

# Journal of Civil Rights and Economic Development

---

Volume 10  
Issue 3 *Volume 10, Summer 1995, Issue 3*

Article 4

---

June 1995

## The Wheelchair Ramp to Serfdom: The Americans With Disabilities Act, Liberty, and Markets

Mark A. Schuman

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Schuman, Mark A. (1995) "The Wheelchair Ramp to Serfdom: The Americans With Disabilities Act, Liberty, and Markets," *Journal of Civil Rights and Economic Development*: Vol. 10 : Iss. 3 , Article 4.  
Available at: <https://scholarship.law.stjohns.edu/jcred/vol10/iss3/4>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# THE WHEELCHAIR RAMP TO SERFDOM: THE AMERICANS WITH DISABILITIES ACT, LIBERTY, AND MARKETS

MARK A. SCHUMAN\*

The great economist Friedrich von Hayek once pointed out that liberty is seldom lost all at once, but rather is lost a little bit at a time.<sup>1</sup> Another economist, Walter Williams, made the same point in a bit more folksy manner when he compared the process by which government has deprived the American people of their liberty to the method of cooking a frog. If one drops a frog into boiling water, the frog will jump out of the pot. If, however, one puts the frog in tepid water and raises the temperature a little bit at a time, the frog will not realize the danger until too late, and will remain in the pot long enough to be cooked. Similarly, the American people have objected to sudden, massive attempts to restrict their freedom. Yet government has deprived the American people of significant parts of their liberty in a slow, incremental fashion, and the American people have, for the most part, reacted passively.

The Americans with Disabilities Act (“ADA”)<sup>2</sup> is such an incremental deprivation of freedom. While all laws prohibiting discrimination in private employment are deprivations of liberty to some extent,<sup>3</sup> the ADA is a significant step beyond such laws as Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>4</sup> and the Age

\* J.D., Yale Law School, 1991; B.A., Harpur College, Binghamton University, 1988. The speaker/author is a former Law Clerk to the Honorable Samuel Alito, Jr. of the United States Court of Appeals for the Third Circuit and is an associate of McCarter & English in Newark, New Jersey. The views expressed in this speech are solely those of the author. © 1995, Mark A. Schuman.

<sup>1</sup> See generally FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944) (quoting David Hume).

<sup>2</sup> 42 U.S.C. § 12101 *et seq.* (Supp. V 1993).

<sup>3</sup> See, e.g., RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992). With regard to government actions in derogation of liberty of contract more generally, see RICHARD EPSTEIN, *TAKINGS* (1985).

<sup>4</sup> 42 U.S.C. §§ 1981a, 2000e *et seq.* (Supp. IV 1993) as amended by the “Civil Rights Act” of 1991.

Discrimination in Employment Act ("ADEA").<sup>5</sup> I want to focus on two ways that the ADA restricts freedom in new dimensions, incrementally depriving the American people of a bit more of their liberty. First, by attempting to eliminate discrimination based on disability, the ADA denies an employer the right to determine the qualifications and abilities relevant to a job. Second, by imposing a duty to reasonably accommodate an employee's or applicant's disability, the ADA establishes a fallaciously "just" or "equitable" price in the terms and conditions of the job, with all the displacement and deprivation of opportunity which such price-fixing inevitably produces.

Anti-discrimination statutes, including the ADA, single out particular characteristics and forbid an employer to discriminate against an individual "because of" the possession of a protected characteristic in regard to hiring, firing, promotion, compensation, or other terms and conditions of employment.<sup>6</sup> Employees charging illegal discrimination must prove not merely that the employer took an adverse employment action against the employee, but also that the employer took the action for a particular prohibited reason.

Earlier anti-discrimination statutes, such as Title VII, were originally intended to restrict freedom in a relatively small way and otherwise to leave employers and employees free to order their affairs as they saw fit. Congress expressed its intent, in statutory language, legislative history, and debate, that Title VII was aimed at intentional discrimination and that its incursion on freedom would be small.<sup>7</sup> Indeed, on their faces, both the ADA and earlier anti-discrimination statutes leave an employer free to take whatever employment action it wants so long as it does not do so

<sup>5</sup> 29 U.S.C. § 621 *et seq.* (1994).

<sup>6</sup> See 42 U.S.C. §§ 12112(a), 2000e-2(a)(1) (Supp. V 1993); 29 U.S.C. § 623(a) (1994) (prohibiting employment actions "because of" protected characteristics).

<sup>7</sup> See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 231-52 (1979) (Rehnquist, J., dissenting) (noting legislative history and debate to effect that Congress did not intend to require discrimination in favor of employee or applicant on the basis of race or other protected characteristic, to require hiring based on protected characteristics in order to rectify "imbalance" in work force, or to restrict employer freedom other than to force employers to disregard protected characteristics). In particular, Senator Hubert Humphrey stressed that Title VII would not "limit the employer's freedom to hire, fire, promote, or demote for any reasons—or no reasons—so long as his action is not based on race . . ." *Weber*, 443 U.S. at 236-37 (Rehnquist, J., dissenting); see also Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities*, 46 ALA. L. REV. 375, 428 (1995) (noting Title VII was initially aimed at preventing intentional discrimination).

for a forbidden reason. These statutes do not protect anyone, including a person with a disability, from an adverse employment action; rather, they require only equal treatment in disregard of the relevant characteristic.<sup>8</sup>

Intent to discriminate, however, is hidden. It exists only in the mind of the actor. Even if an employer intended to act on a prohibited basis, it would not express that intent because of the prohibition. More importantly, employers' freedom in offering the terms of the employment relationship effectively allows them to make employment decisions on whatever bases they choose, in spite of anti-discrimination laws, so long as they do not express an illegal reason.<sup>9</sup> No restriction limited simply to overtly intentional discrimination, as Title VII's original supporters described it to be, could be remotely effective in "eliminating" discrimination. Thus, under the guise of realizing the goals of anti-discrimination laws, government has seized power to restrict freedom more greatly than originally intended or envisioned in purported pursuit of more effectively discerning employers' true intentions. One of the most notable ways in which this occurred was when courts began to allow employees to prove intentional discrimination by the "indirect" method of the *prima facie* case and proof of pretext for discrimination, first authoritatively described in *McDonnell Douglas*

<sup>8</sup> See *Anderson v. University of Wisc.*, 841 F.2d 737, 741-42 (7th Cir. 1988); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

<sup>9</sup> For example, if an employer remains free to determine the skills and qualifications for a job, its criteria may effectively, by design or not, exclude those who share some particular characteristic on the basis of which intentional discrimination may be prohibited. Criteria which are difficult to measure objectively, such as teamwork, supervisory skill, or quality of performance, present further opportunities for the employer to make relatively free choices without expressly (or even intentionally) discriminating against persons sharing certain characteristics. See, e.g., *Ezold v. Wolf, Block, Shorr & Solis-Cohen*, 983 F.2d 509, 542-45 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993) (noting that criteria for law firm partnership are particularly good examples of criteria of employer's judgment of which court should avoid second guessing).

*Corp. v. Green*.<sup>10</sup> The indirect method of proof is available under the ADA.<sup>11</sup>

Eventually, however, even the requirement to prove intent to discriminate was eliminated. "Disparate impact" analysis, first authoritatively recognized by the Supreme Court in *Griggs v. Duke Power Co.*,<sup>12</sup> focuses on the racial, sexual, or ethnic composition of the employer's work force in comparison with an "expected" composition, as prima facie evidence of discrimination.<sup>13</sup> This came to be contrasted with "disparate treatment" analysis, as the traditional inquiry into illegally discriminatory intent came to be known.

We should not be surprised that a regime intended to control the labor market, or indeed any market, in only one small way resulted in massive government scrutiny and intrusion. Govern-

<sup>10</sup> 411 U.S. 792, 802 (1973). An employee alleging intentional discrimination, or "disparate treatment," may prove a prima facie case by proving possession of the relevant characteristic, sufficient qualifications for job in question, sufferance of an adverse employment action (rejection for the job, termination from employment, etc.), and replacement by or more favorable treatment of one not sharing the relevant characteristic. *Id.* If the employee proves a prima facie case of discrimination, the employer must come forward with a legally permissible reason for its action. *Id.*; see also *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). If the employee can show sufficient implausibilities, inconsistencies, or other indicia of doubt that this was the employer's true motivation, the employee may ask the fact finder to conclude that the illegal basis was the true motivation based on the evidence of her prima facie case and the doubt regarding the employer's stated reason, all without any direct evidence of discriminatory intent. *St. Mary's*, 113 S. Ct. at 2749; *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (stating that if employee can show that employer's proffered reason is so weak, implausible, inconsistent, incoherent, or contradictory so as to be unworthy of credence, employee may ask fact finder to infer that proffered reason was pretext for discrimination); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993) (same); *Josey v. John R. Hollingworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993) (same).

Regarding the significance of the indirect method of proof on liberty, see generally Mark A. Schuman, *The Politics of Presumption: St. Mary's Honor Ctr. v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 84-94 (1993).

<sup>11</sup> See, e.g., *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995); *Price v. S-B Power Tool*, 75 F.3d 312, 364-65 (8th Cir. 1996).

<sup>12</sup> 401 U.S. 424, 432 (1971).

<sup>13</sup> See 42 U.S.C. § 2000e-2(k) (Supp. V 1993); *Griggs*, 401 U.S. at 432 (recognizing disparate impact analysis). Under the disparate impact theory, the employee may prevail against an employer for discrimination despite the neutrality of its practices on their face. Without any proof of intent to discriminate on an illegal basis against it, the employer is nonetheless liable if an employment practice tends to preclude or eliminate those sharing a characteristic to a greater extent than it excludes those not sharing that characteristic. The employer's defense, once this disparate impact is shown, is the thin reed of justification of the practice as job related and justified by business necessity. In order to prevail, the employer must also survive the employee's rebuttal that a less exclusionary practice would serve the employer's purposes as well as the challenged criterion or practice.

For one criticism of the idea underlying disparate impact analysis, the "residual fallacy," see THOMAS SOWELL, *THE VISION OF THE ANOINTED* 31-63 (1995).

ment control inevitably grows wherever government itself is given discretion over where, when, and on what grounds it is to exercise its power. When government starts out with only limited control of free decision-making, individuals will inevitably find ways to circumvent the plans and assert their free choice through their remaining freedom. This is especially true when government tries to control voluntary transactions in which both parties to the bargain stand to benefit, such as employment relationships. Inevitably, government finds its will thwarted, and increases the scope of its regulation and control in an effort to eliminate what it perceives as "loopholes." Government finds it must monitor, scrutinize, and control more and more previously free decisions. As the zone of freedom diminishes, individuals continue to shift their behavior to avoid the controls, and government continues to react by further encroaching on freedom in an effort to close the loopholes and ferret out discrimination. In this way, the logic of the original prohibition on free decision making produces more and more government control.

The ADA is intended to preclude employment decisions based on assertedly "irrelevant" disabilities.<sup>14</sup> Since qualifications for a job are themselves set in terms of abilities, however, a condition that substantially limits a major life activity may easily impair the ability to do a job. Substantial limitation of a major life activity is the very definition of a disability under the ADA.<sup>15</sup> Unlike one's race, sex, ethnicity, or age, the nature of one's abilities and disabilities always strikes to the heart of whether one can do the job in question. Hence, any regime to forbid discrimination based on disability inevitably becomes a regime to control the duties and performances an employer may require for a job. The ADA has produced just such controls, which go far beyond what was originally envisioned under earlier anti-discrimination laws.

<sup>14</sup> 42 U.S.C. § 12101(a)(9) (Supp. V 1993). The findings of Congress in passing the ADA decry "the continuing existence of unfair and unnecessary discrimination and prejudice . . . [which] costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* Congress purported to exercise both its power to regulate interstate commerce and its power to enforce the Fourteenth Amendment in enacting the ADA. *Id.* § 12101(b)(4).

<sup>15</sup> 42 U.S.C. § 12102(2)(A) (1988 & Supp. V 1993); 29 C.F.R. § 1630.2(g) (1995) (Equal Employment Opportunity Commission ("EEOC") regulations under the ADA are codified at part 1630 of volume 29 of the Code of Federal Regulations); see also *Oswalt v. Sara Lee Corp.*, 71 F.3d 91, 92 (5th Cir. 1996) (holding that condition substantially affects one or more major life activity required to prove disability).

Under the ADA, courts and agencies must determine the "essential functions" of a job in order to determine whether an individual can perform those functions.<sup>16</sup> This involves separating "fundamental job duties" of the position from "marginal functions."<sup>17</sup> The employer may then consider only the ability to perform essential job functions in determining qualification for a job.<sup>18</sup> Consequently, government scrutiny of job duties must be pervasive in order to prevent employers from consideration of assertedly irrelevant disabilities.

As a result, the ADA, even more than other anti-discrimination statutes, encourages the kind of bureaucratization of employers' organizations and standardization of management structures that frustrates innovation and opportunity for both employers and employees, including the disabled. The ADA and its regulations and administrative procedures assume that employers have hierarchical, standardized organizations in which gathering the information necessary to determine essential job functions is easy and inexpensive.<sup>19</sup> An employer who wishes to have greater flexibility in determining job duties, or whose organization fails to conform to the model for which the regulations and case law under the ADA and other anti-discrimination statutes were written, will find it difficult and expensive to defend against ADA lawsuits. The very

<sup>16</sup> 42 U.S.C. § 12111(8) (1988 & Supp. V 1993); 29 C.F.R. § 1630.2(m) (1995).

<sup>17</sup> 29 C.F.R. § 1630.2(n) (1995); *see, e.g.*, *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674-75 (1st Cir. 1995); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123-24 (10th Cir. 1995).

The EEOC regulation lists criteria for this determination, including, "[t]he employer's judgment as to which functions are essential." 29 C.F.R. § 1630.2(n)(3)(i). Clearly, however, courts and government agencies reserve the right to disagree with the employer or deem the employer's judgment as pretext for discrimination. An individual who, in the eyes of a court or agency, "satisfies the requisite skill, experience, education and other job-related requirements of the employment position . . . and who can perform the essential functions of [the] position" is qualified for that position, thus may not be denied the position on the basis of any incapacities or limitations the employer might perceive as relevant. *Id.* § 1630.2(m) (1995).

<sup>18</sup> 42 U.S.C. §§ 12112(a) (Supp. V 1993) (prohibiting discrimination against a qualified individual with a disability because of that disability); 29 C.F.R. § 1630.4 (1995).

<sup>19</sup> 29 C.F.R. § 1630.2(m) (1995). Courts and the EEOC may collect evidence of job qualifications, such as experience, skill, and educational requirements. *Id.* They must determine what modifications may be made to the job or work site while retaining the "essential functions" of the job. *Id.* § 1630.2(o). They must determine the difficulty or expense of such modifications. *Id.* § 1630.2(p). They must determine the employer's practices in hiring, promotion, layoff, rates of compensation in all forms, job assignments, positions descriptions, training, social and recreational programs, and all other terms, conditions, and privileges of employment. *Id.* § 1630.4. All of these determinations and inquiries requires information the employer is beholden, at least in practical terms, to collect and produce if it wishes to avoid an adverse finding.

lack of bureaucratic organization that the regulations and case law assume may easily provide the foundation for enough doubt regarding the employer's motivation in its decisions to allow a plaintiff to avoid summary judgment on his claim.<sup>20</sup> The substantial cost of trial and the greater risk of a finding of liability are substantial penalties on an employer's choice to avoid bureaucratized and standardized organization, not to mention the growth of the employer's business.

There are other ways in which the ADA restricts freedom in a derivative way. The ADA forbids discrimination against an individual merely "regarded as having a disability."<sup>21</sup> Obviously, this greatly increases the scope of the ADA. An employer must be concerned not just with known disabilities, but also with rumors, reputation, or even the employer's own perceptions of an employee's abilities. Further, the employer may not discriminate against an employee because of the known disability of an individual with whom that employee has a relationship or association.<sup>22</sup> Note that this extends to business, social, and other relationships, and is not limited to family.<sup>23</sup>

The employer is also liable under the ADA for participating in a contract or other arrangement or relationship that has the effect

<sup>20</sup> Distinctions between jobs or the employees holding them, quality of employee performance, and qualifications will often give rise to genuine issues of fact for trial in a discrimination lawsuit. This risk is particularly high where an organization is less formal or more flexibly ordered. Any inconsistency, lack of concrete evidence, or appearance of discretion in decision-making in the employer's practices can easily preclude the relatively inexpensive summary judgment and force the employer to take its chances at an expensive trial or settle for a large amount in payment to the plaintiff. *See supra*, note 10. Justifications of employment decisions which do not fit the expected pattern, or which are consistent with flexibility rather than elaborate structures, are much more likely to be found the kind of ad-hoc, after-the-fact rationales which cannot preclude a jury trial as to whether the employer's true motivation was the forbidden criterion.

<sup>21</sup> 42 U.S.C. § 12101(2)(B) (Supp. V 1993); 29 C.F.R. § 1620.2(l) (1995) ("regarded as having a disability" defined in terms of the employer's treatment and "attitude" toward the employee); *see also* *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) ("The focus is on the impairments effect upon the attitudes of others. This provision is intended to combat the effect of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities.") (citations omitted); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) ("Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence.")

<sup>22</sup> 42 U.S.C. § 12112(b)(4) (Supp. V 1993); 29 C.F.R. § 1630.8 (1995); *see also* *Den Hartog v. Wasatch Academy*, 909 F. Supp. 1393 (1995) (discussing parameters of prohibition on "association" discrimination).

<sup>23</sup> 29 C.F.R. § 1630.8 (1995); *see also* 29 C.F.R. Part 1630 app., discussion of § 1630.8 ("This protection is not limited to those who have a familial relationship with an individual with a disability."). Congress rejected a proposed amendment which would have so limited the protection. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 62, & pt. 3, at 38 (1990).



of subjecting disabled employees to discrimination.<sup>24</sup> Thus, the employer must take care to examine its arrangements with contractors, vendors, unions, consultants, insurers, and employment agencies.

The ADA restricts medical examination of prospective employees; such tests may only be conducted after a conditional job offer and only if all employees are subjected to the test.<sup>25</sup> Thus, in order to test any employee, no matter how obviously limited in some abilities, the employer must test *all* new employees, whether or not the cost of that test justifies testing the other new employees. Further, the test or exam must be "job-related and consistent with business necessity."<sup>26</sup> While employers may inquire regarding the ability of the employee to perform job-related functions,<sup>27</sup> employers must be wary lest an agency or court second-guess whether the test is overbroad or unnecessary. Employers must also be extremely careful regarding the records of such exams and tests, as such information must be recorded on "separate forms and in separate medical files" and treated as "a confidential medical record."<sup>28</sup>

The ADA is the first federal anti-discrimination law to directly restrict questions an employer may ask a prospective employee. Under the ADA, an employer may not inquire whether an applicant has a disability or regarding the disability.<sup>29</sup> The employer may, however, inquire into the ability of the applicant to perform job-related functions.<sup>30</sup> Similar prohibitions govern inquiries or examination of current employees.<sup>31</sup>

<sup>24</sup> 42 U.S.C. § 12112(b)(2) (1995); 29 C.F.R. § 1630.6 (1995); *see also* *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391 (S.D. Ind. 1995) (noting applicability of this provision to collective bargaining agreements); *Bruton v. Southeastern Pa. Transp. Authority*, No. CIV.A. 94-CV-3111, 1994 WL 470277, at \*3 (E.D. Pa. Aug. 19, 1994) (same); *Eisfelder v. Michigan Dep't of Natural Resources*, 847 F. Supp. 78, 84 (W.D. Mich. Nov. 16, 1993).

<sup>25</sup> 42 U.S.C. §§ 12112(d)(2)(A), (d)(3)(A) (Supp. V 1993); 29 C.F.R. § 1630.14(b) (1995); *Grenier v. Cyanimid Plastics, Inc.*, 70 F.3d 667, 675-78 (1st Cir. 1995).

<sup>26</sup> 42 U.S.C. § 12112(d)(4)(A) (Supp. V 1993). EEOC regulations require any criteria used to screen out employees as a result of the examination or inquiry to be job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3) (1995); *see also* *Yin v. California*, No. C94-20116 JW, 1994 WL 594043, at \*3 (N.D. Cal. Oct. 21, 1994) (noting business necessity showing required).

<sup>27</sup> 42 U.S.C. § 12112(d)(2)(B) (Supp. V 1993); 29 C.F.R. § 1630.14(a) (1995).

<sup>28</sup> 42 U.S.C. § 12112(d)(3)(B) (Supp. V 1993); 29 C.F.R. § 1630.14(b)(1) (1995).

<sup>29</sup> 42 U.S.C. § 12112(d)(2)(A) (Supp. V 1993); 29 C.F.R. §§ 1630.13, 1630.14 (1995).

<sup>30</sup> 42 U.S.C. § 12112(d)(2)(B) (Supp. V 1993); *see also* 29 C.F.R. 1630.14(a) (1995).

<sup>31</sup> 29 C.F.R. §§ 1630.13(b), 1630.14(c). The scope of this prohibition may be surprisingly broad. *Cf. Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190, 197 (E.D. Pa. 1994) (stating

The Equal Employment Opportunity Commission ("EEOC") enforcement guidance on pre-employment inquiries highlights the intrusive scope of the ADA on this issue. The original enforcement guidance barred an employer from asking any question which was "likely to elicit information about a disability" before it had extended a job offer.<sup>32</sup> It set forth specific questions which were permissible and prohibited. For example, the EEOC considered each of the following questions to be a disability-related inquiry, and thus an ADA violation, despite any predictive value the answer might have for future job performance:

- ◆ Do you have a disability which would interfere with your ability to perform this job?
- ◆ How many days were you sick last year?
- ◆ How much alcohol do you drink each week? Have you ever been treated for alcohol problems?<sup>33</sup>

Perhaps more exasperating was how fine the line was the EEOC tried to draw. For instance, the question "[d]o you have 20/20 vision?" was permissible; the question "[w]hat is your corrected vision?" was impermissible.<sup>34</sup> "How well can you handle stress?" was permissible; "[d]oes stress affect your ability to be productive?" was not.<sup>35</sup>

The EEOC subsequently revised its enforcement guidance, eliminating much of the reference of the earlier guidance to particular questions.<sup>36</sup> Nevertheless, the proscription on questions "likely to elicit information about a disability" remains, with simply less elaboration on what that means.<sup>37</sup>

surreptitious search of employee's office producing letter regarding disability is medical inquiry under the ADA).

<sup>32</sup> EEOC Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990, issued May, 1994 [hereinafter Original Pre-employment Inquiry Guidance].

<sup>33</sup> Original Pre-employment Inquiry Guidance, "Application of ADA Provisions."

<sup>34</sup> *Id.* § IV.A.

<sup>35</sup> *Id.*

<sup>36</sup> EEOC Revised Enforcement Guidance: Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990, Oct. 10, 1995, EEOC Compliance Manual § 6903 (1995) [hereinafter Revised Pre-employment Inquiry Guidance].

<sup>37</sup> Revised Pre-employment Inquiry Guidance, "The Pre-Offer Stage: What is a Disability-Related Question?"

The ADA also polices reference-checking. According to the EEOC, the employer may not make any inquiry of a third-party that it may not make of the applicant.<sup>38</sup>

The ADA requires that any qualification standards or other criteria that may screen out the disabled to be job-related for that position and consistent with business necessity.<sup>39</sup> It also bars the employer from using criteria that have the effect of discrimination on the basis of disability or perpetuate the discrimination of others.<sup>40</sup> Thus, the ADA forbids employment practices which have a "disparate impact" on the disabled, even if the employer does not intend to discriminate against disabled employees.<sup>41</sup>

The second way in which the ADA exceeds past incursions into liberty is the imposition of the duty of reasonable accommodation of a disability.<sup>42</sup> An employer must make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability.<sup>43</sup> This is an affirmative obligation to offer those employees with disabilities better terms and

<sup>38</sup> Revised Pre-employment Inquiry Guidance, "May an employer ask third parties questions it could not ask the applicant directly?"

<sup>39</sup> 42 U.S.C. § 12112(b)(6) (Supp. V 1993); 29 C.F.R. § 1630.10 (1995); *see also* McDaniel v. Alliedsignal, Inc., 896 F. Supp. 1482, 1491 (W.D. Mo. 1995) (stating that disqualification standards that screen out individuals with disabilities do not violate ADA so long as qualifications standard is "job-related and consistent with business necessity"); Ethridge v. Alabama, 860 F. Supp. 808, 819-20 (N.D. Ala. 1994 (same)).

<sup>40</sup> 42 U.S.C. § 12112(b)(3) (Supp. V 1993); 29 C.F.R. § 1630.7 (1995).

<sup>41</sup> *See, e.g.*, Carlson v. Inacom Corp., 885 F. Supp. 1314, 1322 (D. Neb. 1995) (finding no evidence of disparate impact); Champ v. Baltimore County, 884 F. Supp. 991, 995 (D. Md. 1995) (holding plaintiff failed to make out case); Schmidt v. Safeway Inc., 864 F. Supp. 991, 1001 (D. Or. 1994) (allowing claim for compensatory damages without proof of intent because of availability of disparate impact theory); Peoples v. Nix, No. 93-5892, 1994 WL 423856, at \*3 (E.D. Pa. Aug. 11, 1994) (noting limitation on disparate impact claims assertable under ADA).

<sup>42</sup> 29 U.S.C. § 793 (1988). While the Rehabilitation Act of 1973 has a similar requirement, the ADA's scope is much broader. *Id.* The Rehabilitation Act's private sector anti-discriminatory provision applies only to federally-funded programs or activities. *Id.* It also requires those performing federal contracts in excess of \$10,000 to take "affirmative action" in favor of qualified individuals with disabilities. *Id.* The ADA, however, covers employers of 15 or more employees in an industry affecting commerce. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

Title VII requires reasonable accommodation of religious practices in employment. 42 U.S.C. § 2000e(j) (Supp. V 1993). *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977). However, the ADA duty of reasonable accommodation is much broader in scope due to the vastly greater limitations disabilities are likely to have upon the performance of job duties. Also, the "de minimis cost" limitation upon the Title VII duty of reasonable accommodation was rejected by Congress for application to the ADA duty of reasonable accommodation. *See infra*, note 52.

<sup>43</sup> 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993); 29 C.F.R. § 1630.9 (1995).

conditions than those offered other employees, at greater cost to the employer than that spent on other employees.<sup>44</sup>

The ADA provides examples of reasonable accommodations, such as making facilities accessible, job restructuring, modified work schedules, reassignment, new or modified equipment, new or modified testing or training, and readers or interpreters.<sup>45</sup> The EEOC also suggests that reasonable accommodation may require permitting the use of accrued paid leave at a time the employer would otherwise not, providing additional unpaid leave, or provid-

<sup>44</sup> See, e.g., *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1517 (2d Cir. 1995) (noting that employer may be obligated to provide parking convenient to workplace for disabled employee as reasonable accommodation, though does not provide it to other employees); *Buckingham v. United States*, 998 F.2d 735, 740-41 (9th Cir. 1993) (noting that reasonable accommodations must be made to allow disabled employees to enjoy privileges and benefits of employment equal to those enjoyed by non-disabled employees); *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) (noting change in standard operating procedure is "the essence of reasonable accommodation"); *Ward v. Westvaco Corp.*, 859 F. Supp. 608, 616 (D. Mass. 1994) (providing employee with larger computer display screen and different lighting than provided to other employees may be reasonable accommodation); 29 C.F.R. part 1630 app., discussion of section 1630.9 (reasonable accommodation contemplates changes in way disabled employee, in contrast to employee's peers, does job); see also Rosalie K. Murphy, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1608 (1991) (stating that ADA "requires employers to take positive steps toward including workers with disabilities").

Even the requirement of the ability to regularly and reliably appear for work is not immune from alteration as a reasonable accommodation. See *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 515-17 (2d Cir. 1991), cert. denied, 506 U.S. 815 (1992) (noting that in Rehabilitation Act context, if absenteeism is due to disability, and employer terminates employee for that absenteeism, employer has acted because of disability); *Fritz v. Mascotech Automotive Sys. Group Inc.*, 914 F. Supp. 1481, 1487-91 (E.D. Mich. 1996) (stating that employer must prove that employee's attendance problems would not have been alleviated by a reasonable accommodation in order to avoid ADA liability).

The reality of the reasonable accommodation requirement as an additional benefit to disabled employees belies the EEOC's claim that reasonable accommodation is "a form of non-discrimination." 29 C.F.R. app. part 1603, discussion of § 1630.9. The EEOC's position can only be understood if one defines discrimination to include any accounting for differences in ability. Indeed, the EEOC's position is positively Orwellian: discrimination (in favor of disabled employees) is non-discrimination.

The employer also has the obligation to gather the information needed in order to determine what accommodation is necessary for the disabled employee to perform the job. The employer is only then to determine the reasonableness of that accommodation. If the interactive process between the employer and the employee by which the reasonable accommodation is to be determined breaks down, and a court determines that the break down is the fault of the employer's lack of good faith participation, the employer is liable for failure to reasonably accommodate the employee's disability. See *Beck v. University of Wisc. Bd. of Regents*, 75 F.3d 426, 428 (7th Cir. 1996). Despite the uncertain nature of these terms, neither good faith nor rational belief on the part of the employer is a defense to a charge of discrimination. *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985).

Finally, employers may find summary judgment that they have provided a reasonable accommodation difficult to obtain. See, e.g., *Frye v. Aspin*, 997 F.2d 426, 428 (8th Cir. 1993) ("The question whether an employer has provided a 'reasonable accommodation' is ordinarily a question of fact.")

<sup>45</sup> 42 U.S.C. § 1211(9) (Supp. V 1993); see also 29 C.F.R. § 1630.2(o) (1995); 29 C.F.R. part 1630 app., discussion of §§ 1630.2(o), 1630.9.

ing "personal assistants"—additional employees hired and paid for by the employer so that the disabled employee can perform the job another employee could perform alone.<sup>46</sup>

All terms and conditions of employment, including those which aid the employee in performing the job, are a kind of price for the employment. The effort necessary to perform a job, the arrangements the employee must make in order to perform the job successfully, and the employee's opportunity costs, are the costs to the employee in exchange for which she receives her compensation. The employer must provide conditions sufficient to attract employees, including higher compensation for less pleasant conditions or for jobs which require greater effort or inconvenience. Working conditions, the realm within which reasonable accommodation is determined, are inseparable from the other terms of the employment relationship. A reasonable accommodation forced on the employer is an alteration in the bargain between the employer and employee over the prices each will pay.<sup>47</sup>

The ADA's reasonable accommodation is, in fact, a price floor, a dictate that the employer must pay at least a certain amount in order to enter into the transaction, or else not enter into the transaction at all. Whenever government attempts to set and maintain a "reasonable price" for a commodity, a shortage of that commodity inevitably results. This is the oft-observed pattern in artificially-imposed prices created by government price controls. Both price ceilings, such as those imposed on gasoline which produced shortages and long lines at gas stations in the 1970s, and price floors, such as minimum wages, hinder the market in allocating resources as efficiently as possible. In the case of the price for employment, price floors mean fewer jobs, including fewer jobs for disabled people.<sup>48</sup>

<sup>46</sup> 29 C.F.R. part 1630 app., discussion of § 1630.2(o) (1995).

<sup>47</sup> See, e.g., *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 546 (7th Cir. 1995). The approach Chief Judge Posner took in determining reasonable accommodation considered the relationship between the cost to the employer and the benefit to the disabled employee. Even this approach, however, cannot account for the subjectivity of determining the benefit to the disabled employee from the accommodation, or for how courts or agencies may rationally determine the costs of accommodations such as job restructuring.

<sup>48</sup> See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 491 (1992). "[I]n the effort to aid disabled persons who are able to work, the ADA necessarily increases the costs to those disabled persons (and their families) who are too impaired to work at all." *Id.*

A price floor has a particularly devastating impact on jobs for those who have relatively less to offer in terms of skill or expertise, because such people must often rely on their ability to offer a lower price for their labor in order to obtain a job. A government mandated price floor, as any "reasonable price," will, at the margin, shut some of these people out of the job market. Unless an applicant offers a profitable return on all the compensation the employer offers her, the applicant will not be hired. This compensation includes elements the employer has no choice but to offer, such as a reasonable accommodation of a disability. Those who can command a price for their labor well above the "reasonable" price may profit somewhat by the elimination of price competition. It is just as likely, however, that the total compensation to these employees will not increase, but rather that the costs of accommodation will prevent otherwise higher cash compensation or benefits. The total compensation, in terms of cost to the employer, will remain the same.

Under the ADA, the employer need not provide an accommodation which is an "undue hardship," even if it is reasonable.<sup>49</sup> An "undue hardship" is an action requiring significant difficulty or expense, in light of the cost, the financial resources of the employer, the number of the employer's employees, the employer's facilities, and the type of the employer's operation.<sup>50</sup> The undue hardship limitation, however, offers little reprieve from the problems caused by the reasonable accommodation duty. First, employers are likely to find it quite difficult to convince a court that an accommodation which has been found reasonable is, nonetheless, an undue hardship.<sup>51</sup> In addition, courts are likely to require a rather strong showing that the accommodation will cause insolvency or similar financial disaster before they conclude that the hardship is undue.<sup>52</sup>

<sup>49</sup> 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993); 29 C.F.R. § 1630.9 (1995).

<sup>50</sup> 42 U.S.C. § 12111(10) (Supp. V 1993); 29 C.F.R. § 1630.2(p) (1995).

<sup>51</sup> See *Vande Zande*, 44 F.3d at 545-46 (stating that reasonable accommodation is one which benefits disabled employee, but not in way disproportionate to costs of accommodation to employer; the accommodation is, nonetheless, an undue hardship if, despite its reasonableness for a normal employer, the cost of accommodation would financially break the employer).

<sup>52</sup> See 29 C.F.R. part 1630 app., discussion of § 1630.2(p) (noting undue hardship refers to accommodation which would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter that nature or operation of business); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 *FORDHAM L. REV.* 113, 123-30 (1990) (suggesting that courts should interpret undue hardship quite narrowly: "the

Ultimately, the undue hardship limitation is another form of price control, offering another opportunity for government to second-guess the market on whether the benefits of a business action justify the costs. It also offers an opportunity for further intrusion into a business' affairs, as the information necessary to determine undue hardship is likely to involve discovery into both the employer's finances and workplace practices.<sup>53</sup>

Friedrich von Hayek's ideas on the importance and value of free market prices and the impossibility of rational government determination of prices are valuable tools in analyzing the ADA duty of reasonable accommodation.<sup>54</sup> Hayek demonstrated that it is impossible for any single decision maker, or even a group of decision makers, to set an efficient price, however "rationally" they attempt to do so.<sup>55</sup> The market, a collection of individual actors each seeking her own advantage, however, sets efficient prices quickly and without anyone's conscious design. The market price accounts for information, knowledge, and preferences dispersed among many persons. Hayek showed that the idea of government deciding a reasonable price for a commodity is a fallacy and a conceit, and that such an effort would result in real inefficiencies, foregone wealth and utility, and unnecessary suffering.<sup>56</sup>

The market for labor, including the labor of those one might consider "disabled," is no different from any other market. The price for that labor cannot be efficiently set by central planners, or by anyone by fiat, but must respond to market forces.<sup>57</sup>

undue hardship exemption promises not profit maximization, but protection from material threats to business viability."); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73 (1977). Note that while an accommodation which imposes more than a de minimis cost is an "undue hardship," and thus not required under the Title VII duty to reasonably accommodate religious beliefs, this limitation was explicitly rejected by Congress in the ADA reasonable accommodation/undue hardship context. S. REP. NO. 101-116, 101st Cong., 1st Sess. 36 (1989).

<sup>53</sup> See, e.g., 29 C.F.R. part 1630 app., discussion of § 1630.2(p) (describing how financial resources and basis of funding should be examined in order to determine undue hardship).

<sup>54</sup> See FRIEDRICH A. VON HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 90-91 (1948) [hereinafter *INDIVIDUALISM*]; FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 49-51 (1944); see also Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, in *COLLECTIVIST ECONOMIC PLANNING* (Friedrich A. von Hayek ed. 1967).

<sup>55</sup> See VON HAYEK, *INDIVIDUALISM*, *supra* note 54, at 90-91; Ludwig von Mises, *supra* note 54.

<sup>56</sup> See generally VON HAYEK, *INDIVIDUALISM*, *supra* note 54.

<sup>57</sup> See, e.g., VON HAYEK, *INDIVIDUALISM*, *supra* note 54, at 90-91; Friedrich A. von Hayek, *Two Pages of Fiction: The Impossibility of Socialist Calculation*, in *THE ESSENCE OF HAYEK* 53-61 (Chiaki Nishiyama & Kurt R. Leube ed. 1984) [hereinafter *ESSENCE OF HAYEK*]; Friedrich A. von Hayek, "Social" or "Distributive Justice," in *ESSENCE OF HAYEK*, *supra*, at

Reasonable accommodation also evokes medieval notions of "just price."<sup>58</sup> Like "just price," reasonable accommodation is an ultimately futile attempt to determine objectively fair substantive terms of exchange.

The ADA, however, does not shrink from claiming that government possesses the omniscience necessary for such an endeavor. Congress explicitly purported to find that individuals with disabilities have been discriminated against due to "stereotypic assumptions not truly indicative of the individual ability of such individuals."<sup>59</sup> Congress believed that employers practiced "unnecessary" discrimination and prejudice which cost billions in productivity.<sup>60</sup> Thus, the ADA is intended to extract opportunities from employers for individuals with disabilities unless they are actually unable to do the job, as determined *ex post facto* by courts or the EEOC.<sup>61</sup> Congress resolved to thwart "fears about increased costs and decreased productivity" which would naturally arise from its massive deprivation of liberty by requiring that "job criteria actually measure skills required by the job."<sup>62</sup> Of course, the intrusion and displacement necessary to determine that the criteria do so is itself considerable.

There is no reason to believe that Congress, courts, or the EEOC can or will make better decisions about employment than the employers and employees involved can. Experience suggests the opposite is true. More importantly, even if Congress and the rest of government were staffed with the most intelligent, selfless, and well-intentioned people possible, Hayek and history teach us that government cannot determine a reasonable price. What government can do is to produce gross inefficiencies, retard innovation, and restrict opportunities. The lost opportunities, companies which do not grow, products and services which are never offered, and jobs which are never created because of the ADA are prevented from ever coming into existence in the first place, rather

62-100; Friedrich A. von Hayek, *Uses of Knowledge in Society*, in *ESSENCE OF HAYEK*, *supra*, at 211-224.

<sup>58</sup> See, e.g., RUDOLF KAULLA, *THEORY OF THE JUST PRICE: A HISTORICAL & CRITICAL STUDY OF THE PROBLEM OF ECONOMIC VALUE* (Robert D. Hogg Trans. 1940). The medieval "just price" theory states that goods or services have an intrinsically just, ethical, or in this case reasonable price independent of market forces. *Id.*

<sup>59</sup> 42 U.S.C. § 12101(a)(7) (Supp. V 1993).

<sup>60</sup> 42 U.S.C. § 12101(a)(9) (Supp. V 1993).

<sup>61</sup> H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 31.

<sup>62</sup> *Id.*



than being destroyed after creation. Consequently, the destructive affect of the ADA is too easily underestimated.<sup>63</sup>

The ADA is an anti-discrimination statute different in quality from those of the past. It directly implies government control over the very way employers fashion jobs, set qualifications of employment, and determine the conditions of employment they will offer to their employees. The ADA is thus a quantum leap of government intrusion into the way people order their businesses and their lives.

To return to Walter Williams' analogy, with which I started, the water may not be boiling yet, but the ADA has made it a bit warmer.

<sup>63</sup> Cf. Ron A. Vassel, Note, *The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J.L. & COM. 397, 411 (1994) (concluding that ambiguity and burden of ADA makes it ineffective).