

REEVALUATING REASONABLE ACCOMMODATION: ADAPTING THE CANADIAN PROOF STRUCTURE TO ACHIEVE THE ADA'S EQUAL OPPORTUNITY GOAL

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I. INTRODUCTION

The Americans with Disabilities Act (ADA)¹ of 1990 failed to achieve its promise of being an “emancipation proclamation for people with disabilities.”² In response, Congress recently amended the ADA to be more inclusive and protective of individuals with physical or mental impairments. Under the ADA Amendments Act,³ businesses and courts must place less importance on the gateway question of who is legally disabled. Instead, they must focus more often on which disabled individuals merit accommodation.⁴ The purpose of these amendments is to affirmatively “remove[] societal and institutional barriers”⁵ so that disabled individuals can “fully participate in all aspects of society,”⁶ including the workplace. This boils down to a goal of achieving a baseline level of equal opportunity between disabled and able-bodied individuals.

Increasing the ADA's coverage alone will not achieve this equal

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1. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101-12213 (1994)).

2. Senator Edward M. Kennedy called the ADA a “bill of rights” and “emancipation proclamation” for people with disabilities. *See* 135 Cong. Rec. 19,888 (1989) (transcribing Senator Kennedy's statement).

3. The Americans With Disabilities Act Amendments Act of 2008, Public Law 110-325, 122 Stat. 3554 [hereinafter “ADA Amendments Act”].

4. In any given case, a number of factors will determine whether a disabled individual must be accommodated, including: the nature and severity of his or her impairment; his or her qualifications for the job; the reasonability of the accommodation in question; and the relative hardship that granting the accommodation would impose upon the employer.

5. ADA Amendments Act § 2(a)(2).

6. 42 U.S.C. § 12101 (1994).

opportunity goal. Given the broader class of individuals now protected under the amended ADA, and given concerns about the costs of accommodating disabled individuals, it is likely that businesses and courts will feel pressure to restrict plaintiffs to a relatively narrow right to accommodation.⁷ Additionally, absent other guidance which strengthens the duty to accommodate, employers are still likely to win the vast majority of disability discrimination lawsuits.

Thus, while the ADA Amendments Act primarily focuses on expanding the definition of disability, courts interpreting the statute should refocus on the employer's duty to provide reasonable accommodations up to the point of undue hardship.⁸ Current case law is not clear as to what specific standards should be used to determine whether an accommodation is reasonable.

This paper proposes that the courts should consider adopting a more concrete standard—such as an inquiry into whether the accommodated individual would still provide net economic benefit to the company—to clarify when an accommodation is reasonable. This fact-based inquiry lends itself to a proof structure more similar to that which is found in the Canadian employment discrimination jurisprudence: Canadian courts require an employer to provide a disabled employee with a reasonable accommodation unless the employer can prove that its refusal to do so was excused by a “bona fide occupational requirement.”⁹ Such a showing requires proof that the employer would suffer undue hardship by providing the accommodation.¹⁰ The Canadian approach provides a good example for the United States because Canada and the United States have a shared legal and cultural history; furthermore, Canada has been willing to implement progressive anti-discrimination laws, so it can provide a guide for the U.S. in appropriate circumstances.¹¹

7. Courts tend to sympathize with businesses' concerns about the cost of accommodation, but they may not be well-educated about the measures that disabled individuals require to have equal opportunities. See Michael A. Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 549, 646 (2004). Absent new case law, they are less likely to be willing to grant a broader right to accommodation.

8. In determining whether a given disability-related accommodation would be an undue hardship, the ADA directs negotiating parties or the court to consider the totality of the employer's circumstances, including the nature and cost of the accommodation, the employer's size and location, and the employer's economic condition. 42 U.S.C. § 12111(10) (1994).

9. *British Columbia (Public Service Employee Relations Commission) v. British Columbia (Government Service Employees' Union)*, 1999 N.R. LEXIS 227, at *13 [hereinafter *Meiorin*].

10. *Id.*

11. In essence, the Canadian approach focuses on providing accommodations to all disabled individuals to the extent that is necessary to break down stigmas and to promote

The U.S. Supreme Court should adapt the Canadian strategy by shifting to employers the burden of production regarding the information most relevant to proving whether a disabled employee merits accommodation. Employers should have to provide the evidence necessary to establishing both the estimated value the employee would provide over his or her work life and the estimated costs of providing the accommodation.¹²

While the Canadian proof structure provides a useful comparison for American courts, I do not mean to suggest that the Canadian approach should be adopted without modification in the American context. Indeed, in the U.S., the costs of accommodation are an increasingly large concern, especially given the newly broad coverage of the amended ADA and the current economic downturn. Therefore, American courts should reaffirm that the right to accommodation is subject to the employee's being qualified in the first place, and that employers are best suited to determine what qualifications are necessary for a particular job. Additionally, the courts should recognize that reasonable accommodation does not require incurring either one-time costs or loss of job productivity to the extent that the cost of employing a disabled person would exceed the economic value of the work he or she performs over the course of employment.

On the whole, my proposed standard and shifted burden of production would provide a fair balance between disabled employees' interests in equal treatment and businesses' underlying purpose of making money. Furthermore, it would bring the reality of what disabled workers experience closer in line with the ADA's goal of equality.

II. THE ADA OF 1990

When it was first enacted in 1990, the ADA aimed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹³ Congress hoped that the disabled would gain protections similar to those enjoyed by people who experienced discrimination on the basis of race, color, sex, national origin, religion, or age.¹⁴ In the employment context, the ADA aimed to increase access to the

diversity and substantive equality in society. *See generally id.* (replacing the conventional approach of categorizing discrimination as having either a "direct" or "adverse" effect with a unified approach focusing on whether an employer can show that a prima facie discriminatory standard is a bona fide occupational requirement).

12. This proposed standard and shifted burden of production does not provide courts with guidance as to how to assess the estimated value the employee would provide, and thus, how costly the maximally expensive reasonable accommodation would be. More economic analysis is necessary to establish a procedure for establishing these values.

13. 42 U.S.C. § 12101(b) (1994).

14. *See* 42 U.S.C. § 12101(a)(4) (1994) ("[U]nlike individuals who have experienced

workplace by prohibiting overt discrimination and affirmatively requiring employers to provide reasonable accommodations to qualified individuals with disabilities.¹⁵

The ADA's purpose was never fully realized. A series of Supreme Court decisions narrowly circumscribed the coverage of the ADA,¹⁶ so many disability discrimination complaints were dismissed in federal court because the plaintiffs in question did not satisfy the statutory definition of disability.¹⁷ Indeed, some commentators assert that courts rejected up to 97 percent of disability discrimination claims on this basis.¹⁸ Furthermore, contrary to initial expectations, the reasonable accommodation provision of the ADA generated relatively little conflict,¹⁹ as courts infrequently reached the question of whether an employer had satisfied its duty to reasonably accommodate a disabled employee.²⁰

discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”).

15. 42 U.S.C. § 12112(b) (1994). The statute prohibits both intentional disparate treatment on the basis of disability and the failure to provide reasonable accommodation, and it counts both as types of discrimination.

16. *See e.g.*, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (concluding that an individual should not be held legally disabled unless he or she was prevented or severely restricted from performing tasks that are central to most people's daily lives); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that an individual would not be considered legally disabled if he or she could manage his disability with “mitigating measures” such as glasses or medicines); *see also* Chai Feldblum, *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act*, p. 16, testimony before the U.S. Senate Committee on Health, Education, Labor, & Pensions, Nov. 15, 2007 (“In recent years, the Supreme Court has restricted the reach of the ADA's protections by narrowly construing the definition of disability contrary to Congressional intent.”).

17. *See* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 523 n. 7 (2008) (citing RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 69-95 (2005); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-103 (1999); John W. Parry, *Trend: Employment Decisions Under ADA Title I—Survey Update*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 294, 294-98 (1999); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998)).

18. Feldblum, *supra* note 16, at 17.

19. Selmi, *supra* note 17, at 523-24.

20. *Cf.* Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/Aug. 2007) (implying that plaintiffs very frequently lost their cases because they did not qualify as disabled under the ADA).

III. THE ADA AMENDMENTS ACT OF 2008

Congress signed the ADA Amendments Act into law on September 25, 2008 in response to the weak protections offered by the ADA of 1990. This Act declares that disabilities “in no way diminish a person’s right to fully participate in all aspects of society,”²¹ including participating in the workforce. This Act broadens protections for the disabled by greatly expanding the covered class and by calling for the affirmative “remov[al] of societal and institutional barriers” in appropriate cases.²²

The Amendments Act’s broader vision of the protected class stems from the overly narrow construction of that class prior to the Act’s passage. Prior to the passage of the Amendments Act, the term “disability” was construed so narrowly that many individuals traditionally considered to be disabled were excluded from the ADA’s coverage, including individuals with epilepsy,²³ muscular dystrophy,²⁴ diabetes,²⁵ an amputated limb,²⁶ or a traumatic brain injury.²⁷ This narrow coverage resulted from a series of Supreme Court decisions which drastically limited the facially broad language of the ADA. In particular, *Sutton v. United Air Lines* narrowed the ADA’s coverage by requiring courts to inquire whether mitigating measures²⁸ would allow impaired employees to perform “major life

21. ADA Amendments Act § 2(a)(2).

22. *Id.*

23. *See e.g.*, *EEOC v. Sara Lee Corp.*, 237 F. 3d 349, 351-52 (4th Cir. 2001) (holding that an epileptic woman who woke up with bruises on her limbs after “shaking, kicking, salivating and, on at least one occasion, bedwetting” was not disabled under the ADA because “[m]any individuals fail to receive a full night of sleep”); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (dismissing an epileptic employee’s disability discrimination claim because anti-seizure medication alleviated many of his symptoms, and he therefore did not qualify as disabled under the ADA).

24. *See e.g.*, *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5th Cir. 2003) (concluding that a man with muscular dystrophy was not disabled under the ADA because he had adapted “how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or a ladder”).

25. *See e.g.*, *Orr v. Wal-Mart Stores, Inc.*, 297 F. 3d 720 (8th Cir. 2002) (holding that the ADA did not protect a diabetic employee whose doctor ordered him to take a half-hour lunch break so he could manage his blood sugar levels).

26. *See e.g.*, *Williams v. Cars Collision Center, LLC*, No. 06 C 2105 (N.D. Ill. July 9, 2007) (holding that a woman with an amputated arm did not have a disability, but a mere “physical impairment,” because she was not “prevented or severely restricted from doing activities that are of central importance to most people’s daily lives”).

27. *See e.g.*, *Phillips v. Wal-Mart Stores, Inc.*, 78 F. Supp. 2d 1274 (S.D. Ala. 1999) (denying that a man was disabled under the ADA even though he had suffered a traumatic brain injury which resulted in a four-month coma, dizziness, spasms in his arms and hands, slowed learning, and slowed speech).

28. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Mitigating measures can include wearing glasses, taking medicines, or other treatments.

activities”—if so, they would not be considered disabled. Additionally, the subsequent case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* further limited the scope of the ADA by requiring an individual to first prove that he or she has “an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”²⁹

Like the original enactment of the ADA, the Amendments Act requires that an impairment “substantially limit one or more major life activities” in order to be considered a disability.³⁰ Additionally, both statutes state that a person will be considered disabled if he or she has a record of such an impairment,³¹ or if he or she is regarded as having such an impairment.³² Despite these similarities between the language of the ADA and the Amendments Act, the Amendments Act prescribes a much more generous definition of disability than the ADA by adding rules of construction which make it clear that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”³³

The Amendments Act explicitly rejects the restrictive definitions of disability in *Sutton*³⁴ and *Williams*.³⁵ Thus, when determining whether an impairment substantially limits a major life activity under the Amendments Act, courts can no longer take mitigating measures into account (with the exception of glasses and contact lenses).³⁶ Additionally, the Act gives the phrase “major life activities” a far more expansive definition than that expressed in *Williams*. The concept now includes, for instance, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading,

29. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 185 (2002).

30. 42 U.S.C. 12102 § 3(1) (2008).

31. *Id.*

32. *Id.*

33. ADA Amendments Act § 2(b)(5).

34. *See* ADA Amendments Act § 2(a)(4) (“the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.* . . . and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect”).

35. *See* ADA Amendments Act § 2(b)(4)-(5) (criticizing *Williams* as promoting an “inappropriately high level of limitation necessary to obtain coverage under the ADA”).

36. Despite Congress’s rejection of *Sutton*’s broad holding, *Sutton* would have come out the same way under the ADA and the Amendments Act because of this exception for glasses and contact lenses. *Cf.* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that Petitioners were not disabled within the meaning of the ADA because corrective measures such as glasses or contact lenses would enable them to function identically to those without similar impairments and thus not limit them in the performance of major life activities).

concentrating, thinking, communicating, and working.³⁷ The Amendments Act also rejects the EEOC regulations which defined the term “substantially limits” as “significantly restricted”³⁸ because this definition “express[ed] too high a standard.”³⁹ Instead, the Amendments Act requires that the EEOC issue regulations interpreting “substantially limits . . . [consistent] with the findings and purposes of the ADA Amendments Act of 2008.”⁴⁰

The Amendments Act is therefore very likely to cover individuals whom society would traditionally consider to be disabled (such as the previously mentioned employees with epilepsy, muscular dystrophy, brain injury, etc.). However, the outer bounds of the Act’s coverage remain uncertain.

Businesses will be concerned that the Amendments Act’s definition of major life activity is so broad that essentially anyone with an impairment can qualify as disabled. Arguably, the effect of the Amendments Act is to expand the definition of disability so as to remove any likelihood that a disability claimant can be excluded on the grounds that a disability does not exist, and therefore to require that courts always consider issues of qualification for the job and reasonable accommodation by the employer. In this sense, the Amendments Act makes the ADA much more similar to another major anti-discrimination statute, Title VII of the Civil Rights Act.⁴¹ Title VII does not question whether a claimant in a racial discrimination case, for instance, is a member of a specific racial group; instead, it requires the court to assess the employee’s job qualifications and the employer’s potentially discriminatory actions.⁴²

The amended ADA prohibits employers from “discriminat[ing] against a qualified individual with a disability because of the disability.”⁴³ A qualified individual is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the [relevant] employment position.”⁴⁴ The ADA makes clear that

37. 42 U.S.C. § 12102(2) (2008).

38. ADA Amendments Act § 2(a)(8).

39. *Id.*

40. 42 U.S.C. § 12102(4)(B) (2008); ADA Amendments Act § 506 (granting the EEOC, the Attorney General, and the Secretary of Transportation authority to issue regulations interpreting the definitions of disability (including rules of construction)).

41. *See generally*, 42 U.S.C. § 2000e-2(a)(1)–(2) (2007) (stating, “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

42. *See* Civil Rights Act of 1991 § 107(m), Pub. L. No. 102-166, 105 Stat. 1071; *Desert Palace v. Costa*, 539 U.S. 90 (2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973);.

43. 42 U.S.C. § 12112(a) (2006).

44. 42 U.S.C. § 12111(8) (2006).

prohibited discrimination includes not only “traditional discrimination,”⁴⁵ but also the failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.”⁴⁶

Indeed, the Amendments Act declares that “disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of [discrimination].”⁴⁷ Accordingly, the statute directs courts deciding cases under the ADA to focus on “whether entities covered under the ADA have complied with their obligations” to treat the disabled equally,⁴⁸ which may require “preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.”⁴⁹

This language supports the view that the ADA’s mandate to reasonably accommodate is best viewed under the anti-subordination theory of discrimination. The anti-subordination theory submits that the categorical exclusion of an individual from a workplace benefit because of his or her disability is arbitrary, degrading, and unfair because many disabilities are irrelevant to one’s capacity to do a job.⁵⁰ For example, being wheelchair-bound does not affect an individual’s ability to work as a successful law professor. Indeed, perhaps this law professor is only considered disabled in comparison to an arbitrary, societally-imposed baseline, where the environment is built to support walking individuals.

While it is tempting to think of the ADA’s accommodation provision as a redistributive measure where the disabled are receiving an extra gain,

45. The phrase “traditional discrimination” is referring to the direct denial of formally equal treatment because of an individual’s disability. *See e.g.*, 42 U.S.C. § 12112(b)(1) (2006) (including in the definition of discrimination the acts of “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee”). Such traditional discrimination against a disabled individual is analogous to the denial of a job opportunity to an individual because of her race or color under Title VII. *See supra* note 42.

46. 42 U.S.C. § 12112(b)(5) (2006).

47. ADA Amendments Act § 2(a)(2).

48. *Id.* (explaining that discrimination against the disabled can take the form of “prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers”).

49. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis in original); 42 U.S.C. § 12112(b)(5).

50. *Cf. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-66 (2001) (arguing that the anti-subordination theory explains the harm of first generation race or gender-based discrimination).

the anti-subordination theory is more appropriate. Traditionally, many commentators thought that “real” anti-discrimination laws remedied the exclusion of similarly situated members of protected categories from workplace opportunity to achieve equality for certain historically marginalized groups.⁵¹ These commentators thought that “by affirmatively requiring employers to provide reasonable accommodations to existing or potential workers with disabilities, the ADA does more than simply level an uneven playing field.”⁵²

Michael Stein argues against this traditional view, contending that biological variations are viewed as abnormal partially “because a dominant group has imposed [artificial] conditions that are most favorable to its own circumstances.”⁵³ Therefore, “ADA-mandated accommodations resemble antidiscrimination remedies not simply due to their comparable results, but because fundamentally they are antidiscrimination remedies.”⁵⁴ The statute’s goal of removing the subordination of individuals with disabilities is a product of *formal* and *equalizing* justice, not redistributive justice, because it acknowledges that equal access to goods and opportunities in the workplace is not a special benefit.⁵⁵ Rather, this equal access to benefits of employment is something that all employees who are qualified for their jobs are entitled to have. Therefore, reasonable accommodations are suitable remedies to those artificial workplace conditions that historically excluded the disabled.⁵⁶

While the amended ADA is likely to be effective in addressing traditional discrimination against disabled individuals protected by the statute, it is less clear whether it will be as effective in reaching its “basic equal opportunity goal” with regards to individuals who require accommodation.⁵⁷ The ADA clearly requires employers to provide qualified individuals with “reasonable accommodation,” but it leaves as a “great unsettled question” the matter of what can or should be considered a

51. Stein, *supra* note 7, at 582-83.

52. *Id.* (“Compelling employers to accommodate disabled workers, these scholars agree, pushes both the workplace equilibrium and its financial calculus beyond equality, and thus differentiates the ADA from its predecessors. The conception of disability—related accommodations being distinct from Title VII antidiscrimination prohibitions is so pervasive that it has [made] the Supreme Court [more hostile to plaintiffs bringing failure to accommodate claims under the] ADA . . .”).

53. *Id.* at 601.

54. *Id.* at 583 (emphasis omitted).

55. *Id.*

56. *Id.* at 637.

57. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (“[T]he Act specifies . . . that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal. The Act requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy”).

reasonable accommodation.⁵⁸ In Judge Posner's words, reasonable accommodation "requires something less than the maximum possible care . . . [relative to] the benefits of the accommodation to the disabled worker as well as to the employer's resources."⁵⁹

IV. CURRENT CASE LAW FALLS SHORT OF ACHIEVING FORMAL EQUALITY FOR EMPLOYEES WHO REQUIRE REASONABLE ACCOMMODATION

The Supreme Court articulated the current standard for when a given accommodation will be required under the ADA in the recent case, *U.S. Airways Inc., v. Barnett*.⁶⁰ In that case, the Court denied the disabled plaintiff's request for an exception to his company's seniority system so he could keep his less physically demanding job. The Court reasoned that accommodating the plaintiff by granting the exception was unreasonable "in the run of cases" because it would disrupt other employees' expectations of "fair, uniform treatment" under the seniority system.⁶¹ Additionally, the Court was unconvinced that the plaintiff showed any special circumstances which warranted a finding that the accommodation was reasonable in his specific situation, even though he had presented evidence that his employer reserved the right to change "any and all" of its hiring and promotion policies without advance notice.⁶² The Court concluded by noting that, even if the plaintiff had been able to show that the accommodation was reasonable, the employer could still assert the undue hardship defense.⁶³

Barnett's holding is flawed for two reasons. First, it does not provide specific enough guidance as to what accommodations businesses will be required to grant, ex ante. Indeed, *Barnett* leaves open several important questions. What constitutes a reasonable accommodation "in the run of cases"? What is a reasonable accommodation in an individual case?

Second, and more fundamentally, *Barnett's* holding usually would not

58. Stein, *supra* note 7, at 646 (citing Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L. J. 1, 8 (1996)).

59. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995); *see also* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (establishing that reasonable accommodation does not require an employer to bear more than a "de minimis" cost).

60. *Barnett*, 535 U.S. 391 (2002).

61. *Id.* at 403-04.

62. *See id.* at 423-24 (Souter, J. and Ginsburg, J., dissenting) ("[I]t is hard to see the seniority scheme here as any match for Barnett's ADA requests, since U.S. Airways apparently took pains to ensure that its seniority rules raised no great expectations.").

63. *Id.* at 402 (stating that the employer will not be required to provide a reasonable accommodation if it proves that the requested accommodation would impose an undue hardship in the specific case at bar).

require an employer to grant a disputed accommodation, and it protects certain disabled individuals more than others. Thus, it creates tension with the amended ADA's stated goal of providing equal opportunity to all qualified individuals with disabilities.⁶⁴ Under *Barnett*, it is far easier for a plaintiff to prove traditional discrimination than the failure to reasonably accommodate. The plain language of the ADA does not contemplate any difference between types of discrimination in that there is an equally strong prohibition against traditional discrimination and the failure to reasonably accommodate.⁶⁵ A plaintiff will be able to show traditional discrimination by proving his or her prima facie case, so long as the employer is not able to rebut the inference that its agents had an illegitimate motive.⁶⁶ In contrast, a plaintiff seeking an accommodation must prove not only his or her prima facie case of discrimination, but must also prove either that the accommodation is reasonable in most cases or that there are special circumstances warranting the accommodation in his or her specific case (a difficult standard to meet under *Barnett*).⁶⁷

Businesses will likely press the courts to continue applying *Barnett* broadly due to their concerns that a less employer-friendly burden-shifting framework would require them to provide accommodations in more cases, including cases where opportunistic employees try to excuse bad work behavior by asserting the protections of the ADA. This is a valid concern, but it is mitigated by limitations to an employer's duty to accommodate. There are four main limitations: the requirement that an individual be qualified,⁶⁸ the requirement of reasonability,⁶⁹ the defense of undue hardship,⁷⁰ and the definition of "substantially limits."⁷¹ These limitations would help ensure that a more employee-friendly standard would not excessively harm businesses.

64. A narrow interpretation of *Barnett* would limit its holding to the facts, *e.g.*, to cases involving requested exceptions to a seniority system.

65. 42 U.S.C. § 12112(a) (2006) prohibits discrimination against a qualified individual on the basis of disability with regard to employment. 42 U.S.C. § 12112(b) (2006) defines the word "discrimination" as including not only classic disparate treatment, but also as including the failure to provide reasonable accommodations, unless such accommodations would impose an undue hardship on the employer.

66. *Desert Palace v. Costa*, 539 U.S. 90 (2003); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

67. *See Barnett*, 535 U.S. at 391 (holding that there were no special circumstances which warranted requiring the accommodation even though the employer had frequently bent its seniority rules for other employees).

68. 42 U.S.C. § 12112(a) (2006); 42 U.S.C. § 12111(8) (2006).

69. 42 U.S.C. § 12112(b)(5) (2006).

70. *See supra* note 9 (illustrating how the Canadian courts allow defendant employers to show undue hardship).

71. The EEOC's definition of the term "substantially limits" will determine the boundaries of the amended ADA's coverage by helping to establish which individuals will be considered legally disabled.

Given *Barnett*'s holding, the ADA Amendments' broadening of the protected class may not, in and of itself, be enough to achieve the ADA's anti-discrimination mandate. *Barnett* is narrowly written and lacks sufficient guidance as to what accommodations are reasonable; furthermore, it normally requires a showing of reasonableness in the "run" of similar cases, as it is difficult to show that special circumstances justify accommodation in the individual case.⁷² Thus, under the amended ADA and *Barnett*, the ADA's protections may be broad, but they are also weak.

V. TOWARDS A MORE INCLUSIVE STANDARD FOR REASONABLE ACCOMMODATION

A standard which requires employers to accommodate a disabled individual if he or she would provide net economic benefit to the company over his or her work life would further the formal equality goals of the Amendments Act while protecting employers' economic interests. This standard would require decision-makers to assess the employee's qualifications for the job, the estimated value that the employee would provide over his or her work life, and the total cost of the accommodation.⁷³ Because of the undue hardship defense, this standard would not overly burden employers with excessive expenditures.⁷⁴

This standard is consistent with what Cass Sunstein has called the "best understanding" of reasonable accommodation: "that an accommodation would be unreasonable if the costs exceeded the benefits."⁷⁵ However, cost-benefit analysis can be conducted not only with the costs to the employer of providing the accommodation and the benefits to the employer that the employee provides over his or her lifetime, but with other costs and benefits as well.

In fact, another option is to consider the costs to the employer of providing the accommodation versus the benefits to the employee of using the accommodation.⁷⁶ This option corresponds with Judge Posner's conception of which costs and benefits to consider in *Vande Zande*.⁷⁷ Sunstein has criticized Judge Posner's approach in *Vande Zande* because it

72. U.S. Airways, Inc. v. *Barnett*, 535 U.S. 395, 403 (2002).

73. Employees are much less likely than employers to have access to the information that would allow them to calculate these figures.

74. See *supra* note 9 (allowing employers to show excessive expenditures as an undue hardship defense for accommodations they cannot make).

75. Cass Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1899 (2007).

76. See *id.* at 1908 (mentioning both the economic and emotional benefits accommodations provide disabled employees).

77. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995).

did not adequately consider the emotional benefits that an accommodation would provide a disabled employee.⁷⁸ Sunstein argues that any measurement of benefits to the employee must account for both the economic and emotional benefits that an accommodation would provide.⁷⁹ However, even if Judge Posner's version of cost-benefit analysis was modified to include assessments of emotional benefits, employers would be likely to undervalue these benefits because they have financial incentives to do so and because the accommodation is subjectively more important to the employee than the employer. For this reason, it is preferable to use the benefits the employee's work provides the company instead of the benefits the accommodation provides the employee, as the latter option would likely result in employers granting fewer accommodations than the ADA Amendments envision.⁸⁰

No matter which benefits one decides to take into account, requiring individualized cost-benefit analysis will refocus the debate on the costs of accommodation, a subject of heated controversy during the debates leading up to the ADA of 1990's passage.⁸¹ Accommodations aren't always as costly as many businesses first assume. Employers participating in a recent Department of Labor study reported that accommodations usually were not very expensive and provided the company with tangible benefits. This report states:

“Of the employers who gave cost information related to accommodations they had provided, 251 out of 447 (56%) said the accommodations needed by employees and job applicants with disabilities cost absolutely nothing. Another 164 (37%) experienced a one-time cost Of those accommodations that did have a cost, the typical one-time expenditure by employers was \$600.”⁸²

78. Cass Sunstein argues that the reduction in stigma experienced by disabled employees is a valid—even essential—consideration when assessing the economic benefits of accommodations to employees. *See* Sunstein, *supra* note 75, at 1909 (discussing potential valuation of benefits through the employee's “willingness to pay” for accommodation versus his or her “willingness to accept” lack of accommodation. The latter accounts for emotional effects on the employee). *But see* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995) (refusing to account in more than a cursory way for stigma that the plaintiff would face if she were not accommodated).

79. Sunstein, *supra* note 75, at 1909.

80. To assess the benefits the employee's work would provide to the employer, decision-makers need to know labor costs. These costs are not proprietary in some cases, for instance, in cases regarding union contracts. However, employers have an incentive not to provide labor cost numbers in a legal proceeding where they would become public, both because labor costs may be proprietary (particularly skilled labor mix and costs) and because of privacy concerns for other employees in the same or similar job categories).

81. Allbright, *supra* note 20, at 328.

82. Job Accommodation Network, U.S. Department of Labor's Office of Disability

Furthermore, employers who had made accommodations for employees with disabilities reported multiple benefits as a result.⁸³ The most frequently mentioned direct benefits were “(1) the accommodation allowed the company to retain a qualified employee, (2) the accommodation increased the worker’s productivity, and (3) the accommodation eliminated the costs of training a new employee.”⁸⁴ The most widely mentioned indirect benefits employers received were “(1) the accommodation ultimately improved interactions with co-workers, (2) the accommodation increased overall company morale, and (3) the accommodation increased overall company productivity.”⁸⁵

Because accommodations often are not as costly as businesses would initially assume, and because they provide employers with valuable benefits, the proposed standard requiring individualized cost benefit analyses probably will result in more disabled individuals being accommodated. Employers should not be too worried about this standard because it would not require employers to take on employees who would cause the company a net long-term economic loss, and it would not require them to take on such high economic costs relative to their short-term budgets as to cause undue hardship.⁸⁶ Moreover, the standard would allow an employer to decide whether its employees are qualified for their jobs and whether their work would profit the company in the first place.

Businesses might argue that an employee’s yearly compensation package already captures the exact economic value of the employee’s contributions to the company, so any granted accommodation makes the employee less valuable to the company and gives him or her extra compensation. Additionally, businesses might argue that asking the company to make the accommodation and bear all the costs of doing so is unfair to their other workers in the “run of cases,”⁸⁷ as these employees’ work may have become more difficult because of the accommodation—this is the very reasoning that underlies *Barnett*.⁸⁸ According to these arguments, perhaps a disabled employee should have to pay part of the accommodation he or she is granted.

Employment Policy, *Workplace Accommodation: Low Cost, High Impact 2* (2007), <http://www.jan.wvu.edu/media/LowCostHighImpact.doc> [hereinafter Job Accommodation Network].

83. *Id.* at 2.

84. *Id.*

85. *Id.*

86. *See generally Meiorin, supra* note 9 (requiring employers to provide accommodations for disabled Canadians in the absence of a bona fide occupational requirement or undue economic hardship on the employer).

87. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-03 (2002).

88. *Id.* Arguably, in *Barnett*, the other workers in similar jobs would lose benefits of their own seniority because of the disabled worker’s accommodation.

However, this idea runs afoul of the anti-subordination theory underlying the ADA, which states that all individuals who are qualified for their jobs deserve equal access to the benefits of employment.⁸⁹ This theory argues that accommodations place disabled and able-bodied individuals at the baseline level of access to workplace opportunities that all qualified employees are entitled to have. Therefore, forcing an employee to pay part or all of the accommodation is equivalent to impermissibly penalizing him or her because of his or her disability.

Furthermore, accommodating a disabled employee can yield direct benefits to the employer, if the employee is known to be productive, because it will allow the business to keep a valuable worker.⁹⁰ More generally, accommodating any employee, whether he or she is known to be productive or not, can yield indirect benefits to the employer in terms of improved employee morale and improved public image.⁹¹ Finally, accommodation can provide tangible benefits to other employees: for instance, a reading device that magnifies print can benefit employees other than the disabled worker because the machine is durable and can be used by other individuals when the disabled employee is not using it.⁹² These benefits to the business and its other workers justify asking it to pay the cost of the accommodation.

VI. ADAPTING THE CANADIAN EMPLOYMENT DISCRIMINATION PROOF STRUCTURE WOULD BETTER IMPLEMENT THIS PROPOSED STANDARD FOR REASONABLE ACCOMMODATION

American courts should consider adapting the Canadian framework by shifting the burden of production to employers regarding reasonable accommodation. Employers should have to provide evidence relevant to establishing the estimated value that employees similarly situated to the plaintiff would provide over their work lives and the costs of providing the accommodation in question. Canadian courts require employers to provide reasonable accommodations unless their refusals to do so are related to business necessity and the accommodations in question would cause undue hardship.⁹³ The Canadian strategy of placing the burden of production on employers is well-suited to implementing my proposed standard because it would force employers to reveal hard-to-find information relevant to the

89. Stein, *supra* note 7, at 637-39 (discussing how the ADA helps eliminate some of the artificial disadvantages for disabled individuals in the workplace).

90. Job Accommodation Network, *supra* note 82, at 1.

91. *Id.*

92. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 846 (2007).

93. *Meiorin*, *supra* note 9, at *47.

inquiry of whether an employee would economically benefit the company.

As a preliminary matter, the Canadian approach provides a useful lens through which to contemplate potential solutions to problems in the American employment law jurisprudence. Indeed, Canada has developed a legal analysis for employment claims that is very similar to the one in this country.⁹⁴ Yet, in general, Canada's approach to employment discrimination issues is significantly more progressive than that of the U.S.'s, and the Canadian experience may provide a "roadmap" for moving U.S. law in that direction when appropriate.⁹⁵

The major anti-discrimination statutes in Canada include the Canadian Human Rights Act ("CHRA") and its sister statutes at the provincial level.⁹⁶ These statutes "have an elevated legal status," meaning that their provisions trump those of other non-constitutional sources of law.⁹⁷ Unlike the American civil rights statutes,⁹⁸ Canada does not use separate analyses for assessing intentional disparate treatment cases and unintentional disparate impact cases.⁹⁹ Further, while the United States uses separate statutes to analyze different genres of discrimination,¹⁰⁰ the CHRA does not

94. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 118 (2006); see also Austen Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 UNIV. ILL. L. REV. 637, 673 (2007) (pointing out that Canada "'share[s] a common law heritage . . . liberal democratic and federal structures of government' and other historical, societal, and legal similarities that make their laws particularly well suited to comparison").

95. Seiner, *supra* note 94, at 118.

96. Canadian Human Rights Act [hereinafter CHRA]; Ontario Human Rights Code; British Columbia Human Rights Code.

97. *Meiorin*, *supra* note 9, at *40.

98. American courts still use separate analyses for so-called "disparate treatment" and "disparate impact" cases. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (detailing the systemic disparate treatment analysis in the Title VII context); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 343 n.23 (1977) (inferring that the employer's hiring policy was discriminatory from the "inexorable zero," i.e., the employer's complete failure to hire any minority taxi drivers); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (outlining disparate impact analysis in the Title VII context). However, unifying the inquiries for disparate treatment and the disparate impact, like the Canadian system does, would further help the disabled to integrate into society and the workforce. Such a unified system would also provide a simpler, more elegant analytical framework for thinking about disability discrimination cases. Eliminating the separation between these analyses in the ADA context would be beneficial because: the distinction is artificial, as few fact patterns fit neatly into one track or the other; the effect on the employee is the same, regardless of whether the employer discriminated intentionally or not; and the availability of damages will vary depending on which track the fact pattern is analyzed under. See Seiner, *supra* note 94, at 132 (explaining the Canadian system).

99. See *Meiorin*, *supra* note 9, at *41-46 (collapsing the formerly distinct analyses for disparate impact cases and disparate treatment cases under Canadian law).

100. For instance, the ADA covers disability discrimination, the Age Discrimination in Employment Act covers age discrimination, and Title VII of the Civil Rights Act covers race, sex, gender, national origin, and alienage discrimination.

differentiate among disability discrimination, sex discrimination, race discrimination, or any other type of covered discrimination.¹⁰¹ Finally, while the ADA is somewhat unique among American civil rights laws in its requirement that employers reasonably accommodate,¹⁰² the CHRA imposes a duty to accommodate for all types of covered discrimination.¹⁰³ Despite these differences between the ADA and the CHRA, the burden-shifting aspects of the Canadian jurisprudence are worth considering and importing into the ADA context.

The CHRA and its sister statutes aim to achieve “substantive equality” through “transformative measures” which make society and the workforce more egalitarian and diverse.¹⁰⁴ Substantive equality requires more than achieving formal equality of treatment and opportunity; it also requires breaking down those systemic rules and practices which lead to inequitable results. The Canadian Supreme Court criticizes the formal equality model because this model does not require decision-makers to “challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism, and sexism, which result in a society being designed well for some and not for others,” and because it “allows those who consider themselves ‘normal’ to continue to construct institutions and relations in their image, as long as others, when they challenge this construction, are ‘accommodated.’”¹⁰⁵ In contrast, the Court lauds the ideal of substantive equality underlying the CHRA, which “abandon[s] the idea of ‘normal’ and work[s] for genuine inclusiveness.”¹⁰⁶

The Supreme Court of Canada most recently addressed the means by which the Canadian Human Rights Tribunals shall work towards the goal of substantive equality in *British Columbia (Public Service Employee*

101. See CHRA Part I (3)(1) (“For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.”).

102. The only other statute which requires reasonable accommodation in the employment context is the Pregnancy Discrimination Act. Pregnancy Discrimination Act, amendment to Title VII of Civil Rights Act of 1964, 42 U.S.C.A. § 2000e(k) (1978).

103. See CHRA Part I (15)(2) (“For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.”).

104. *Meiorin*, *supra* note 9, at *39; CHRA; Ontario Human Rights Code; British Columbia Human Rights Code, R.S.B.C. 1996, ch.210 (2008). Similarly, the Amendments Act contemplates that disability should not be a barrier to full participation in society and the workforce, so that the affirmative removal of stereotypes and of societal and institutional barriers is an appropriate anti-discrimination remedy. ADA Amendments Act.

105. *Meiorin*, *supra* note 9, at *37.

106. *Id.* at *38.

Relations Commission) v. British Columbia Government Service Employees' Union (Meiorin).¹⁰⁷ In this case, the female plaintiff was fired from her job as a firefighter for having failed the provincial government's new aerobic standard for physical fitness.¹⁰⁸ The Court found this aerobic standard to be discriminatory because 65 to 70 percent of male applicants passed this test on their initial attempts, while only 35 percent of female applicants had similar success.¹⁰⁹ The Court held that the Government had not discharged its burden of showing that it had accommodated the plaintiff up to the point of undue hardship because it presented "no credible evidence" showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily.¹¹⁰

Meiorin is notable for many reasons,¹¹¹ but for the purposes of this analysis, it is relevant because it is the most recent Canadian Supreme Court case to address an employer's duty to accommodate. Like its predecessors, *Meiorin* reaffirms that once the employee proves that he or she was treated differently because of his or her disability, the employer bears the burdens of production and proof to demonstrate that it would suffer undue hardship if it were to provide the accommodation in question to individual employees sharing the characteristics of the plaintiff.¹¹²

107. Canada has Human Rights Tribunals at the federal and provincial levels. These Tribunals implement the Human Rights statutes.

108. *Meiorin*, *supra* note 9, at *11.

109. *Id.* at *17. It should be noted that, in contrast to the American approach, the Canadian approach requires employers to accommodate individuals who face discrimination on any prohibited grounds (not just disability or religion).

110. *Id.*

111. *Meiorin* is the case which first made clear that the goal of Canadian Human Rights legislation was to create substantive equality. *Id.* at *39. Furthermore, in *Meiorin*, the Supreme Court of Canada laid down a framework that unified the analyses for disparate treatment and disparate impact and that set a new test for when an employer would be required to grant an employee a workplace accommodation. In the first step of this new test, the Court required the plaintiff to prove a prima facie case of discrimination by showing that the practice or policy in question has a discriminatory effect. In the second step, it shifted the burden to the employer to prove that: (1) its practice was enacted for a purpose rationally related to business necessity; (2) it enacted its practice in the good faith belief that the practice was reasonably necessary to achieve this purpose; and (3) the practice was reasonably necessary to achieve this purpose. For an employer to prove that the practice was reasonably necessary, it must demonstrate it would suffer undue hardship if it provided accommodation of individual employees sharing the characteristics of the plaintiff. *Id.* at *48-49.

112. *Id.* at *61. *See also* Ontario Human Rights Commission and O'Malley (Vincent) v. Simpson-Sears, [1985] 2 S.C.R. 536 (directing the employer to pay the employee the difference between her earnings as a part-time employee and what she would have earned as a full-time employee because there was no evidence that further steps would have caused undue hardship and would have been unreasonable); Bhinder v. CN, [1985] 2 S.C.R. 561 (finding that the employer's hard-hat rule was a bona fide occupational requirement and it

Canadian discrimination law aims to be more far-reaching than American discrimination law; indeed, some of its cases criticize American discrimination law for being too parsimonious.¹¹³ Thus, it is inappropriate to import the Canadian approach completely into American law.

In light of both the similarities and the differences between the CHRA and the ADA,¹¹⁴ U.S. courts should adapt the Canadian approach by placing upon the employer the burden of production regarding otherwise hard-to-find information relevant to whether a disabled employee would economically benefit the company. By doing so, the courts would create a framework which would fortify the protections of the Amendments Act and would help to achieve the Act's goal of providing a baseline level of equal opportunity to both able-bodied and disabled individuals.

VII. CONCLUSION: RETHINKING REASONABLE ACCOMMODATION

To sum up the argument, the broadened coverage of the amended ADA will be insufficient, in and of itself, to achieve an adequate baseline level of equal opportunity between the disabled and able-bodied.¹¹⁵ Those disabled individuals who require reasonable accommodation will still have difficulty fully participating in the workforce under the ADA Amendments and *Barnett*, even though the ADA does not distinguish between

would be an undue burden for them to make an exception to the rule).

113. *See e.g.*, *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970 (rejecting the American “de minimis” standard for undue hardship as too lenient and noting that employers are obligated to endure some hardship as members of an egalitarian and diverse society).

114. The CHRA aims to be far more inclusive and protective than the ADA does. In fact, the Canadian employment discrimination jurisprudence is too plaintiff-friendly to import without modification into the American context. In *Meiorin*, the Supreme Court of Canada made clear that the goal of Canadian Human Rights legislation was to strike down actions or policies with discriminatory effects—regardless of whether there was any intent to discriminate, and regardless of whether such actions or policies adversely affected one individual or many—so as to recreate a society which did not use discriminatory norms. In contrast, the ADA only mandates that qualified disabled workers must be granted accommodations on the individual level so they can fully participate in the workforce. The ADA does not envision creating sweeping systemic changes which alter what is considered normal, and it does not contemplate completely reforming the workforce so that it suits the disabled and the able-bodied equally well.

115. The Amendments Act charges the EEOC, the Attorney General, and the Secretary of Transportation with issuing regulations, including rules of construction, to implement the definitions of disability. My argument assumes that the EEOC and other governmental agencies will not create a restrictive definition of “disability,” so disabled individuals generally will not face problems in proving this threshold requirement. Indeed, the Amendments Act commands the EEOC to promulgate more inclusive definition of “substantially limits” for the purposes of determining who is disabled. This definition will be binding on the courts. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(5), 122 Stat. 3553 (2008).

individuals who experience traditional discrimination and individuals who are denied reasonable accommodation.

To remedy this inconsistency, American courts should require employers to make individualized cost-benefit assessments of disabled employees when deciding whether the accommodations in question are reasonable. Such an analysis will have to include information about the worker's qualifications and productivity as well as the objective costs of accommodation. Under this proposed standard, employers will have to accommodate qualified employees if it is economic to do so, unless providing the accommodation would lead to undue hardship.¹¹⁶

The U.S. Supreme Court will have to reassess current case law and move away from *Barnett* to implement this proposed standard. Because the Canadian jurisprudence has illustrated a way to achieve greater equality without excessively harming businesses, the Court should consider adapting the Canadian approach to implement this standard. The Court should require employers to produce information relevant to establishing the estimated value an employee would provide over his or her work life and the estimated costs of providing the accommodation.

Since the Court recently enumerated the burden-shifting framework for analyzing reasonable accommodations in *Barnett*, it may be reluctant to revisit the issue so soon. However, the Amendments Act explicitly requires reasonable accommodations for the disabled in order to equalize workplace opportunity, and *Barnett* does not provide an adequate framework for deciding what accommodations are reasonable. Therefore, another Court visit is needed to strengthen and develop the protections of the Amendments Act.

116. See *Meiorin*, *supra* note 9, at *61 (requiring employers to demonstrate that accommodating individuals with similar characteristics would pose an undue economic burden).