, & Treatments*, AM. KIDNEY FUND, http://www.kidneyfund.org/kidney-disease/kidney-failure/#what_causes_kidney_failure (last visited Apr. 20, 2019) (discussing the fact that kidney failure can be caused by type-2 diabetes and high blood pressure, which might be worsened by some lifestyle choices).

361 Korn, *supra* note 349, at 48.

362 *Id.* at 49. *See also* Navarro v. Pfizer Corp., 261 F.3d 90, 97 (1st Cir. 2001); Cook v. R.I. Dept. of Mental Health, Retardation, & Hosps., 10 F.3d 17, 24 (1st Cir. 1993) (holding that under section 504 of the Rehabilitation Act, protection is not limited to those who did not contribute to their own impairment); Henderson v. N.Y. Life, Inc., 991 F. Supp. 527, 531 n.4 (N.D. Tex. 1997) ("[T]he cause of a disability is always irrelevant to the determination of disability." (quoting EEOC Compliance Manual Section 902.2(c))); Lawrence v. Metro-Dade Police Dept., 872 F. Supp. 950, 956 n.5 (S.D. Fla. 1993).

363 *See, e.g.*, Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 483 (2001) (discussing the double victim blaming by courts and employers of those with HIV); John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 523–25 (2011).

or without reasonable accommodations), the cause of the impairment should not matter.[364] As Professor Korn posits, does one really want to go down a road where one questions every person with lung cancer about his smoking habits and questions every person with a spinal cord injury regarding whether it was caused by reckless behavior?[365] Professor Korn is correct that this would be a troubling factor to allow employers or courts to consider. The reality is that for most conditions, even if caused by voluntary choices, by the time these impairments become disabilities, they are likely immutable. The person who becomes paralyzed from a sky-diving accident, for example, cannot undo that injury, and thus still deserves the protection of the ADA.

4. Consequences of Not Receiving an Accommodation

The final factor that warrants consideration is the consequences of not accommodating a particular employee because of the cumulative hardship defense. In other words, will an employee with a disability lose his job if the employer does not provide the requested accommodation? In prior work, this Author emphasized the importance of accommodating individuals with disabilities (even when those accommodations place burdens on other employees) in cases where *not* accommodating the employee would lead to his termination.[366] Specifically, in discussing accommodations that affect other employees or even infringe on other employees' seniority rights under a bona fide seniority system, the accommodation should have to be given *unless* the accommodation would cause the involuntary termination of another employee.[367] This Author's previous work drew the line at termination because of the severity of termination, which has been referred to as the "capital punishment" of the workplace.[368] As emphasized in this prior work, many people have their lives wrapped up in their jobs, and termination is not only a loss of regular pay "but also 'dashed expectation as to future benefits, a loss of character and personal identity, and the loss of financial security one expected.'"[369]

Although termination is always devastating, it is even more devastating for individuals with disabilities, who often will have a more difficult time finding another job. Thus, courts *should* consider the consequences of not providing an accommodation to an employee who is seeking one. If one

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364 Korn, *supra* note 349, at 49.

365 *Id.*

366 Porter, *supra* note 203, at 336.

367 *Id.* at 335–36.

368 *Id.* at 337.

369 *Id.* (quoting Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 278 (2000)); *see also* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 353 (2001).

individual with a disability would lose his job if not accommodated, but the others would not, then this factor would favor the individual who stands to lose his job.

The legislative history of the ADA provides support for this factor. For instance, before the ADA was passed, then–Vice President George Bush stated that excluding the millions of disabled individuals who want to work from the employment ranks costs society billions of dollars annually in support payments and lost income tax revenues.[370] As stated in the legislative history, "discrimination makes people with disabilities dependent on social welfare programs rather than allowing them to be taxpayers and consumers."[371]

Professor Bagenstos has discussed the importance of the goal of independence for individuals with disabilities.[372] As stated by Bagenstos, most "people with disabilities do not want charity, pity, or government handouts; instead; they simply want the opportunity to live in the community and work for a living."[373] In fact, one way disability-rights activists were able to achieve the passage of the ADA with such bipartisan support was to use the "independence frame" to garner the support from political leaders and the public.[374] As Bagenstos states:

> [T]he value of the independence frame to disability rights advocates should be obvious. To achieve their goals, disability rights leaders could almost endorse the wave of fiscal conservatism and opposition to welfare programs. They could say that people with disabilities do not want to be dependent on disability benefits; they "simply want to work."[375]

For this reason, the Author of this Article has argued several times in favor of interpreting the ADA to keep individuals with disabilities employed as much as possible.[376] As this Article's Author has previously stated:

> If one goal of the disability rights movement is to increase the independence of individuals with disabilities, and if that includes increasing the employability of disabled individuals, then we should support efforts to employ and to *keep* employed individuals with disabilities. Accordingly, if an employee needs an accommodation, and without it, the employee would lose his job, then in order to further the independence goal of the ADA, the accommodation should be given even if it causes some burdens on other employees. If the disabled employee loses

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370 S. REP. NO. 101-116, at 15–16 (1989).

371 *Id.* at 16.

372 SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009).

373 *Id.* at 22–23.

374 *Id.* at 27.

375 *Id.* at 29.

376 *See, e.g.*, Porter, *supra* note 203, at 335; Nicole Buonocore Porter, *Relieving (Most of) the Tension: A Review Essay of SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT*, 20 CORNELL J.L. & PUB. POL'Y 761, 802 (2011) [hereinafter "Porter, *Relieving*"].

> his job, it might be very difficult for him to get another job, which could lead him to . . . rely on public benefits. Because one goal of the disability movement is to decrease the reliance on public support, then allowing accommodations even when they affect other employees should also be a goal.[377]

Of course, this cited argument assumes one disabled employee. The hypothetical situation in this Article involves more than one disabled employee, which complicates the analysis.

Applying this factor to the hypothetical in this Article does not lead to very clear results. Assuming Dave cannot change his dialysis schedule, he would at least need to be given the reduced hours on the days he has dialysis. Otherwise, because he cannot live without dialysis (or a new kidney), he would be forced to quit his job or be fired for not meeting his employer's demands. It is unclear whether he would have the energy to work longer hours on the days he is not getting dialysis (Tuesdays and Thursdays). It is also unclear how productive he would be on those days if he was exhausted from the dialysis. Carl is in a great deal of pain, but it is not clear whether he would be able to continue working if he were not given the time off in the middle of the day to lay down and rest his back. It is also possible that he might be able to work later in the day to make up for the time he missed from his mid-day break.

It is also not clear whether Brooke would manage to remain employed if she were forced to come in every day at 9:00 a.m. This would likely be dependent on many variables regarding the treatment and status of her depression. If the job is very important to her, she might force herself to get in on time, but at the expense of her ongoing health and treatment. Alternatively, Brooke could still come in later but stay later to make up the missed hours. Finally, Amy could arguably force herself to get up on time even though she has received very little sleep the night before because of her MS medication. Or, like Brooke, she could come in later and stay later if her fatigue allows her to work longer hours. Alternatively, however, Amy might decide that the disease-modifying treatment is not worth the side effects if she is not given the reduced-hours schedule. Because the treatment is designed to reduce the number of MS flare-ups and progression of the disease, her decision could have long-lasting negative effects on her health and well-being.[378] Thus, although this factor would likely favor giving the accommodation to Dave (because he is probably the most likely to not be able to continue working without it), the result is not entirely clear.

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377 Porter, *Relieving*, *supra* note 376, at 802.

378 *See* NATIONAL MULTIPLE SCLEROSIS SOCIETY, DISEASE-MODIFYING THERAPIES FOR MS 11 (2019), http://www.nationalmssociety.org/NationalMSSociety/media/MSNationalFiles/Brochures/Brochure-The-MS-Disease-Modifying-Medications.pdf.

D. *Balancing the Factors: Prioritizing Employability*

This Author's initial proposition was that the fourth factor above (consequences of not being accommodated) should be the factor that trumps all of the rest. However, it now seems self-evident that this factor will not be dispositive in many, if not most, cases. In other words, in situations of cumulative hardship, more than one employee with a disability would often lose her job if she is not accommodated. This is because employers generally are required to provide an accommodation to an employee only if it allows the employee to perform an essential function of the job.[379] An employer is also not required to give an employee her preferred accommodation.[380] Thus, if another accommodation would be effective, the employer would be complying with the statute by providing that accommodation. So for instance, if Amy in this Article's hypothetical could be accommodated by the change in her start time (coming in at 11:00 a.m. rather than 9:00 a.m.) but did not need a reduction in hours to be able to perform the essential functions of her job, then the employer would only have to give her the change in start time, but not the reduction in hours. Presumably, the employer would provide the least burdensome accommodation (from the employer's perspective) that would be effective. Taking this one step further, if one assumes an employer was facing the situation described in this Article's hypothetical, where all four employees *need* the accommodation in order to be able to perform the essential functions of their job, then all four might face termination (or be forced to resign or go on a leave of absence) if not given the reduced-hours accommodation.

1. Prioritizing Employability

If this Article's hypothetical happened in real life, and all of the employees seeking an accommodation would lose their jobs if not accommodated, this Article proposes that employers and courts should consider and prioritize the overall employability of the affected employees. In other words,

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[379] 42 U.S.C. § 12111(8) (defining a qualified individual as one who can perform the "essential functions" of the job); 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations to qualified employees). *But see* Porter, *supra* note 223, at 112 (discussing the EEOC enforcement guidance that states that the ADA "requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the 'benefits and privileges of employment' equal to those enjoyed by similarly-situated employees without disabilities").

[380] *See, e.g.*, Mobley v. Allstate Ins. Co., 531 F.3d 539, 546 (7th Cir. 2008) ("[A]n employer is not obligated to provide an employee the accommodation [s]he requests or prefers." (second alteration in original)); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996) ("It is . . . now well established that the ADA does not require an employer to provide the best accommodation possible to a disabled employee.").

if all of the employees stand to lose their jobs if not accommodated, the employer should then ask which of the employees is least likely to find another job. This consideration will likely lead the employer to contemplate both the biological severity of the disability and the stigma surrounding the disability. This issue will also be influenced by the position the disabled employees possess, as well as the market in the relevant industry.

Thus, in deciding the hypothetical case at hand, arguably Dave is the least likely to find another job if fired from his current job. One can imagine a potential employer being very unwilling to hire an employee who not only has schedule restraints but also must remain on dialysis indefinitely unless and until he receives a kidney transplant.[381] A kidney transplant is major surgery, making it likely that Dave will need a lengthy leave of absence in the future. All of these factors make his employability prospects quite poor.

Brooke's disability (depression) is probably the most stigmatizing of the four,[382] but it is possible she might be able to keep it hidden when she applies for other jobs. Perhaps she could seek out employers who had universal flex-time policies.[383] It is also possible that the severity of her depression will periodically wane, making it more likely for her to be able to work full-time.

Although those who have multiple sclerosis can and do suffer stigma,[384] much of this stigma occurs when the disease progresses far enough to cause the person to use a wheelchair or be unable to control the movement of her extremities. Amy's MS has not progressed that far and therefore is unlikely to be very stigmatizing at this point. It is likely that she could find another suitable job if terminated from ABC Manufacturing Corp. because of the cumulative-hardship issue.

Finally, Carl's disability is not likely to be very stigmatizing. He was in a skiing accident, which has physical consequences that seem to be less stigmatizing than genetic disabilities. His back injury, or at least the pain he experiences from it, is also likely to be temporary. Thus, his future employability seems pretty certain. Of course, this analysis is dependent on the fact that the job these employees perform is a desk job, not one that is physically demanding. If these four employees worked instead in a manufacturing job or for a construction company, this analysis would likely change, probably making Carl the least employable.

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381 *Dialysis*, NAT'L KIDNEY FOUND., https://www.kidney.org/atoz/content/dialysisinfo_(last visited Apr. 20, 2019). This resource also explains that the average life expectancy of someone on dialysis is 5–10 years. *Id.*

382 *See supra* Section III.C.2.

383 *See* Porter, *supra* note 223, at 108 (arguing in favor of a universal accommodation mandate).

384 *See* NATIONAL MULTIPLE SCLEROSIS SOCIETY, EMPLOYMENT MATTERS: MANAGING MS IN THE WORKPLACE 4, https://www.nationalmssociety.org/NationalMSSociety/media/MSNationalFiles/Documents/Employment-Program-Managing-MS-In-The-Workplace-Toolkit_final-2.pdf.

2. The Endowment Effect and Minimizing Special Treatment Stigma

One criticism to the above proposal is explained by the endowment effect. The endowment effect theorizes that individuals value entitlements they possess more than ones they do not.[385] A related theory is the status quo bias, which asserts that "individuals tend to prefer the present state of the world to alternative states, all other things being equal."[386] Thus, in cumulative-hardship situations, those employees who have already been receiving the accommodation are going to feel more entitled to it and therefore more upset if it is taken away.

Taking away some employees' accommodations to give the accommodation to another employee will cause or exacerbate what this Author calls "special treatment stigma." Special treatment stigma is the stigma facing employees who receive accommodations in the workplace, which are often perceived as "special treatment."[387] Although the negative consequences of special treatment stigma are often at the hands of employers who are reluctant to provide any accommodations that will be perceived as special treatment even when they are legally obligated to do so,[388] in the cumulative-hardship scenario presented by this Article's hypothetical, the employer has already agreed to accommodate the employees. Thus, the special treatment stigma referred to here occurs when coworkers resent employees who receive accommodations because those accommodations either place burdens on the coworkers or because they are accommodations that the coworkers wish they could have for themselves.[389] For instance, if the employer took away Brooke's or Carl's accommodation to give it to Dave, it is easy to understand why Brooke or Carl would be upset, angry, and resentful of Dave.

Employers often try to avoid creating this special treatment stigma.[390] Certainly, a smart employer will try to find a creative compromise. As mentioned earlier, if each of the four employees agrees to work an additional few hours per week (perhaps staying later or foregoing lunch), the employer might not have to take away an accommodation from anyone.

Of course, the big complication with all of this is that employers are not supposed to share information about employees' disabilities and their

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[385] *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) (describing the endowment effect as "the principal [*sic*] that people tend to value goods more when they own them than when they do not").

[386] *Id.* at 1228–29.

[387] Porter, *supra* note 223, at 87.

[388] *Id.* at 97–98.

[389] *Id.* at 98.

[390] *Id.* at 104.

accompanying accommodations with other employees.[391] Thus, unless the employees are sharing the information themselves (and in a small department, it is certainly possible they are), the other employees might not understand that an employee has reduced hours because of a disability. This will likely lead to resentment by those other employees, and makes it difficult for the supervisor to have an open conversation about the conflict.[392]

Employers also could avoid some of this special treatment stigma by managing expectations when they agree to a particular accommodation. As this Author has written in other work, employers withdrawing previously provided accommodations is a common phenomenon.[393] Sometimes they do so for illegitimate reasons, such as when a new supervisor comes onto the scene and discontinues an accommodation that has been working very well with very few negative consequences for months, or even years.[394] In other situations, employers provide an accommodation under the (sometimes erroneous) assumption that the accommodation will be needed only temporarily because the employer believes the employee's condition will improve.[395] And sometimes employers provide accommodations even knowing that the accommodations will cause burdens on the employer (even undue burdens), but they do so, again believing the accommodation will be temporary.[396]

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391 The EEOC has interpreted the medical nondisclosure provision in the ADA to mean that employers are prohibited from disclosing any information about an employee's disability or accommodation. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 903 (2008); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), https://www.eeoc.gov/policy/docs/accommodation.html ("An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as 'different' or 'special' treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace."); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), https://www.eeoc.gov/policy/docs/psych.html (stating that an employer cannot disclose medical information or the fact that an accommodation has been provided because this implies that there is a disability).

392 For this reason, Professor Emens argues that the EEOC's position on the secrecy of an employee's disability status is flawed. Emens, *supra* note 391, at 904. She states that the EEOC's position is awkward because it "suggest[s] that employers can engage in a kind of generalized double-talk about protecting workers' privacy and complying with federal law, which effectively says without saying so directly that the employer is accommodating a disability." *Id.* She also states that this rule "may send the message that disability is a source of embarrassment or shame." *Id.* Instead, she believes that as long as "the disabled employee approves, it would be far better if employers disclosed the impetus for . . . accommodations [given] in a way that promotes" a more integrative workforce. *Id.*

393 Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885, 890 (2015).

394 *Id.* at 906–07 (discussing Isbell v. John Crane, Inc., 30 F. Supp. 3d 725, 734 (N.D. Ill. 2014)); *see also id.* at 917.

395 *Id.* at 917.

396 *Id.* at 913–14. In my *Withdrawn Accommodations* article, I discuss a real-life example from my practice days where an employer that operated using rotating shifts allowed an employee who was undergoing kidney dialysis to have a straight day shift to accommodate his dialysis schedule and the resulting fatigue. *Id.* at 913. Instead of requiring other employees to rotate through the other shifts more often, the

In these situations, the employer could avoid the problems that arise from withdrawing accommodations by honestly managing the expectations of its employees. For instance, in the hypothetical presented in this Article, the employer could tell Amy, Brooke, and Carl that their accommodations are conditional on the department being able to operate sufficiently with the reduction in hours. The employer probably should not do this in a warning or disclaimer type of way. Instead, the supervisor, Eli, should sit down with these employees and explain the reality of the situation. With each employee seeking that same accommodation, there should be a new discussion. Of course, this would work best if each employee has openly disclosed his/her reduced-hours accommodation and the reason for it with the rest of the department. When Dave asks for his accommodation, in an ideal world, the supervisor would sit down with all four of the employees and try to arrive at an arrangement that allows all four of the employees to continue working successfully.

In a prior work, the Author of this Article relied on the communitarian theory to justify placing burdens on other employees when needed to accommodate and keep employed a disabled employee.[397] As stated in the prior work:

> As the number of individuals with disabilities increases because of the broadened statutory coverage, an employee could find himself both the non-disabled co-worker who must take on some of the burden for a disabled co-worker's accommodation and at the same time, a disabled employee who needs an accommodation to remain employed, hence placing some burdens on other employees. In this way, the burdens placed on non-disabled co-workers are really no different than the community support co-workers have given to each other for years. We help others in our communities because we care about them but we also know that the members of our communities will be there to help us if and when we find ourselves in need.[398]

employer allowed the day shift to be over-staffed and the afternoon or midnight shift to be under-staffed. Porter, *supra* note 393, at 913. When the employee's condition did not improve and a kidney transplant was not immediately on the horizon, the employer withdrew that accommodation, claiming undue hardship. *Id.* at 913–14. This Author believes it remained an open issue whether the employer should have allowed the employee to keep the straight shift and require other employees to rotate through the other shifts more frequently. *See sources cited* Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 243 n.227 (2016). But the way the employer had been accommodating the employee, by being over-staffed on one shift and under-staffed on another, could very well create an undue hardship, and the fact that the employer had agreed to the accommodation on a temporary basis should not be used against that employer by requiring the employer to provide the accommodation permanently. Porter, *supra* note 393, at 914, 917.

[397] Porter, *Relieving*, *supra* note 376, at 803–06. Simply stated, communitarians emphasize the value of community over individual rights. Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209, 1217 (1994); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 454 (1987).

[398] Porter, *Relieving*, *supra* note 376, at 805–06.

This argument is also relevant here. The four employees in this Article's hypothetical should be willing to work together to arrive at a compromise that will allow each of them to remain employed.

There is also an interesting case that demonstrates this spirit of compromise. In *Miller v. Illinois Department of Transportation*,[399] the plaintiff worked on a bridge crew.[400] He had a disability that precluded him from working from heights, especially in an unsecured environment.[401] His fear precluded him from performing only less than three percent of his job, and he was able to finish his assigned job tasks on all but one occasion.[402] The crew informally accommodated the plaintiff and other team members who could not perform all the tasks, such as one team member who could not weld and another who could not ride in the snooper bucket, was unable to spray the bridges because of allergies, and was not required to mow the yard or rake patching debris.[403] The crew members would swap assignments as necessary to allow the crew to complete the tasks required.[404] The court stated: "[T]he team worked effectively as a team, taking advantage of each member's abilities and accommodating each member's limitations."[405] The employer eventually withdrew the plaintiff's accommodation, leading to litigation where the district court granted the employer's motion for summary judgment.[406] Fortunately, the Seventh Circuit reversed, stating that a reasonable jury could find that the work plaintiff could not perform was not an essential function because the bridge crew worked as a team, accommodating each other's abilities and disabilities.[407]

All of this is to say that employers arguably could avoid some of the backlash that occurs if accommodations have to be modified or taken away in cases of cumulative hardship by being open and honest up front of the limitation of the accommodation (e.g., by telling the employees that the accommodation is only available as long as it is effective and does not cause productivity problems for the employer). Furthermore, employers could avoid backlash if they open up conversations with the affected employees to figure out ways to work together to accommodate all of the employees who need an accommodation—thereby ultimately avoiding the catastrophic consequences of termination.

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399 643 F.3d 190 (7th Cir. 2011).

400 *Id.* at 192.

401 *Id.*

402 *Id.*

403 *Id.* at 193.

404 *Id.*

405 *Miller*, 643 F.3d at 193.

406 *Id.*

407 *Id.* at 198.

III. OTHER ACCOMMODATION ISSUES THAT IMPLICATE INTRA-CLASS DISCRIMINATION

For the reader who is skeptical regarding how often this cumulative hardship hypothetical might occur in real life, there are other accommodation issues that could involve decisions that implicate intra-class rivalries. For instance, consider the following hypothetical:

Your client is a private manufacturing employer with one hundred employees. Larry Lepore has worked for the employer in the shipping/receiving department for ten years. This department has twenty-one employees and operates all three shifts (day shift (7:00 a.m.–3:00 p.m.), afternoon shift (3:00 p.m.–11:00 p.m.), and midnight shift (11:00 p.m.–7:00 a.m.)). The employees must rotate through all three shifts—one week on the day shift, one week on the afternoon shift, and one week on the midnight shift. Larry Lepore was recently diagnosed with kidney failure and must go on kidney dialysis while he waits for a new kidney. He would die without kidney dialysis or a kidney transplant. The kidney dialysis schedule makes it impossible for him to work the afternoon shift (because he gets his dialysis in the afternoon) or the midnight shift (because he needs the night to recover from the dialysis). Larry Lepore asks his employer to allow him to work only the day shift rather than rotating through all three shifts.

The employer talks to its lawyer and finds out that most courts have held that rotating shifts are an essential function of the job, and therefore employers do not have to provide a waiver from the rotating shifts as an accommodation.[408] The employer then informs Larry that the straight shift is not a reasonable accommodation. Larry then asks for a transfer to another position in the company that works a straight day shift. There is only one such position in the company for which Larry is qualified. It is a position working the register in the on-site cafeteria. However, this position is highly coveted (because it's not a physically strenuous position) and one other employee, Mack Murphy, has also applied for this position. The employer is non-unionized and does not have a formal seniority system, but it's generally understood that those who have been there longest get treated better. Mack is fifty years old and has been working for the company for twenty years. He wants the job because he has a back injury and his job on the plant floor has caused him

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[408] *See, e.g.*, Kallail v. Alliant Energy Corp. Servs., Inc., 691 F.3d 925, 927–28, 932 (8th Cir. 2012); Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 655–56, 662 (W.D. Ky. 2012); Tucker v. Mo. Dept. of Soc. Servs., No. 2:11-CV-04134-NKL, 2012 WL 6115604, at *4, *6 (W.D. Mo. Dec. 10, 2012); Bogner v. Wackenhut Corp., No. 05-CV-6171, 2008 WL 84590, at *6 (W.D.N.Y. Jan. 7, 2008); Dicksey v. New Hanover Cty. Sheriff's Dep't, 522 F. Supp. 2d 742, 749 (E.D.N.C. 2007). *But see* Maes v. City of Española, No. 1:12-CV-01250, 2014 U.S. Dist. LEXIS 36154, at *14 (D.N.M. Jan. 13, 2014) (plaintiff's testimony that she would have been able to perform her essential work functions under a different work schedule was sufficient evidence of prima facie discrimination to preclude summary judgment).

to be in constant pain. But Mack knows that there is not an accommodation that would allow him to work on the plant floor without standing and walking, so his only option (short of quitting, which he cannot afford to do) would be a transfer to another position. The cashier job in the cafeteria would be perfect for him because it would allow him to sit on a stool while he rings up the food for the employees.

Obviously, this hypothetical raises other issues not relevant here, including whether the obligation to reassign an employee with a disability trumps the informal seniority system the employer uses,[409] and whether Mack's back impairment rises to the level of a disability.[410] But putting aside these issues, for this Article's purposes, the real issue is how the employer should choose between giving the vacant position to Larry or to Mack. The remainder of this Part applies the individual factors laid out in Part II to this hypothetical before explaining how prioritizing employability gets one to the right result.

The first factor presented in Part II was the severity of the disability. That factor probably goes to Larry (just as it would go to Dave in the hypothetical in the Introduction). The second factor proposed in Part II, the stigma surrounding the disability, is a close call. This Article discussed the stigma surrounding kidney failure earlier. In this new hypothetical, Mack's back impairment might be stigmatizing for a different reason—because there is a belief that back injuries and back pain are overstated and exaggerated.[411] But stigma will probably not tip the scale in one direction or another.

As previously discussed, the "choice or blame" factor criticized in Part II should not be employed, thus leaving the reader with the question: what are the consequences to Larry and Mack when one of them is denied the reassignment accommodation? The employer has a way of avoiding the negative consequences to Larry. It can choose to (even though it is probably not required to) let him stay in his current position and work a straight day shift. But if it does not do that (and assuming it is not required to under the ADA), then without the reassignment accommodation, Larry would lose his job. The answer is not as clear with respect to Mack. He has been suffering through his back pain in his current job. Presumably, he could continue to do so for

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409 Although the Supreme Court has held that a bona fide seniority system generally trumps the employer's obligation to reassign an employee with a disability, even when that seniority system is unilaterally implemented rather than part of a collective bargaining agreement, US Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002), here there is no bona fide seniority system, so giving the accommodation to Larry over Mack would not run afoul of the rule in *Barnett*.

410 In the actual hypothetical the Author uses with her students, there is a third, non-disabled and arguably more qualified, employee also competing for the position. This issue is omitted from this hypothetical to keep things simple.

411 *Cf.* Jennifer Chandler et al., *Panel 3: Chronic Pain, "Psychogenic" Pain, and Emotion*, 18 J. HEALTH CARE L. & POL'Y 275, 283 (2015) (stating that individuals with chronic pain who request reasonable accommodations in the workplace are perceived to be asking for undeserved special treatment); Verkerke, *supra* note 340, at 934 (stating that claims by those with "hidden disabilities," such as back pain, are the most frequently filed claims under the ADA).

some period of time until another position opened up that might allow him to sit more. But it is unclear how often this would happen in a manufacturing plant. The cafeteria cashier job is somewhat unusual in the manufacturing plant setting. This factor probably favors Larry, but only slightly, because it is possible both of them would eventually be out of a job if either is not given the cashier position as an accommodation.

Thus, one can see how the three factors do not necessarily provide a definitive answer in this case. But if one follows the framework above—prioritizing employability (and assuming both individuals stand to lose their job if either is not accommodated), one should determine which employee is least likely to find gainful employment somewhere else. Larry, like Dave in this Article's first hypothetical, will likely have difficulty finding another job, at least until he gets a kidney transplant.[412] Although arguably Mack will also have some difficulty finding a job that can accommodate his back pain, there are manufacturing jobs or other low-skilled jobs that could probably accommodate his disability. It is likely this analysis of prioritizing employability should lead the employer to give the position to Larry. However, to maximize the employment options for all of its employees, the better alternative would be to allow Larry to work a straight day shift in his current department even though the employer is probably not legally required to do so, and give Mack the transfer to the cashier position, thereby keeping both individuals employed, and allowing the employer to keep two valuable employees.

CONCLUSION

Given the expanded protected class under the ADA after the Amendments of 2008, it is quite possible that an employer will be faced with the situation of having to accommodate several disabled employees who are seeking the same accommodation. Such a scenario could likely lead to the employer experiencing an undue hardship if the accommodations are viewed cumulatively. This Article has attempted to arrive at a fair solution for resolving these issues of cumulative hardship and other issues that implicate intra-class rivalries. Because one of the highest-priority goals of the ADA is to increase the employment opportunities for individuals with disabilities,[413] this Article concludes that employers and courts should prioritize the employability of individuals with disabilities in order to resolve issues of cumulative hardship.

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412 *See supra* Section III.D.1.

413 *See* BAGENSTOS, *supra* note 372, at 116.