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# Need I Prove More: Why an Adverse Employment Action Prong Has No Place in a Failure to Accomodate Disability Claim

Megan I. Brennan  
[lawreview@hamline.edu](mailto:lawreview@hamline.edu)

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**NEED I PROVE MORE:  
WHY AN ADVERSE EMPLOYMENT ACTION PRONG  
HAS NO PLACE IN A  
FAILURE TO ACCOMMODATE DISABILITY CLAIM**

*Megan I. Brennan* \*

<b>I.</b>	<b>INTRODUCTION</b>	497
<b>II.</b>	<b>CONFUSION REGARDING ELEMENTS OF A FAILURE TO ACCOMMODATE CLAIM</b>	499
<b>III.</b>	<b>THE LANGUAGE OF THE ADA’S DISCRIMINATION STATUTE</b>	503
<b>IV.</b>	<b>EEOC REGULATIONS AND GUIDANCE</b>	505
<b>V.</b>	<b>DISAGREEMENT AMONGST COURTS</b>	506
	<i>A. ADVERSE EMPLOYMENT ACTION NEEDED</i>	507
	<i>B. ADVERSE EMPLOYMENT ACTION NOT NEEDED</i>	509
<b>VI.</b>	<b>PUBLIC POLICY</b>	512
<b>VII.</b>	<b>CONCLUSION</b>	514

### I. INTRODUCTION

Imagine a scenario where an employee with diabetes requests breaks in order to monitor and maintain his blood sugar levels. The employer denies this request. The employee is never able to use his meter at work and is not allowed to eat or drink on the plant floor. As a result, the employee suffers hypoglycemic attacks at work causing him to collapse and altering his capacity to think clearly and act appropriately. The employer admits that it reasonably failed to accommodate the employee. Does this employee state a claim if he did not suffer a resulting adverse employment action, i.e. a

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\* Megan I. Brennan is an associate at Nichols Kaster, PLLP. I am grateful to my husband, John Brennan, and my colleagues, Steven Andrew Smith, Esq., Adam Hansen, Esq. and paralegals Ashlee Wendt and Heather O’Neil, for their insightful comments and assistance with editing this article.

material change in terms or conditions of employment (for example a demotion or termination)?<sup>1</sup>

This article argues that the answer should be a resounding yes. Failure to accommodate claims should not be analyzed using the disparate treatment *prima facie* standard, as some courts have done.<sup>2</sup> Rather, consistent with the text, structure, and remedial purpose of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.* (“ADA”), the failure to reasonably accommodate is in and of itself a form of discrimination in violation of the ADA.<sup>3</sup> Respectfully, courts that insist otherwise are plain wrong.

The question of whether a plaintiff must suffer an adverse action in a failure to accommodate claim has been frequently overlooked in the past. However, the issue is bound to become more prevalent given the employee-friendly changes to the ADA in the Americans with Disabilities Act Amendments Act (“ADAAA”), which became effective January 1, 2009,<sup>4</sup> and the recent upward trend in the number of ADA charges of discrimination filed with the Equal Employment Opportunity Commission (“EEOC”).<sup>5</sup> It is crucial to bring clarity to this point of law.

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<sup>1</sup> The facts are taken from *Nawrot v. CPC Int’l.*, 259 F. Supp. 2d 716 (N.D. Ill. 2003).

<sup>2</sup> Whether the *McDonnell Douglas* framework applies at all, or in modified form, to failure to accommodate disability cases is beyond the scope of this article. For a discussion of such, see Aaron Matthew Laing, *Failure to Accommodate, Discriminatory Intent, and the McDonnell Douglas Framework: Distinguishing the Analyses of Claims Arising Under Subparts (a) and (b) of S 12112(b)(5) of the ADA*, 77 WASH. L. REV. 913 (2002); U.S. Equal Employment Opportunity Comm’n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002), available at [http://www.eeoc.gov/policy/docs/accommodation.html#N\\_38\\_](http://www.eeoc.gov/policy/docs/accommodation.html#N_38_) (explaining the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation) (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 1523 (2002)); see also *Peebles v. Potter*, 354 F.3d 761, 765–69 (8th Cir. 2004) (applying “a modified burden-shifting analysis” to plaintiff’s reasonable accommodation claim).

<sup>3</sup> Throughout this article the references to “failure to accommodate” claims pertain to claims under § 12112(b)(5)(A), not to claims under § 12112(b)(5)(B), which involve denying employment opportunity to avoid providing a reasonable accommodation.

<sup>4</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); see U.S. Equal Employment Opportunity Comm’n, *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008*, available at [http://www.eeoc.gov/laws/statutes/adaaa\\_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm) (last visited April 23, 2012).

<sup>5</sup> For four consecutive years after the ADAAA was passed, the percentage of charges filed including a disability claim rose from the prior fiscal year. Annual EEOC Statistics reported at [eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm](http://eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm). In fiscal year 2012, 26.5% of all charges included a disability claim. *Id.* In fact, the EEOC’s enforcement of the ADA in fiscal year 2011 “produced the highest increase in monetary relief among all of the statutes: the administrative relief obtained for disability discrimination charges increased by almost 35.9 percent to \$103.4 million compared to \$76.1 million in the previous fiscal year.” Press Release, EEOC, *Private Sector Bias Charges Hit All-Time High* (Jan. 25, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>.

The first section of this article explains the dispute and confusion surrounding what elements are required to establish a failure to accommodate claim under the ADA. The second section will explain that the language of the ADA supports the conclusion that an adverse employment action is unnecessary to state a claim of discrimination based on the failure to reasonably accommodate an employee. The third section will address how the EEOC's guidance suggests that no separate adverse employment action is necessary for such claims. The fourth section will analyze case law addressing whether an adverse action is needed. Finally, section five will explore the public policy reasons behind recognizing a failure to accommodate disability *prima facie* case that does not include an adverse employment action prong.

## II. CONFUSION REGARDING ELEMENTS OF A FAILURE TO ACCOMMODATE CLAIM

42 U.S.C. § 12112 includes a “General rule” regarding discrimination against persons with disabilities.<sup>6</sup> It states:

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.<sup>7</sup>

The construction of the phrase “discriminate against a qualified individual on the basis of disability” is explained in the following section.<sup>8</sup> The subsections thereunder explain various forms of prohibited discrimination, including:

[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]<sup>9</sup>

Confusion arises because the failure to accommodate is not “discrimination” as the concept is traditionally understood.

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<sup>6</sup> 42 U.S.C. § 12112(a).

<sup>7</sup> *Id.*

<sup>8</sup> § 12112(b).

<sup>9</sup> § 12112(b)(5)(A).

There are various types of discrimination claims that disabled employees may pursue when proceeding under 42 U.S.C. § 12112, including disparate treatment, hostile work environment,<sup>10</sup> disparate impact,<sup>11</sup> and the failure to reasonably accommodate. Disparate treatment and retaliation claims are the ones most easily confused with failure to accommodate claims.<sup>12</sup>

The United States Supreme Court explained that “[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristics].”<sup>13</sup> The elements of a *prima facie* case disparate treatment claim under the ADA, although varying slightly from court to court, generally include proof that the individual: (1) is disabled, as defined by the ADA; (2) is “qualified,” *i.e.*, can perform the essential functions of the job with or without reasonable accommodation; and (3) has suffered an adverse employment action because of the disability.<sup>14</sup> In a disparate treatment discrimination case under the ADA, an adverse employment action is one that causes a material change in the terms or conditions of employment.<sup>15</sup>

To establish a failure to accommodate claim, the plaintiff must show he: (1) is disabled within the meaning of the ADA; (2) the employer is subject to the ADA and on notice of the disability and need for the accommodation; and (3) that the employee could perform the essential

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<sup>10</sup> Lanman v. Johnson Cnty., Kans., 393 F.3d 1151, 1156 (10th Cir. 2004) (holding that a hostile work environment claim is actionable under the ADA).

<sup>11</sup> See 42 U.S.C. § 12112(b)(6) (disparate impact discrimination includes “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities...”).

<sup>12</sup> See *e.g.*, Timmons v. Gen. Motors Corp., 469 F.3d 1122, 1125–26 (7th Cir. 2006) (plaintiff waived potential failure to accommodate claim by labeling and analyzing it as a disparate treatment claim); Pagliaroni v. Daimler Chrysler Corp., No. 04-C-1213, 2006 WL 2668157, at \*9 (E.D. Wis. Sept. 15, 2006) (rejecting argument that employer’s failure to accommodate employee’s disability can be considered retaliation).

<sup>13</sup> Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (quoting *Teamsters v. U.S.*, 431 U.S. 324, 335, n. 15 (1977)). In *Raytheon Co.*, the Court vacated and remanded the case because the Ninth Circuit improperly applied a disparate-impact analysis to the employee’s disparate-treatment claim. *Id.* at 55.

<sup>14</sup> Kurtis A. Kemper, *What Constitutes “Constructive Discharge” Under Americans with Disabilities Act of 1990 (42 U.S.C. § 12101)*, 182 A.L.R. Fed. 609 (2002); see *e.g.*, Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

<sup>15</sup> See *Brown v. Cox*, 286 F.3d 1040, 1045 (8th Cir. 2002). As with Title VII claims brought under the substantive antidiscrimination provision, plaintiffs alleging discrimination under the ADA must show an “ultimate employment” action. *Williams v. Brunswick Cnty. Bd. of Educ.*, 725 F. Supp. 2d 538, 547 (E.D.N.C. 2010); see *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1453 (11th Cir. 1998) (looking to Title VII to interpret adverse action in ADA discrimination case). Title VII’s substantive antidiscrimination provision is limited to actions that affect employment or alter the conditions of the workplace, such as discharge or a material change in compensation, terms, conditions, or privileges of employment. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61–62 (2006).

functions of the position with a reasonable accommodation.<sup>16</sup> However, there is a split amongst the courts regarding the remaining elements.<sup>17</sup> Some courts only require one additional element -- a showing that the defendant failed to reasonably accommodate the plaintiff.<sup>18</sup> On the other hand, certain courts mandate that the plaintiff also prove that he suffered an adverse employment action.<sup>19</sup> In other circuits, it remains unclear whether an adverse action is necessary to state a claim.<sup>20</sup> The dispute and confusion is attributable, at least in part, to parties and courts failing to clearly differentiate between disparate treatment and failure to accommodate claims.<sup>21</sup> Although disparate treatment

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<sup>16</sup> Elizabeth O'Connor Tomlinson, *Cause of Action for Failure to Make Reasonable in Workplace Under Americans with Disabilities Act*, 48 Causes of Action 137, § 4 (updated Aug. 2011).

<sup>17</sup> See *infra* text accompanying notes 18, 19, and 20.

<sup>18</sup> *Mzyk v. N. E. Indep. Sch. Dist.*, 397 F. App'x 13, 16 (5th Cir. 2010); *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 638 n. 1 (7th Cir. 2010); *Drozdzowski v. Northland Lincoln Mercury*, 321 F. App'x 181, 184 (3d Cir. 2009); *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App'x 439, 443 (10th Cir. 2002); *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n. 11 (4th Cir. 2001); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001).

<sup>19</sup> *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) (stating that in order to establish a “failure to accommodate” claim, plaintiff must demonstrate he suffered an adverse employment action because of his disability); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (reiterating *Allen*); see *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001) (holding that, in reasonable accommodation cases, the plaintiff must show that the disability caused the adverse employment action); *Marshall v. Federal Exp. Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997) (stating, “As the language of § 12112(a) makes clear, for discrimination (including denial of reasonable accommodation) to be actionable, it must occur in regard to some adverse personnel decision or other term or condition of employment” and finding “there is no adverse action before us with any nexus to a possible denial of reasonable accommodation.”).

<sup>20</sup> See *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 101–102 (1st Cir. 2007) (stating final element as “[the defendant], despite knowing of [the plaintiff]’s disability, did not reasonably accommodate it.”); cf. *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011) (noting that the final prong is “the employer took an adverse employment action against her because of the alleged disability”); see *Myers v. Cuyahoga Cnty., Ohio*, 182 F. App'x 510, 515 (6th Cir. 2006) (listing final two elements as “she requested an accommodation; and [ ] the employer failed to provide the necessary accommodation”); cf. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1107, 1109 (6th Cir. 2008) (requiring plaintiff, who alleged defendants’ failure to accommodate her disability was the impetus for her involuntary resignation, to show that she suffered an adverse employment action due to her disability); see *Fenney v. Dakota, Minn. & E. R. Co.*, 327 F.3d 707, 716 (8th Cir. 2003) (stating that last element is plaintiff “suffered an adverse employment action as a result of the disability.”); cf. *Peebles v. Potter*, 354 F.3d 761, 766–67 (8th Cir. 2004) (acknowledging the “failure to make reasonable accommodations in the employment of a disabled employee is a separate form of prohibited discrimination” and “[i]n a reasonable accommodation case, the “discrimination” is framed in terms of the failure to fulfill an affirmative duty—the failure to reasonably accommodate the disabled individual’s limitations.”).

<sup>21</sup> For example, in *Timmons v. Gen. Motors Corp.*, 469 F.3d 1122, 1125–26 (7th Cir. 2006), the Seventh Circuit held that plaintiff waived any potential failure to accommodate employment claim by calling his claim a disparate treatment claim, analyzing it as a disparate treatment claim, and by crafting only a disparate treatment claim in opposing summary judgment. Likewise, in *Pagliaroni v. Daimler Chrysler Corp.*, No. 04-C-1213, 2006 WL

and the failure to accommodate may sometimes coexist,<sup>22</sup> they are different types of discrimination. Sometimes this critical distinction gets lost in the analysis. This confusion must stop.

Failure to accommodate claims are also sometimes erroneously confused with retaliation claims. The ADA prohibits an employer from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”<sup>23</sup> In a retaliation case under the ADA, a plaintiff must prove the following elements: (1) he engaged in a protected activity; (2) his employer acted adversely against him;<sup>24</sup> and (3) his protected activity was causally connected to her employer's adverse action.<sup>25</sup> A disabled employee's request for an accommodation is considered a protected activity.<sup>26</sup> However, the failure to accommodate an employee's

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2668157, at \*8 (E.D. Wis. Sept. 15, 2006), the court noted that although both parties presented adverse employment action as an element of the claim, the plaintiff is not required to prove such adverse action to be entitled to relief under the ADA. Similarly, in *Hawkins v. Dale Med. Ctr.*, 1:05 CV 540 SRW, 2006 WL 1537228, at \*1 n.1 (M.D. Ala. May 31, 2006), the court treated the count as a failure to accommodate termination claim because it was worded unclearly in plaintiff's complaint, defendant treated it as such and plaintiff did not object to such characterization in response to summary judgment. Moreover, in *Wade v. DaimlerChrysler Corp.*, 418 F. Supp. 2d 1045, 1051 (E.D. Wis. 2006), the court rejected defendant's argument plaintiff was required to show she suffered an adverse action as part of her failure to accommodate disability *prima facie* case, and noted that regardless, the argument was waived by defendant because it was not repeated in its reply brief.

<sup>22</sup> See, e.g., *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 834 (8th Cir. 2000) (“Failing to provide an employee with reasonable accommodations can tend to prove that the employer also acted adversely against the employee because of the individual's disability.”).

<sup>23</sup> 42 U.S.C. § 12203(a); see *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 2012 WL 75047 (January 11, 2012) (recognizing retaliation claims under the ADA, but holding the Establishment and Free Exercise Clauses of the First Amendment bar such actions by a minister against her church).

<sup>24</sup> See *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1266 (10th Cir. 2009) (recognizing adoption of *Burlington N.'s* Title VII retaliation standard in the ADA retaliation context). The Supreme Court has stated that “the antiretaliation provision [in Title VII], unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.” *Burlington N.*, 548 U.S. at 64. Instead, a plaintiff may satisfy the requirement of adverse employment action under Title VII's antiretaliation provision by showing that “a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 68 (quotations omitted).

<sup>25</sup> *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n. 11 (4th Cir. 2001), cert. denied 535 U.S. 933 (2002); see also *Tabatchnik v. Cont'l Airlines*, 262 Fed. App'x. 674, 676 (5th Cir. 2008); *Benoit v. Technical Mfg. Co.*, 331 F.3d 166, 177 (1st Cir. 2003); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 569 (8th Cir. 2002); *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3rd Cir. 1997).

<sup>26</sup> *Cassimy v. Bd. of Educ. of Rockford Pub. Sch.*, 461 F.3d 932, 938 (7th Cir. 2006); *Wright v. COMPUSA, Inc.*, 352 F.3d 472, 478 (1st Cir. 2003); *Heisler v. Metro. Council*, 339 F.3d 622, 632 (8th Cir. 2003); *Shellenberger v. Summit Bancorp., Inc.*, 318 F.3d

disability is not considered retaliation. If it were, all failure to accommodate claims would also be retaliation claims.<sup>27</sup>

In short, adverse employment actions are needed to establish disparate treatment and retaliation claims under the ADA. A failure to accommodate claim may be successful absent an adverse action.

### III. THE LANGUAGE OF THE ADA'S DISCRIMINATION STATUTE

In exploring the issue of whether a failure to accommodate necessitates an adverse action, an overview of the ADA's discrimination statute is essential. As discussed below, the ADA Amendments Act of 2008 did not directly address whether an adverse action is needed to state a failure to accommodate claim. A careful reading of the statute in its entirety reveals that an adverse action was not and is not a requirement.

Before the ADA Amendments Act of 2008, the "General rule," Section 12112(a) used to state:

No covered entity shall discriminate against a qualified individual *with a disability because of the disability of such individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.<sup>28</sup>

It was argued that the phrase "because of" in this section meant that an adverse action was a necessary element of a failure to accommodate claim, just like all other types of ADA claims.<sup>29</sup> However, at least one court declined to adopt such a literal reading of the ADA.<sup>30</sup> It pointed out that not only would such a reading be contrary to the purposes of the reasonable accommodation requirement, it would also be illogical given that some of the subsections of Section 12112(b) already contain the phrase "because of", and hence do not rely on the "because of" language supplied in Section 12112(a), while other subsections do not.<sup>31</sup>

The ADA Amendments Act of 2008 revised Section 12112(a) by striking "with a disability because of the disability of such individual" and

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183, 191 (3rd Cir. 2003); *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 706 (4th Cir. 2001); *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1265-66 (10th Cir. 2001).

<sup>27</sup> *Pagliaroni v. Daimler Chrysler Corp.*, No. 04-C-1213, 2006 WL 2668157, at \*8-\*9 (E.D. Wis. Sept. 15, 2006).

<sup>28</sup> 42 U.S.C. § 12112(a) (emphasis added).

<sup>29</sup> *Nawrot*, 259 F. Supp. 2d at 723.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



inserting “on the basis of disability” in its place.<sup>32</sup> Unfortunately, the decision to strike the “because of” language in that section, did not eliminate the controversy. The revision was not an effort by Congress to clarify whether an adverse employment action is needed for failure to accommodate claims. Instead, the Congressional Record notes that the change was made to “ensure[] that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a “person with a disability.”<sup>33</sup> The Congressional Record also explains that the amendment “mirror[s] the structure of the nondiscrimination protection provision in Title VII of the Civil Rights Act of 1964.”<sup>34</sup> Thus, the debate continues on the proper interpretation of Sections 12112(a) and (b) as it pertains to reasonable accommodation claims.

Some defendants and courts have advocated for a tortured reading of these sections, concluding that a failure to accommodate claim must always include some form of adverse employment action.<sup>35</sup> Advocates of this position reason that the General rule set forth in section (a) qualifies the term “discriminate” with the phrase “in regard to” and then lists several forms of employment-related actions; thus suggesting an adverse employment action is a necessary part of every disability discrimination claim under the ADA.<sup>36</sup> They contend that the subsections found under section (b) are forms of discrimination, not to be divorced from the adverse employment action requirement of the general rule in the preceding section.<sup>37</sup>

On the other hand, a more straightforward reading of the ADA leads to the conclusion that no separate adverse action is necessary. One of the two subsections relating to reasonable accommodations in the ADA, Section 12112(b)(5)(B), contains language suggesting that a specific adverse action, denial of an employment opportunity, is necessary. Specifically, subsection (B) prohibits “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]”<sup>38</sup> However, the other reasonable accommodation subsection, § 12112(b)(5)(A) (i.e. the focus of this article), does not indicate that an adverse action is necessary and creates an affirmative obligation for

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<sup>32</sup> 2008 Amendments, Subsec. (a). Pub.L. 110-325, § 5(a)(1); 42 U.S.C. § 12112(a).

<sup>33</sup> STATEMENT OF MANAGERS, 154 Cong. Rec. S8840-01, S8843, 2008 WL 4223414, at \*10 (September 16, 2008); *see infra* text accompanying note 68 (comparing failure to accommodate religion claims to failure to accommodate disability claims).

<sup>34</sup> *Id.*

<sup>35</sup> *Victor v. State*, 203 N.J. 383, 411–12 (N.J. 2010).

<sup>36</sup> *Id.* at 411.

<sup>37</sup> *Id.*

<sup>38</sup> § 12112(b)(5)(B).

employers to reasonably accommodate an employee's disability.<sup>39</sup> Not only does such an interpretation provide a more logical reading of the statute as a whole, it also harmonizes with the policy rationales behind the ADA.<sup>40</sup>

#### IV. EEOC REGULATIONS AND GUIDANCE

The EEOC's regulations and Interpretive Guidance on the ADA also suggest an adverse employment action is not an element of a failure to accommodate claim.<sup>41</sup> It explains that one form of non-discrimination is the obligation to make a reasonable accommodation.<sup>42</sup> It follows that it is the failure to fulfill this obligation that gives rise to liability. Likewise, the EEOC's enforcement guidance on failure to accommodate claims under the ADA focuses on the reasonableness of the proposed accommodation, whether an undue hardship exists, and the interactive process used to determine the appropriate accommodation.<sup>43</sup> There is no mention of an additional showing of a separate adverse employment action.<sup>44</sup> Likewise, EEOC investigators are not instructed to consider whether there has been an adverse employment action in assessing whether an employer has violated the ADA by denying a reasonable accommodation.<sup>45</sup> Thus, acknowledging the failure to accommodate as a freestanding claim with its own distinct elements, comports with the EEOC's interpretation and guidance of this statute.

On a related note, the EEOC takes the position in litigation that no adverse employment action is necessary in failure to accommodate disability cases.<sup>46</sup> The EEOC has had mixed results with this position – for example, the Seventh Circuit Court of Appeals noted the district court strayed from the reasonable accommodation test by requiring the EEOC to demonstrate an adverse employment action and warned the court to avoid such a misstep on remand.<sup>47</sup> Yet, the Eighth Circuit rejected that same position submitted by

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<sup>39</sup> § 12112(b)(5)(A).

<sup>40</sup> See *infra* Section VI.

<sup>41</sup> The EEOC's interpretive guidance on Title I of the ADA, 29 C.F.R. app. 1630, "while not controlling upon the courts by reason of [its] authority, do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 104 n.13 (2007) (citing *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 672 (1st Cir. 1995)).

<sup>42</sup> Interpretive Guidance on Title I of the ADA 29 C.F.R. app. 1630.9.

<sup>43</sup> U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002), available at [http://www.eeoc.gov/policy/docs/accommodation.html#N\\_38\\_](http://www.eeoc.gov/policy/docs/accommodation.html#N_38_); see also *infra* note 77 (discussing the interactive process) [hereinafter *Reasonable Accommodation*].

<sup>44</sup> See *supra* note 43, *Reasonable Accommodation* at Burdens of Proof.

<sup>45</sup> See *supra* note 43, *Reasonable Accommodation* at Instructions for Investigators.

<sup>46</sup> See *Fenney v. Dakota, Minn. & E. R. Co.*, No. 02-1479, 2002 WL 32375072, at \*17-18 (8th Cir. Apr. 30, 2002) (EEOC amicus brief).

<sup>47</sup> *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 638 (7th Cir. 2010).

the EEOC in an amicus brief and adopted defendant's position to the contrary.<sup>48</sup>

The EEOC's approach on this issue places the focus on the proper inquiries and should be consistently followed by courts.

## V. DISAGREEMENT AMONGST COURTS

Surprisingly, relatively few cases have gone beyond a recitation of the *prima facie* case into an analysis squarely addressing the issue of whether a failure to accommodate claim actually *requires* a separate adverse employment action.

One potential reason for the lack of case law on point is that employees who have not suffered adverse employment actions are probably less likely to bring a lawsuit. To this point, employees are generally hesitant to sue their current employers.

Another potential reason for the shortage of case law on this issue is that many employees who have not been reasonably accommodated quit their jobs; thus, the issue before the court often focuses on whether the plaintiff can establish constructive discharge, without even addressing whether doing so is necessary to state a claim. Although sometimes pled as a "separate count," a constructive discharge action is not actually a cause of action in and of itself.<sup>49</sup> To establish a constructive discharge an employee must show that his working conditions were intolerable such that a "reasonable person in the employee's position would have felt compelled to quit."<sup>50</sup> Sometimes a failure to accommodate can lead to circumstances that meet this threshold showing. This will be particularly true where the failure to accommodate is repeated or accompanied by discriminatory treatment of the disabled employee. For example, the Sixth Circuit stated,

[A] complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberateness necessary for constructive discharge. [ ] We emphasize that our holding today does not pave the way for an employee to assert a claim for constructive discharge every time an employer fails to accommodate her disability. But when an employee makes a repeated request for an accommodation and that request is both denied and no other reasonable alternative is offered, a jury may conclude that

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<sup>48</sup> Fenney, 2002 WL 32375072, at \*17-18 (EEOC amicus brief); Fenney v. Dakota, Minn. & E. R. Co., 327 F.3d 707, 716 (8th Cir. 2003) (Order).

<sup>49</sup> Kurtis A. Kemper, *What Constitutes "Constructive Discharge" Under Americans with Disabilities Act of 1990 (42 U.S.C. § 12101)*; 182 A.L.R. Fed. 609 (2002).

<sup>50</sup> 182 A.L.R. Fed. 609.

the employee's resignation was both intended and foreseeable.<sup>51</sup>

However, in situations where the failure to accommodate may be isolated and mundane (or even extreme), it may be difficult to meet the often rigorous constructive discharge standard.<sup>52</sup>

When courts have been faced with the issue of whether an adverse employment action is needed to establish a *prima facie* failure to accommodate claim, they are split on the outcome. The minority insists upon such a showing; while the majority does not.

#### *A. Adverse Employment Action Needed*

Some courts maintain that in a failure to accommodate disability claim a plaintiff must demonstrate he suffered an adverse employment action, specifically one that causes a material change in the terms or conditions of employment.<sup>53</sup>

An understanding of *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029 (7th Cir. 1999), provides useful insight into this position. In *Foster*, an employee with carpal tunnel syndrome was suspended and eventually fired for allegedly failing to follow company attendance rules.<sup>54</sup> Foster's EEOC charge alleged she was terminated because of her disability, yet she filed a failure to accommodate claim, not a claim for disparate treatment.<sup>55</sup> It appears that her failure to accommodate claim was based on the theory that she would not have violated company procedures had her employer accommodated her disability. In her case, the Seventh Circuit recited the law as follows:

Accordingly, to state a *prima facie* case of "failure to accommodate" disability discrimination, a plaintiff who has

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<sup>51</sup> Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1109 (6th Cir. 2008) (internal citation and quotation omitted).

<sup>52</sup> For example, in *Pagliaroni v. Daimler Chrysler Corp.*, No. 04-C-1213, 2006 WL 2668157, at \*8, 10 (E.D. Wis. Sept. 15, 2006), the court denied defendant's motion for summary judgment regarding plaintiff's failure to accommodate claim, holding she was not required to prove an adverse employment action, but granted the motion with respect to plaintiff's constructive discharge claim, which was based on the allegation that she had to quit because her employer failed to accommodate her disability. (As discussed above, constructive discharge is not technically a separate claim. *See supra* text accompanying note 49.)

<sup>53</sup> *See e.g.*, *Fenney v. Dakota, Minn. & E. R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003); *see Hawkins v. Dale Med. Ctr.*, 1:05 CV 540 SRW, 2006 WL 1537228, at \*8 n.5 (M.D. Ala. May 31, 2006); *Bradley v. Fed. Express Corp.*, No. A-04-CA-718 AWA, 2006 WL 1751775 (W.D. Tex. May 25, 2006). To be clear, *Foster* was not the first case to require this element. *See e.g.*, *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001); *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997).

<sup>54</sup> *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999).

<sup>55</sup> *Id.*

suffered an adverse employment action must show that: (1) she was or is disabled; (2) the defendant was aware of her disability; (3) she was otherwise qualified for her job; and (4) the disability caused the adverse employment action (a factor which is implied if not stated)... Accordingly, to state a *prima facie* case of disability discrimination for failure to accommodate the disability, a plaintiff must demonstrate all four of the elements listed above, including the claim that she was discharged because of her disability.<sup>56</sup>

Because the defendant claimed it terminated Foster “because of her violation of company policy, not because of her disability”, the court focused its analysis on the phrase “because of” with respect to the fourth element.<sup>57</sup>

Other courts, even in other circuits, then relied on *Foster’s* recitation of the elements of a failure to accommodate claim under the ADA.<sup>58</sup> Soon it became apparent that there was disagreement, especially in the Seventh Circuit, regarding the proper elements of such a claim.<sup>59</sup> Because the *Foster* Court prefaced its recitation of the *prima facie* case with the phrase, “a plaintiff who has suffered an adverse employment action must show that ...” certain district court judges in that circuit began differentiating between cases involving a plaintiff who had suffered an adverse employment action, in which the *Foster* Court’s *prima facie* case applied, and those based solely on a failure to accommodate.<sup>60</sup> In 2010, the Seventh Circuit put the issue to rest (hopefully) once and for all in that Circuit when it stated: “[T]he [district] court appears to have mistakenly applied an element of the disparate treatment test as part of its evaluation of reasonable accommodation...No adverse employment action is required to prove a failure to accommodate.”<sup>61</sup>

However, unlike the Seventh Circuit, some courts in other jurisdictions have not carefully examined (or reexamined) the issue, and continue to insist an adverse action is required.<sup>62</sup>

<sup>56</sup> *Id.* at 1032–33 (internal citation omitted).

<sup>57</sup> *Id.* at 1033.

<sup>58</sup> See e.g., *Fenney*, 327 F.3d at 717; *Bradley*, 2006 WL 1751775, at \*3; *Hawkins*, 2006 WL 1537228, at \*8 n.5; *Parker*, 260 F.3d at 107-08; but see *Scalera v. Electrograph Sys., Inc.*, 848 F. Supp. 2d 352, 361-62 (E.D.N.Y. 2012) (E.D.N.Y. 2012) (holding *Parker* not controlling because unlike *Parker*, *Scalera* did not allege she was fired because her employer failed to provide a reasonable accommodation that would have allowed her to return to work).

<sup>59</sup> See *Kendra v. Principi*, No. 02 C 3715, 2003 WL 21078039, at \*2 (N.D. Ill. May 13, 2003) (citing cases and noting disagreement).

<sup>60</sup> *Nichols v. Unison Indus., Inc.*, 99-C-50194, 2001 WL 849528 (N.D. Ill. July 24, 2001); *Nawrot*, 259 F. Supp. 2d at 722–23 (citing *Foster*, 168 F.3d at 1032).

<sup>61</sup> *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 638 n. 1 (7th Cir. 2010).

<sup>62</sup> See e.g., *Rea v. Wal-Mart Store 1105*, 419 F. App’x 700, 700–01 (8th Cir. 2011) (citing *Fenney*, 327 F.3d at 717, which relied on *Foster*), *cert. denied*, 132 S. Ct. 407 (2011) *reh’g denied*, 132 S. Ct. 807 (2011).

### ***B. No Adverse Employment Action Needed***

On the other hand, the vast majority of courts correctly appreciate that the failure to accommodate is itself an act of discrimination that violates the ADA. Many have found employer liability notwithstanding the lack of an adverse employment action<sup>63</sup> or have explained in dicta that an adverse action would not be required.<sup>64</sup> Similarly, courts interpreting failure to

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<sup>63</sup> *Williams v. Philadelphia Hous. Auth. Police Dept.*, 380 F.3d 751, 771–72 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (reversing summary judgment for employer in case involving police officer with depression whose requests for reassignment to accommodate his disability were denied); *Picard v. St. Tammany Parish Hosp.*, 611 F. Supp. 2d 608, 610–12, 620 (E.D. La. 2009) (holding it was unnecessary to prove a separate adverse employment action element in a failure to accommodate case in case where hospital transcriptionist, who suffered from carpal tunnel syndrome and Charcot-Marie-Tooth disease, resigned after being denied the use of voice-recognition software by her employer); *Richmond-Jeffers v. Porter Twp. Sch. Corp.*, 208-CV-278, 2012 WL 1714403, at \*10–11 (N.D. Ind. May 14, 2012) (denying summary judgment on failure to accommodate claim where employer allegedly failed to provide breaks to accommodate plaintiff’s disabilities); *Scalera v. Electrograph Sys., Inc.*, 848 F. Supp. 2d 352, 362 (E.D.N.Y. 2012) (E.D.N.Y. 2012) (stating there is no adverse employment element to plaintiff’s claim and holding fact issues existed as to whether employer reasonably accommodated employee’s Pompe Disease with the five accommodations it allegedly provided); *Harvey v. Wal-Mart La.L.L.C.*, 665 F. Supp. 2d 655, 670 (W.D. La. 2009) (denying summary judgment and noting adverse action was irrelevant in case where employee with degenerative arthritis retired after being denied an accommodation due to his discomfort standing up); *Boice v. Se. Pennsylvania Transp. Auth.*, No. 05-4772, 2007 WL 2916188, at \*15 (E.D. Pa. Oct. 5, 2007) (genuine issues of material fact existed where employer refused employee’s request to remain on a day shift in order to regulate his diabetes medication and refused his request to allow him to park closer to the maintenance facility or be given access to a handicapped parking space to accommodate his disabilities); *Wade v. DaimlerChrysler Corp.*, 418 F. Supp. 2d 1045, 1051 (E.D. Wis. 2006) (denying summary judgment for employer where it failed to accommodate employee’s occupational asthma when it failed to allow him to change his respirator daily); *Pagliaroni v. Daimler Chrysler Corp.*, No. 04-C-1213, 2006 WL 2668157, at \*8 (E.D. Wis. Sept. 15, 2006) (denying summary judgment where employee with occupational asthma and anaphylaxis alleged employer failed to transfer her to another “no vapor area” and failed to enforce its no smoking policy); *Brown v. City of N. Chicago*, No. 04 C 1288, 2005 WL 475160, at \*4 (N.D. Ill. Feb. 28, 2005) (denying motion to dismiss where employer failed to accommodate request to assign employee with back problems and a serious heart condition to tasks that did not violate his medical restriction regarding bending and lifting.); *Nawrot*, 259 F. Supp. 2d at 722–724 (denying motion for summary judgment on remand where diabetic employee’s requests for breaks were refused, which caused him to suffer hypoglycemic attacks at work causing collapse and altering his capacity to think clearly and act appropriately); *Dudley v. Dallas Indep. Sch. Dist.*, No. Civ. 3:99CV2634BC, 2001 WL 123673 (N.D. Tex. Jan. 12, 2001) (denying summary judgment where custodial employee, who suffered from chronic respiratory failure and asthmatic bronchitis, alleged failure to accommodate based on failure to transfer her to another position, and noting that a lack of adverse action would not be fatal to her claim).

<sup>64</sup> *See e.g.*, *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 734 (5th Cir. 1999) (acknowledging that “it is perhaps arguable that the failure to accommodate an employee standing alone may give rise to a claim under the ADA,” but failing to reach that question); *Victor v. State*, 203 N.J. 383, 421–22 (N.J. 2010) (assuming a failure to accommodate a

accommodate claims under the Rehabilitation Act, which adopts the ADA standard,<sup>65</sup> have also held that there is no requirement to demonstrate any adverse action other than the failure to accommodate itself.<sup>66</sup> Likewise, in failure to accommodate religion cases under Title VII, plaintiffs are not required to show adverse employment actions to state a claim.<sup>67</sup> Some courts have chosen to look to Title VII religious discrimination failure to accommodate cases for guidance and, by analogy, have reasoned that because no adverse employment action is required in Title VII religion cases, none is required for ADA failure to accommodate cases.<sup>68</sup>

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disability unaccompanied by an adverse employment consequence could be actionable under the New Jersey Law Against Discrimination (LAD), but holding the plaintiff did not establish *prima facie* case of failure to accommodate.) Although the New Jersey Supreme Court ultimately declined to decide the issue in *Victor*, at least some New Jersey courts have continued to insist that an “adverse employment action remains a required element of a *prima facie* failure to accommodate case. See *Alotto v. ECSM Util. Contractors, Inc.*, CIV.A. 09-1144, 2010 WL 5186127 (D.N.J. Dec. 15, 2010); see also *Durham v. Atl. City Elec. Co.*, CIV. 08-1120 RBK AMD, 2010 WL 3906673 (D.N.J. Sept. 28, 2010) (noting *Victor* decision was irrelevant to case at hand where plaintiff clearly suffered a discrete adverse employment decision, and discussion of adverse employment action in *Victor* was merely *dicta*).

<sup>65</sup> The Rehabilitation Act provides, *inter alia*, that “no otherwise qualified individual with a disability” may be discriminated against by a federal agency “solely by reason of her or his disability.” 29 U.S.C. § 794(a). The Act also provides that the standards governing employment discrimination claims applicable under the Americans with Disabilities Act (“ADA”) apply to the Rehabilitation Act, *id.* § 794(d).

<sup>66</sup> See e.g., *Nadler v. Harvey*, 06-12692, 2007 WL 2404705 (11th Cir. Aug. 24, 2007) (stating *prima facie* case for failure to accommodate separately from *prima facie* case for disability discrimination under the Rehabilitation Act); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1077 n.5 (8th Cir. 2006) (citing *Peebles v. Potter*, 354 F.3d 761, 766 (8th Cir. 2004)); *Edmonson v. Potter*, 118 F. App’x 726, 728 (4th Cir. 2004) (reciting elements of failure to accommodate separately from elements of disability discrimination under the Rehabilitation Act); *Maine Human Rights Comm’n v. Sunbury Primary Care, P.A.*, 770 F. Supp. 2d 370, 401 (D. Me. 2011) (analyzing claim under 5 M.R.S. § 4592(1)(C), failure to provide auxiliary aids and services); *Pantazes v. Jackson*, No. 04-1056, 366 F. Supp. 2d 57, 67 n.2 (D.C. Cir. Mar. 31, 2005) (declining to grant summary judgment where defendant raised for the first time lack of adverse employment action in its Reply, but noting that withholding accommodations can itself constitute actionable discrimination).

<sup>67</sup> Under Title VII, it is an unlawful employment practice to discriminate on the basis of religion, 42 U.S.C. § 2000e-2, “unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). “The intent and effect of [the] definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.” *Nawrot*, 259 F. Supp. 2d at 724 (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977)); see *supra* text accompanying note 34 (discussing Congressional Record, which explains that the amendment to the ADA “mirror[s] the structure of nondiscrimination protection provision in Title VII...”); but see *Haliye v. Celestica Corp.*, 717 F. Supp. 2d 873, 876 n.2 (D. Minn. 2010) (citing *Jones v. TEK Indus., Inc.*, 319 F.3d 355, 359 (8th Cir. 2003) (*prima facie* case of failure to accommodate [religion] requires proof that plaintiff was disciplined for failing to comply with a conflicting employment requirement)).

<sup>68</sup> In support of its conclusion that no separate adverse action is required in ADA failure to accommodate cases, the Northern District of Illinois asserted that “ADA reasonable

In the ADA context, there is some divergence regarding how courts reach the conclusion that no separate adverse employment action is necessary to state a failure to accommodate claim.

Some courts state that the failure to accommodate is itself an adverse employment action.<sup>69</sup> This is an unsound approach. Trying to categorize the failure to reasonably accommodate as an “adverse employment action” in order to use the standard disparate treatment *prima facie* case is like trying to fit a square peg into a round hole. Although the definition of what constitutes an adverse employment action has been interpreted broadly,<sup>70</sup> the failure to reasonably accommodate an employee does not logically fall within the scope of the phrase’s meaning.

The more logical approach is to call a spade a spade. The failure to accommodate is not an adverse action, nor is an adverse action required to state a claim. This has been said effectively in a number of ways. Certain courts just blatantly state that the failure to accommodate is itself an act of discrimination.<sup>71</sup> Others courts acknowledge – either by explicitly stating such or by providing separate *prima facie* cases – that a disability discrimination case may be proved either by showing that the plaintiff

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accommodation claims are nearly identical to the corresponding Title VII section.” *Nawrot*, 259 F. Supp. 2d at 724. On the other hand, others have declined to look to Title VII for guidance on whether the ADA requires an adverse action in failure to accommodate cases because of perceived differences between Title VII and ADA failure to accommodate cases. *Victor v. State*, 203 N.J. 383, 404 n.6 (N.J. 2010) (citing, *inter alia*, Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 935 n.18 (2003) (distinguishing between reasonable accommodation requirements in Title VII and in ADA).

<sup>69</sup> See e.g., *Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751, 761 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (“Adverse employment decisions in this context include refusing to make reasonable accommodations for a plaintiff’s disabilities.”); *Braheny v. Pa.*, No. 10-3536, 2012 WL 176186, at \*4 (E.D. Pa. Jan. 18, 2012) (quoting *Williams*); *Reifer v. Colonial Intermediate Unit 20*, 462 F. Supp. 2d 621, 634, 636 (M.D. Pa. 2006) (noting “an ‘adverse employment decision’ includes an employer’s failure to accommodate, reasonably, the employee’s disability”, but granting summary judgment because plaintiff could not show that she was a qualified individual or that the defendant failed to engage in good faith in the interactive process); *Boice v. Se. Pa. Transp. Authority*, No. 05-4772, 2007 WL 2916188, at \*15 (E.D. Pa. Oct. 5, 2007) (quoting *Reifer*, 462 F. Supp. 2d at 634).

<sup>70</sup> See *supra* text accompanying notes 15 and 24 (explaining adverse employment action standard in discrimination and retaliation cases under Title VII and the ADA).

<sup>71</sup> *Wade v. DaimlerChrysler Corp.*, 418 F. Supp. 2d 1045, 1051 (E.D. Wis. 2006) (citing 42 U.S.C. § 12112(b)(5)(A)) (“[T]he failure to accommodate is itself an act of discrimination that violates the ADA...A plaintiff alleging a claim for failure to accommodate is not required to allege an adverse employment action.”); *Pagliaroni v. Daimler Chrysler Corp.*, No. 04-C-1213, 2006 WL 2668157, at \*8 (E.D. Wis. Sept. 15, 2006) (quoting and following *Wade*, 418 F. Supp. 2d 1045).



suffered an adverse employment action because of her disability *or* that her employer failed to make a reasonable accommodation.<sup>72</sup>

## VI. PUBLIC POLICY

There are strong public policy reasons why the failure to reasonably accommodate an employee's disability should be a stand-alone claim that does not require an adverse employment action.

First of all, recognizing that a failure to accommodate an employee's disability is a freestanding cause of action (sans an adverse action), will put teeth in the ADA. As noted in the Interpretive Guidance: "The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."<sup>73</sup> If there are no consequences for failing to remove such barriers, the policy behind the ADA will largely go ignored. Magistrate Judge Norton Denlow of the Northern District of Illinois provided a strong rationale on this point:

[Defendant's] construction of the ADA subsections creates employer liability only if the employee suffered an adverse employment action because of his disability. Under this construction an employer would not be liable in situations where known disabilities are not accommodated simply for management's laziness or cost benefit analysis. The ADA

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<sup>72</sup> See e.g., *Mzyk v. N. E. Indep. Sch. Dist.*, 397 F. App'x 13, 15–16 (5th Cir. 2010) (reciting elements of disparate treatment and failure to accommodate disability claims separately); *Drozdowski v. Northland Lincoln Mercury*, 321 F. App'x 181, 184 (3d Cir. 2009) ("plaintiff can establish a discrimination case under the ADA by proving that his employer either took adverse action against him because of his disability or failed to make reasonable accommodations for his known disabilities"); *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 101–102 (1st Cir. 2007) (analyzing disparate treatment claims separately from failure to accommodate claims); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001) (final element of *prima facie* case requires plaintiff to prove "he was discriminated against because of his disability...An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide 'reasonable accommodations' for the disability-unless doing so would impose undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).") (internal citation omitted); *Haines v. Cherokee County*, 1:08-CV-2916-JOF/AJB, 2010 WL 2821853 (N.D. Ga. Feb. 16, 2010) (reciting the final element generically as requiring plaintiff to demonstrate that the "defendant unlawfully discriminated against [her] because of the disability," and explaining how disparate treatment and failure to accommodate cases are each proved, but finding plaintiff's claim failed because she did not request an accommodation), *report and recommendation adopted as modified*, 1:08-CV-02916-JOF, 2010 WL 2821780 (N.D. Ga. July 15, 2010); *Nawrot*, 259 F. Supp. 2d at 722–724 (recognizing that "an ADA claim can be based on an adverse action because of the disability or a failure to accommodate"); *Dudley v. Dallas Indep. Sch. Dist.*, No. Civ. 3:99CV2634BC, 2001 WL 123673 (N.D. Tex. Jan. 12, 2001) ("[A] discrimination claim under the ADA may be based on the employer's discriminatory adverse action; i.e., terminating or demoting an individual because of his disability, or on the employer's failure to provide the employee with a reasonable accommodation.") (internal citation omitted).

<sup>73</sup> Interpretive Guidance on Title I of the ADA 29 C.F.R. app. pt. 1630.9.

requires employers to accommodate employee[s'] disabilities whether or not the failure to do so is based on some discriminatory animosity toward the employee[s'] disability. [Defendant] cannot escape liability under the ADA just because its failure to accommodate did not result in an adverse employment action to [Plaintiff].<sup>74</sup>

Secondly, recognizing it as its own claim with its proper elements would eliminate the constructive discharge conundrum. If a separate adverse action were required to sustain a failure to accommodate case, it is foreseeable that some employers, either of their own accord or upon the advice of legal counsel, would refrain from taking any separate adverse action against employees who they have failed to accommodate. Many employees would be left with the choice of remaining employed by a company that refused to (and potentially continues to refuse to) accommodate them and having no legal recourse or “resigning” and arguing constructive discharge, which may or may not succeed in court. Neither option is good; the law should not force such a choice.

Third, there are still built-in protections to prevent and weed out meritless claims. Employers will likely argue that recognizing the failure to accommodate as a stand-alone claim absent an adverse action will open up the floodgates to litigation. Such scare tactics are nonsense. The ADA and the economic realities of lawsuits provide protections to defeat meritless claims. Absent wage loss or extreme emotional distress,<sup>75</sup> employees (and plaintiffs' employment lawyers) will not find it financially worthwhile to bring a lawsuit every time a failure to accommodate occurs. While the ADA is a fee-shifting statute, which permits reasonable attorneys' fees and costs to be recovered by a prevailing plaintiff,<sup>76</sup> there still exists little incentive for attorneys to take run-of-the-mill failure to accommodate claims given that most cases settle and, even if the plaintiff prevails at trial, the plaintiff may not be able to recover all of her fees and costs.

Moreover, properly recognizing the failure to accommodate as a separate theory of discrimination does not mean that every request for accommodation that is not granted will trigger automatic liability. The

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<sup>74</sup> *Nawrot*, 259 F. Supp. 2d at 724.

<sup>75</sup> The following remedies are available under the ADA: preliminary and permanent injunctive relief, backpay, front pay, compensatory damages, punitive damages, liquidated damages, attorney's fees, and costs of litigation. Elizabeth O'Connor Tomlinson, *Cause of Action for Failure to Make Reasonable in Workplace Under Americans with Disabilities Act*, 48 CAUSES OF ACTION 137, § 30 (updated Aug. 2011); 42 U.S.C. § 12117(a).

<sup>76</sup> “In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs.” 42 U.S.C. § 12205. The applicable standards to governing attorney's fees awards under the ADA are the same as those that apply to other civil rights statutes. 42 U.S.C. § 12205; Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C. § 2000e-5(k).

parties have a mutual obligation to engage in the interactive process in good faith.<sup>77</sup> For example, in *Loulseged v. Akzo Nobel Inc.*, the Fifth Circuit failed to reach the issue of whether the failure to accommodate an employee standing alone may give rise to a claim under the ADA because it ruled that the employer had not refused to reasonably accommodate the employee.<sup>78</sup> Instead, the court reasoned that by quitting, the employee had caused a breakdown in the interactive process.<sup>79</sup>

Additionally, the ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

## VII. CONCLUSION

The plain language of the statute, well-reasoned jurisprudence, and public policy all lead to the conclusion that failure to reasonably accommodate claims under the ADA do not require an adverse employment action. If an employee can demonstrate he is disabled, qualified, and that his employer failed to reasonably accommodate him, he has stated a claim. To the extent the employee further asserts that the failure to accommodate led to an adverse employment action (for example, a constructive discharge), the fact-finder should determine whether such causation exists. The inquiry should not be whether he suffered an adverse action because of his disability (that is a disparate treatment issue), but rather whether the failure to reasonably accommodate him resulted in an adverse action. If there is no causation between the failure to accommodate and the adverse employment

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<sup>77</sup> “To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.” 29 C.F.R. app. pt. 1630 (“Process of Determining the Appropriate Reasonable Accommodation”). To demonstrate that the employer failed to participate in the process, the employee must prove that “(1) the employer knew about the employee’s disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith.” *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 951 (8th Cir. 1999); see also John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"*, 79 CHI.-KENT L. REV. 665, 677 (2004).

<sup>78</sup> 178 F.3d at 734–35.

<sup>79</sup> *Id.*

action, this would not undermine his ability to state a claim;<sup>80</sup> it would, however, likely affect his ability to recover certain damages, such as wage loss.

Thus, for failure to reasonably accommodate cases arising under the ADA, parties and courts should: (1) label the claim properly, *i.e.* “Failure to Reasonably Accommodate Plaintiff under the ADA” or something to that effect; (2) list it as its own count;<sup>81</sup> (3) lay out the *prima facie* elements clearly;<sup>82</sup> and (4) analyze this claim separately from other potential disability claims/theories of liability (for example, disparate impact, disparate treatment, retaliation, or hostile work environment, and disability claims asserted under state law).

Getting the law right on this issue will result in truly removing and alleviating barriers to the equal employment opportunity of individuals with disabilities.<sup>83</sup>

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<sup>80</sup> See *e.g.*, *Scalera v. Electrograph Sys., Inc.*, 848 F. Supp. 2d 352, 361–62 (E.D.N.Y. 2012) (noting no proof of causal connection required where, although plaintiff was terminated, her disability discrimination claim was premised solely on allegation that employer failed to provide reasonable accommodation).

<sup>81</sup> See *Solomon v. Sch. Dist. of Philadelphia*, No. 10-3221, 2012 WL 831959, at \*6–12 (E.D. Pa. Mar. 12, 2012) (combining plaintiff’s allegations based on a failure to accommodate theory as one count, and her allegations based on a disparate treatment theory as a separate count).

<sup>82</sup> See *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n.11 (4th Cir. 2001) (stating the elements as: (1) that he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position; and (4) that the employer refused to make such accommodations).

<sup>83</sup> See *supra* note 73 and accompanying text (stating that the reasonable accommodation requirement helps remove barriers for individuals who are disabled).