The "Presence Is An Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill

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I. INTRODUCTION

The Americans With Disabilities Act of 1990 (ADA) characterizes itself as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] Because it is designed to assure "equality of opportunity, full participation, independent living, and economic self-sufficiency"[2] for the disabled, the ADA is that group's "long-awaited equivalent to the Civil Rights Act of 1964."[3]

The ADA provides "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[4] Moreover, in an attempt to assure maximum fairness in its application, the ADA's drafters delegated to the courts the responsibility for conducting fact-specific, individualized inquiries. However, in the context of disabled employees with high absenteeism, courts have fashioned a sweeping, unnecessary, and misleading rule of law in contravention of the case-by-case approach mandated by the ADA. This ill-conceived blanket rule requires, as a matter of law, a person's "presence" as an essential function of most, if not all jobs. Thus, courts have effectively eliminated ADA protection for an entire class of disabled individuals—those suffering from chronic illnesses.

Most disabled individuals with high absenteeism suffer from so-called "invisible chronic illnesses"—diseases that are characterized by

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1. 42 U.S.C.A. § 12101(b)(1) (West 1994).

2. *Id.* § 12101(a)(8).

3. 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).

4. 42 U.S.C.A. § 12101(b)(2) (West 1994).

their chronicity and non-externally manifested symptomatology.[5] Examples of these "invisible chronic illnesses" include chronic fatigue syndrome, irritable bowel syndrome, HIV infection, multiple sclerosis, endometriosis, Crohn's disease, fibromyalgia, and lupus erythematosus.[6] These illnesses typically involve unpredictable periods of pain or fatigue or both, interspersed with periods of remission, resulting in the continued disruption of the work and the lives of their victims. Anyone suffering from an "invisible chronic illness" is in a particularly tenuous position when it comes to employment.[7] Often these victims are afraid to tell their employers of their conditions for fear of reprisal. As one sufferer of chronic fatigue syndrome described the situation, "I'm afraid I can't keep the act up anymore because I'm so exhausted. But I'm even more afraid if I let them know what I'm going through it will mean the end of my job."[8] Eventually, this woman's chronic fatigue symptoms may force her to miss work frequently. When that happens, her fears will not be laid to rest if she looks to the ADA for protection.

In nearly all cases, long-term chronic illnesses satisfy the ADA's broad definition of disability.[9] However, when these illnesses begin to cause absenteeism, the "presence is an essential function" rule effectively denies protection to the victims of these illnesses, as they are no longer "qualified individuals" under the ADA regardless of whether they satisfy the technical requirements for a position.

The idea that "presence is an essential function" is a myth because (1) it erroneously assumes that most jobs can be performed only at the worksite, and (2) virtually all employers are able to, and do, accommodate some degree of employee absenteeism. Thus, this Comment argues that the "presence is an essential function" rule is unsound. The courts should discard this rule and, instead, ask the question that

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5. PAUL J. DONOGHUE & MARY E. SIEGEL, SICK AND TIRED OF FEELING SICK AND TIRED—LIVING WITH INVISIBLE CHRONIC ILLNESS 4 (1992).

6. *Id.* at 6.

7. Although this Comment is concerned with chronic illness, an in-depth analysis of the problems unique to HIV infection, mental illness, and drug and alcohol addiction is beyond the scope of this article. For discussions of these issues, see Paul F. Mickey, Jr. & Maryelena Pardo, *Dealing With Mental Disabilities Under the ADA*, 9 LAB. LAW. 531 (1993); Loretta K. Haggard, Note, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans With Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343 (1993); Laura Pincus, *The Americans With Disabilities Act: Employers' New Responsibilities to HIV-Positive Employees*, 21 HOFSTRA L. REV. 561 (1993).

8. DONOGHUE & SIEGEL, *supra* note 5, at 111.

9. *See infra* notes 25-29 and accompanying text.

is mandated by the ADA: Can the chronically ill employee be accommodated?

This approach is appropriate for four reasons: First, the unnecessarily broad and sweeping language that "presence is an essential function" is both unnecessary and misleading. Second, the ADA and its interpretive regulations *mandate* fact-intensive, case-specific inquiries in order to satisfy the ADA's goal of making employment opportunities available to the maximum number of disabled individuals. Third, it is the disabled individual, not his or her absenteeism, that must be accommodated. Finally, numerous reasonable accommodations exist for individuals with disability-related absenteeism.

Part II of this Comment will describe the legislative history and provisions of Title I of the ADA. It will also trace the evolution of the "qualified individual" and the duty to accommodate, as well as the emergence of the "presence is an essential function" myth. Part III will describe how the courts' invention and continued application of the "presence is an essential function" myth is contrary to the purposes of the ADA. Finally, Part IV will offer an appropriate approach to analyzing cases involving disability-related absenteeism.

II. TITLE I OF THE AMERICANS WITH DISABILITIES ACT

A. *Legislative History and Purpose*

Congress enacted Title I of the ADA in response to the discrimination that persons with disabilities encountered in the workplace. The legislators recognized that the history of isolation and discrimination faced by disabled individuals continued to pervade American society, particularly private employment. They determined that people with disabilities, as a group, suffered reduced socioeconomic status. Further, they concluded that discrimination denied the disabled the opportunity to compete equally with others, and cost both the government and the private sector "billions of dollars in unnecessary expenses resulting from dependency and non-productivity."[10]

Before the ADA was enacted, the employment picture for people with disabilities was dismal. Two-thirds of all disabled Americans between ages 16 and 64 were not working at all, although two thirds

10. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, 28-29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

of those wanted to have a job.[11] Despite enactment of legislation such as the Rehabilitation Act,[12] both employment and income levels among the disabled actually dropped between 1980 and 1988.[13] The majority of unemployed disabled individuals, an estimated 8.2 million people, were relying on insurance payments or government payments to support themselves.[14] The House of Representatives, in 1990, recognized the demoralization felt by disabled individuals when they are denied the ability to be self-supporting.[15] As one disabled woman put it, "[W]e can go just so long constantly reaching dead ends. I am broke, degraded, and angry . . . . [W]hich way and where can we go? What and who can we be?"[16]

Inherent in the ADA legislation is the acknowledgment that disabled persons represent an untapped resource. "Millions of disabled Americans who have been denied access to the workplace are well educated and can be easily trained. What is more, they are some of the most highly motivated people in our society today."[17] Accordingly, a rule that precludes the chronically ill from the protection of the ADA is clearly antithetical to the purposes of the legislation.

B. Provisions of Title I

Title I of the ADA prohibits discriminatory employment practices against a "qualified individual with a disability" because of that individual's disability.[18] Covered entities[19] may not discriminate against qualified individuals because of their disabilities in job application procedures; hiring, advancement, or discharge actions; employee compensation; job training; nor in other terms, conditions, or privileges of employment.[20] Discriminatory actions prohibited by the ADA include failing to make reasonable accommodations to the

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11. *Id.* at 32 (citing LOUIS HARRIS & ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 50 (1986)), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

12. 29 U.S.C.A. §§ 701-797 (West 1994).

13. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, 32 (1990) (citing U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, LABOR FORCE STATUS AND OTHER CHARACTERISTICS OF PERSONS WITH WORK DISABILITIES, 1981-1988. CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, No. 160, Table C, 4), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

14. *Id.* at 33, *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

15. *Id.*

16. *Id.* at 43, *reprinted in* 1990 U.S.C.C.A.N. 303, 325.

17. *Id.* at 45, *reprinted in* 1990 U.S.C.C.A.N. 303, 327.

18. 42 U.S.C.A. § 12112(a) (West 1994).

19. A "covered entity" is a private employer employing more than 15 employees. *Id.* § 12111(5)(A).

20. *Id.* § 12112(a).

known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[21] The ADA also prohibits "utilizing standards, criteria, or methods of administration that have the *effect* of discrimination on the basis of disability."[22]

Thus, the ADA plaintiff states a prima facie case of discrimination by showing that he or she is a "qualified individual with a disability," that is, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions

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21. *Id.* § 12112(b)(5)(A). The following is a complete list of discriminatory actions prohibited by the ADA:

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
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> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs;
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> (3) utilizing standards, criteria, or methods of administration—
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> (A) that have the effect of discrimination on the basis of disability; or
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> (B) that perpetuate the discrimination of others who are subject to common administrative control;
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> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
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> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
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> (B) 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;
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> (6) 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 unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
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> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id. § 12112(b).

22. *Id.* § 12112(b)(3)(A) (emphasis added).

of the employment position that such individual holds or desires."[23] Once these elements are shown, the burden shifts to the employer to show that the suggested accommodation would impose an undue hardship.[24]

1. Disability

The plaintiff's first step, then, is to show that he or she is "an individual with a disability." An "individual with a disability" is one who (1) has a physical or mental impairment[25] that substantially limits one or more of the individual's "major life activities," (2) has a record of such impairment, or (3) is regarded as having such an impairment.[26]

"Major life activities" are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, [or] *working*."[27] An individual's ability to work is substantially limited if his or her ability to perform a class of jobs or a broad range of jobs of various classes is significantly restricted when compared with the ability of an average person who has comparable qualifications.[28] Thus, even if a physical or mental impairment limits an individual only in his or her ability to work, the individual satisfies the statutory definition of "an individual with a disability."[29]

For several reasons, victims of chronic, long-term illness almost always satisfy the statutory definition of "individual with a disability." First, most chronic illnesses are characterized by intermittent periods of acute symptoms that severely impair the individual's ability to function. Second, most chronic illnesses, while often treatable to reduce the severity of symptoms, are usually incurable. Finally, during the debilitating episodes that are characteristic of chronic illness, the victim is often unable to work at all, or can work only for short periods

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23. *Id.* § 12111(8).

24. The shifting burdens of persuasion of an ADA case are modeled after those of Title VII. Walders v. Garrett, 765 F. Supp. 303, 308 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992).

25. A physical or mental impairment is

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (1994).

26. 42 U.S.C.A. § 12102(2) (West 1994); 29 C.F.R. § 1630.2(g) (1994).

27. 29 C.F.R. § 1630.2(i) (1994) (emphasis added).

28. *Id.* pt. 1630 app.

29. *Id.*

of time. Thus, there appears to be little debate over whether or not victims of chronic illnesses are disabled: In virtually every case discussed in this Comment, the plaintiffs easily satisfied the definition of "individual with a disability."

2. Essential Functions

Next, the plaintiff must show that he or she can perform the "essential functions" of the employment position, with or without reasonable accommodation. Essential functions are not defined in the statute. However, the EEOC regulations define essential functions as "the fundamental job *duties* of the employment position the individual with a disability holds."[30] A job function may be considered essential for any of several reasons. For example, a job function may be essential because (1) the employment position exists for the performance of the function, (2) the number of employees among whom performance of the function can be distributed is limited, or (3) the function is highly specialized and the employee was hired for his or her expertise or ability to perform it.[31]

Under the EEOC regulations, the following factors determine whether a particular function is essential:

> (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequence of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.[32]

By referring to the "performance" of "duties," this statutory scheme clearly contemplates *tasks*, not the ethereal concept of "presence." Significantly, these regulations strongly suggest that an essential function cannot be defined by physical requirements that disqualify disabled workers from performing it.[33] For example, when a sack-handler position requires an employee to pick up fifty-pound sacks and carry them from the company loading dock to the storage room, an employer cannot say that the essential function of the position is *carrying* the sacks. Rather, the employer must say that the

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30. *Id.* § 1630.2(n)(1) (emphasis added).
31. *Id.* § 1630.2(n)(2).
32. *Id.* § 1630.2(n)(3).
33. *See id.* pt. 1630 app. (Section 1630.9 Not Making Reasonable Accommodation).

essential function is causing the sack to move from the loading dock to the storage room because defining the function in terms of human physiology would effectively disqualify a person with a back problem from performing the job. Defining the function as causing the sack to move from one place to another allows for the implementation of any number of reasonable accommodations, such as the provision of a dolly, hand truck, or cart.[34]

Analogizing the foregoing example to the chronically ill employee with absenteeism problems, it is unacceptable to say that presence is an essential function because this defines the job in terms of a physical requirement. If a person's disability prohibits him or her from adhering to a regular work schedule, the question should be: What reasonable accommodation would allow that person to accomplish the actual job duties?

3. Reasonable Accommodation

As with essential functions, "reasonable accommodation" is not defined by statute. Instead, the legislation provides examples of reasonable accommodations, such as "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position."[35] According to the EEOC guidelines, reasonable accommodation includes "modifications . . . to the manner or circumstances under which the position held or desired is customarily performed . . . that enable a qualified individual with a disability to perform the essential functions of that position."[36] However, an accommodation is only reasonable when it does not impose an undue hardship on the employer.[37]

Once the plaintiff has established a prima facie case, the employer is permitted to show that making the necessary accommodations would impose an undue hardship on its operations.[38]

4. Undue Hardship

"Undue hardship" is "an action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include, among others, the nature and cost of the accommoda-

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34. *See id.*

35. 42 U.S.C.A. § 12111(9) (West 1994).

36. 29 C.F.R. § 1630.2(o)(ii) (1994).

37. Hence, although the burden of showing undue hardship lies with the employer-defendant, in actuality the plaintiff implicitly has to show that the suggested accommodations do *not* impose undue hardship.

38. *Walders*, 765 F. Supp. at 308.

tion, the overall financial resources of the facility, the number of persons employed at such facility, and other impacts of such accommodation upon the operation of the facility.[39] The EEOC guidelines mirror the statutory language[40] but add another factor: "[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[41]

These factors reflect Congress' desire to balance the interests of the employer with those of the disabled person who is seeking accommodation. The undue hardship analysis is the employer's "opportunity to prove that . . . the costs [of an accommodation] are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[42] Where accommodating a disabled person would place too onerous a burden on the operations of an employer, the employer is not legally bound to provide such accommodation. Notably, however, in nearly all of the disability-related absenteeism cases, employers rarely, if ever, had to show how accommodating a plaintiff's illness and its resultant attendance problems would impose an undue hardship. In most cases, the courts simply agreed with the employers' argument that presence was an essential function. Because a plaintiff with attendance problems was unable to perform this essential function, his or her prima facie case necessarily failed, and the courts found no need to inquire into any of the factors comprising undue hardship.

For example, in *Tyndall v. National Education Centers, Inc.*,[43] Mary Tyndall, a lupus victim, was discharged for excessive absenteeism because of her illness. Despite the plaintiff's excellent performance

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39. The ADA defines undue hardship as

> an action requiring significant difficulty or expense when considered in light of the [following] factors[:] (i) The nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses or resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C.A. § 12111(10) (West 1994).

40. 29 C.F.R. § 1630.2(p)(2) (1994).

41. *Id.*

42. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995).

43. 31 F.3d 209 (4th Cir. 1994).

evaluations, the court disqualified her from the protection of the ADA because "an employee who does not come to work cannot perform any of his job functions, essential or otherwise."[44] Interestingly, the employer had accommodated the plaintiff's absences in the past. The employer did not show why a continuation of this accommodation would impose on it an undue hardship.

Similarly, in *Jackson v. Veterans Administration*,[45] a temporary housekeeping aide who suffered from rheumatoid arthritis was not "otherwise qualified" under the Rehabilitation Act[46] because he failed to satisfy the "presence requirement" of the job.[47] The court rejected the aide's suggestions of scheduling a regular day off or delaying the start of his shift for his treatments.[48] According to the majority, the suggested accommodations did not address the unpredictable nature of the absences, and this unpredictability precluded any reasonable accommodation: "Requiring the VA to accommodate such absences would place upon the agency the burden of making last-minute provisions for Jackson's work to be done by someone else. Such a requirement would place an undue hardship on the agency."[49] Unfortunately, the court did not support this conclusion with any evidence.

5. The Case-By-Case Requirement

As the statutory definitions and long lists of factors suggest, courts should evaluate the elements of an ADA suit on a case-by-case basis. "This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs."[50] Notwithstanding this case-by-case requirement, courts continually apply a blanket rule that presence is an essential function. This rule originated in cases where excessive disability-related absenteeism occurred, where presence may have been an arguable prerequisite to the job, and where there probably was no reasonable accommodation available for the plaintiff.

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44. *Id.* at 213 (citing Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986)).

45. 22 F.3d 277 (11th Cir. 1994).

46. The provisions of the ADA and the Rehabilitation Act are construed similarly. *See infra* notes 52-53 and accompanying text.

47. *Jackson*, 22 F.3d at 279.

48. *Id.*

49. *Id.*

50. 29 C.F.R. pt. 1630 app. (1994) (Background).

C. The Origin of the "Presence Is An Essential Function" Myth

The first cases holding that presence is an essential function arose under the Rehabilitation Act before the Supreme Court clarified the affirmative duty to accommodate in the landmark case of *School Board of Nassau County v. Arline*.[51] This line of reasoning was followed in subsequent Rehabilitation Act cases and found its way into ADA cases because the ADA requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes.[52] Therefore, even modern courts have looked to Rehabilitation Act case law to interpret provisions of the ADA.[53]

The "presence is an essential function" line of reasoning first emerged in *Wimbley v. Bolger*,[54] a pre-*Arline* Rehabilitation Act case in which the plaintiff, who suffered from a mental condition, was discharged for violations of the United States Postal Service's attendance control policy requiring advance notice of absences. Although the court acknowledged that the plaintiff could perform his job when he came to work, it found that the plaintiff was not a qualified disabled employee under the Rehabilitation Act.[55] "It is elemental that one who does not come to work cannot perform *any* of his job functions, essential or otherwise."[56] The court did not require the Service to show why accommodating Mr. Wimbley's absences would impose an undue hardship. Instead, the court stated that the Service "must have employees who can be counted on to come to work on a regular basis."[57] Thus, they concluded "it is *obvious* why the Postal Service could not simply allow plaintiff to come and go as he pleased."[58]

Similarly, in *Matzo v. Postmaster General*,[59] while conceding that a stenographer's technical skills were satisfactory, the court held that

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51. 480 U.S. 273 (1987).

52. *See* 42 U.S.C.A. § 12117(b) (West 1994).

53. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995); Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 213 (4th Cir. 1994); Dutton v. Johnson County Bd. of Comm'rs, 859 F. Supp. 498, 504 (D. Kan. 1994); EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

54. 642 F. Supp. 481 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987).

55. *Id.* at 485. The Rehabilitation Act, as originally enacted, used the terms "handicap" and "handicapped," whereas the ADA uses the terms "disability" and "disabled." For consistency, the latter terms are used throughout this Comment.

56. *Id.*

57. *Id.*

58. *Id.* (emphasis added).

59. 685 F. Supp. 260 (D.D.C. 1987), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988).

she was not otherwise qualified under the Rehabilitation Act because "a minimal and basic qualification for any job . . . is the ability to report for work and remain on duty for the duration of the workday . . . . [A disability] which deprives a worker of an ability to fulfill an essential requirement of his craft can *never* be 'otherwise qualified.'"[60] The opinion was devoid of any discussion of why suggested accommodations would have imposed undue hardship on the employer.[61]

Unfortunately, the requirement that courts must follow Rehabilitation Act case law has led some courts to disregard the change in statutory language from the Rehabilitation Act to the ADA.

D. The Evolution of the "Qualified Individual" from the Rehabilitation Act to the ADA

Because the ADA originated in the Rehabilitation Act, it is helpful to compare the language of the two statutes and then examine Rehabilitation Act case law addressing an employer's duty to accommodate.

The provisions of the ADA were derived from the regulations implementing section 504 of the Rehabilitation Act of 1973.[62] The Rehabilitation Act, in its original form, provided that an "otherwise qualified [disabled] individual" should not be excluded from participation in any program receiving federal financial assistance.[63] According to the Rehabilitation Act's interpretive regulations, an "otherwise qualified [disabled] individual" was, in the employment context, one who could perform the essential functions of the job. When this performance was not possible, the court was to consider whether any reasonable accommodation by the employer would enable the person to perform those functions.[64] As courts began to interpret these requirements, confusion arose as to the extent of the employer's duty to accommodate.

For example, in *Southeastern Community College v. Davis*,[65] the Supreme Court acknowledged that the Rehabilitation Act required

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60. *Id.* at 263 (emphasis added).

61. *See id.* at 263-64. Not surprisingly, a similar approach was taken in a subsequent case decided by the same court. *See* Lemere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988). In that case, an alcoholic's two-year pattern of unscheduled absences removed her from the protection of the Rehabilitation Act. Because her absences prevented her from following a regular work schedule under which she could "perform the essential functions" of her position, she lost the status of a "qualified handicapped employee." *Id.* at 280.

62. 29 U.S.C.A. § 791 (West 1994).

63. *Id.* § 794.

64. School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987).

65. 442 U.S. 397 (1979).

institutions to make modifications in their programs to accommodate disabled persons.[66] At the same time, however, the Court defined the "otherwise qualified" person as "one who is able to meet all of a program's requirements *in spite of* his [disability]."[67] As one commentator noted, "the Court's contradictory language failed to clarify the duty of accommodation and set the stage for confusion in the lower courts."[68]

In 1987, however, the Supreme Court confirmed that employers have an affirmative duty to accommodate the disabled. In *School Board of Nassau County v. Arline*,[69] the Court stated that when a disabled person is not able to perform the essential functions of the job, the lower court must also consider whether any "reasonable accommodation" by the employer would enable the disabled person to perform those functions.[70] "Employers have an *affirmative obligation* to make a reasonable accommodation for a [disabled] employee"[71] and cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.[72] Further, the district court must conduct an individualized inquiry and make appropriate findings of fact,[73] specifically considering the factors delineated in the interpretive regulations as to whether such accommodation would impose undue hardship.[74] Although this opinion still left open the question of how much accommodation was enough, it made clear that equal treatment for the disabled was not all that was required under the Rehabilitation Act.

In light of the confusion over the Rehabilitation Act's definition of the "otherwise qualified" disabled individual and the scope of the employer's duty to accommodate, the ADA's drafters were careful to insert the reasonable accommodation requirement into the statutory definition of a "qualified individual with a disability." Under the ADA, a "qualified individual with a disability" is "an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual

66. *Id.* at 408.
67. *Id.* at 406 (emphasis added).
68. Murphy, *supra* note 3, at 1623.
69. 480 U.S. 273 (1987).
70. *Id.* at 289.
71. *Id.* at 289 n.19 (emphasis added).
72. *Id.*
73. *Id.* at 287.
74. *Id.* at 287 n.17.

holds or desires."[75] In theory at least, this should have resolved whatever question might have remained about whether disabled employees must be accommodated.

Nonetheless, in the context of disability-related absenteeism, courts have been reluctant to let go of the idea that presence is an essential function of most jobs, resulting in cursory treatment of the reasonable accommodation and undue hardship issues. Although it appears that under the ADA courts have taken a more balanced approach by acknowledging the duty to accommodate, they continue to perpetuate the "presence is an essential function" myth. Further, it is far from clear how cases will be analyzed in the future.[76] It is time to discard this myth altogether so that individuals disabled by chronic illnesses will know that they are protected by the ADA.

III. HOW AND WHY THE "PRESENCE IS AN ESSENTIAL FUNCTION" MYTH SUBVERTS THE PURPOSE OF THE ADA

For several reasons, the "presence is an essential function" myth disserves the purposes of the ADA and the class of people it is designed to protect. First, the sweeping language used by the courts is both unnecessary and misleading. Second, the myth allows the court to avoid the individualized inquiry that is mandated by the ADA by hindering the plaintiff's ability to state a prima facie case, thus circumventing the undue hardship analysis. Third, the myth disregards the fact that it is the *person* with the disability who must be accommodated, not the absenteeism that must be accommodated. Finally, the myth belies the fact that accommodations exist for disabled employees with attendance problems.

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75. 42 U.S.C.A. § 12111(8) (West 1994) (emphasis added). In addition, the Rehabilitation Act's interpretive regulations now contain nearly identical language. *See* 29 C.F.R. § 1613.702(f) (1994).

76. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995); Barfield v. Bell S. Telecoms., Inc., 886 F. Supp. 1321 (D. Miss. 1995) ("This court recognizes . . . that regular attendance at work is an essential function of virtually all jobs."); Johnson v. Children's Hosp. of Phila., No. 94-5698, 1995 U.S. Dist. LEXIS 7743, at *4-5 (E.D. Penn. June 5, 1995) ("[A]bsences caused by a disability do not eliminate the requirement that an employee demonstrate regular attendance in order to be considered 'qualified' for the position."); Falczynski v. Amoco Oil Co., 533 N.W.2d 226, 232 (Iowa 1995) (Plaintiff "could not perform the quintessential function of regularly attending work."). *But see* Hall v. Janet Wattles Ctr., No. 94-C-50239, 1995 U.S. Dist. LEXIS 5801, at *10 (N.D. Ill. Apr. 14, 1995) ("[D]etermining whether an employer's actions constitute discrimination violative of the ADA involves looking both to whether the person can perform the essential functions of the job and to whether a reasonable accommodation can be made that would permit the employee to do so."); Carlson v. Inacom Corp., 885 F. Supp. 1314 (D. Neb. 1995) (requiring employer to present evidence that plaintiff's absences resulted in essential business not being completed in a timely and efficient manner).

A. The Courts' Sweeping Language is Unnecessary and Misleading

In most of the cases perpetuating the "presence is an essential function" line of reasoning, such a sweeping rule was unnecessary to the result of the case. For example, in *Carr v. Reno*,[77] the court held that a coding clerk who suffered from an ear condition that caused periodic dizziness, nausea, and vomiting so that she had to be absent from work for prolonged periods of time without warning, was not a "qualified individual" under the Rehabilitation Act.[78] The coding clerk was part of a small staff that worked under tight deadlines, and her absences prevented her from performing her duties within those deadlines.[79] Further, the unpredictable nature of her disability meant that there was probably no reasonable accommodation available that would have enabled her to meet the deadlines.[80] On these facts, even under a full analysis of the reasonable accommodation and undue hardship issues, the plaintiff probably would not have been able to prevail. However, rather than limiting the case to its own facts, the court held that regular attendance was an essential function of a coding clerk position; thus, despite the plaintiff's outstanding performance rating, she was not qualified for protection under the Rehabilitation Act.[81]

Not only was the court's holding unnecessarily broad—in general, the job of coding clerk seems particularly suited to telecommuting—but it was misleading. Although the court acknowledged the affirmative duty to accommodate,[82] it rejected the argument that the district court should have conducted an "individualized inquiry" into possible forms of reasonable accommodation; once the district court determined that the coding clerk could not perform an essential function of the job, there was no need for further factfinding. As the court put it, "Any other holding would require a district court to engage in a pro forma wild goose chase every time a plaintiff invokes the Rehabilitation Act."[83] However, an individualized inquiry is *exactly* what is required under both the Rehabilitation Act and the ADA.

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77. 23 F.3d 525 (D.C. Cir. 1994).
78. *Id.* at 530.
79. *Id.* at 529.
80. *See id.*
81. *Id.*
82. *Id.* at 528.
83. *Id.* at 530. Ironically, despite its strong language, a careful reading of the opinion reveals that the appellate court *did* conduct an individualized inquiry in this instance. *See id.* at 529-30.

Even where courts have acknowledged the need for a reasonable accommodation and undue hardship inquiry, they have simultaneously undermined it with unnecessarily broad statements. For example, in *Dutton v. Johnson County Board of County Commissioners*,[84] a case involving a heavy equipment operator who suffered from migraine headaches, the court's inquiry was whether any reasonable accommodation would allow the plaintiff to perform the essential functions of his job without creating an undue hardship on the defendant.[85] Although this inquiry would have been sufficient under the ADA, the court perpetuated the "presence is an essential function" line of reasoning when it made the irrelevant comment that "regular attendance is no doubt an essential function of almost every job."[86]

B. The "Presence is an Essential Function" Myth Circumvents the Individualized Inquiry and the Employer's Obligation to Show Undue Hardship

The individualized approach that is mandated by the ADA is thwarted when a plaintiff is disqualified because of an inability to appear at the workplace. Because of the structure of the prima facie ADA case, if presence is an essential function and the plaintiff's disability precludes her from "performing" this function, there is no need for further factfinding. Courts have used this method of reasoning to eliminate unsympathetic plaintiffs from the protection of both the Rehabilitation Act and the ADA.[87]

As a result, the cases are generally devoid of concrete factors that explain when accommodating disability-related absenteeism would impose undue hardship on an employer.[88] Common bases for finding undue hardship range from the simplistic to the nonexistent—from naked assertions such as "it is obvious why the plaintiff cannot come and go as he pleases"[89] to no discussion whatsoever of undue hardship.[90] This lack of guidance as to the line between reasonable accommodation and undue hardship has been criticized by commenta-

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84. 859 F. Supp. 498 (D. Kan. 1994).

85. *Id.* at 505.

86. *Id.* at 508.

87. *See, e.g.*, Lemere v. Burnley, 683 F. Supp. 275 (D.D.C. 1988).

88. *E.g.*, Walders v. Garrett, 765 F. Supp. 303, 309 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), *aff'd*, 928 F.2d 396 (3d Cir. 1991); Matzo v. Postmaster Gen., 685 F. Supp. 260, 263 (D.D.C. 1987), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988).

89. Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987).

90. *See* Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994).

tors as creating "unnecessary indeterminacy which disserves employers and the disabled alike."[91] It is perhaps a weakness of the legislation itself that it does not require a quantitative basis for undue hardship; it requires only that the accommodation be "an action requiring significant difficulty or expense."[92] Yet, in order to remain true to the spirit of the legislation, courts should be more stringent in requiring employers to delineate the factors that constitute undue hardship.[93]

Perhaps one of the reasons courts have not been sufficiently stringent is that quantifying the cost of accommodating disability-related absenteeism may be trickier and less precise than, for example, quantifying the cost of renovating a work station. Nevertheless, if one follows the guidelines provided by the ADA's interpretive regulations, this task should not be unduly burdensome.

C. *The Disabled Person, Not Absenteeism, Must Be Accommodated*

The "presence is an essential function" myth assumes that the absenteeism itself must be accommodated. For example, in *Santiago v. Temple University*,[94] the court held that

> an employee of any status, full or part time, cannot be qualified for his position if he is unable to attend the workplace to perform the required duties, because attendance is necessarily the fundamental prerequisite to job qualification. "The law does not protect absenteeism or employees who take excessive leave and are unable to perform the prerequisites of their job."[95]

Although it is true that the law does not protect *absenteeism*, the law is supposed to protect the *disabled*. Yet in this decision, absenteeism is treated as outside the scope of anything that would need to be accommodated. "Plaintiff cannot be accommodated for excessive absenteeism. Where a [disability] cannot be accommodated, plaintiff is not otherwise qualified."[96]

In truth, it is the disabled individual who must be accommodated, not absenteeism. Even in cases where the essential functions of a job can only be performed at specific locations at specific times, this focus

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91. R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DET. C.L. REV. 1163, 1167.

92. 42 U.S.C.A. § 12111(10)(A) (West 1994).

93. See *infra* note 112 and accompanying text.

94. 739 F. Supp. 974 (E.D. Pa. 1990), *aff'd*, 928 F.2d 396 (3d Cir. 1991).

95. *Id.* at 979 (quoting Stevens v. Stubbs, 576 F. Supp. 1409, 1415 (N.D. Ga. 1983)).

96. *Id.*

on locations and times is not the determinative focus under the ADA. In the words of one court:

> [F]or a person with a vocationally relevant disability, such as chronic bronchitis which causes absences from work, determining whether an employer's actions constitute discrimination violative of the ADA involves looking both to whether the person can perform the essential functions of the job *and* to whether a reasonable accommodation can be made that would permit the employee to do so.[97]

One difficulty the courts are having, which becomes apparent upon a review of the case law, is determining the level of accommodation that is required. This was the question left unanswered by *Arline*. The failure to fully consider the reasonable accommodation question appears to be a holdover from the pre-*Arline* days when courts apparently assumed that equal treatment was all that was required under disability rights legislation. However,

> the theory of equal treatment presumes that employers can use neutral job-selection criteria that will accurately measure a potential worker's ability to perform the job in question. In this regard disability discrimination poses a problem, because seemingly neutral criteria often reflect an unstated norm that effectively excludes people with disabilities.[98]

The ADA acknowledges the fact that seemingly neutral criteria may reflect an unstated norm that effectively excludes people with disabilities. One form of discrimination under the ADA is "utilizing standards, criteria, or methods of administration that have the *effect* of discrimination on the basis of disability."[99] Under this language, a disabled employee is a victim of discrimination when she is fired because her disability precludes her from adhering to the same attendance requirements as apply to non-disabled employees. Further, this language implicitly mandates an inquiry into whether or not a reasonable accommodation exists for an employee's inability to meet those attendance requirements. At least one court held "accommodation" to mean that "[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."[100]

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97. Hall v. Janet Wattles Ctr., No. 94-C-50239, 1995 U.S. Dist. LEXIS 5801, at *10 (N.D. Ill. Apr. 14, 1995) (emphasis added).

98. Murphy, *supra* note 3, at 1613.

99. 42 U.S.C.A. § 12112(b)(3)(A) (West 1994) (emphasis added).

100. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

D. Persons With Disability-Related Absenteeism Can Be Accommodated

The "presence is an essential function myth" belies the fact that persons with disability-related absenteeism can be accommodated. In many cases, courts have made conclusory statements such as "it is elemental that one who does not come to work cannot perform *any* of his job functions, essential or otherwise."[101] Although at first glance it seems axiomatic that presence would be an essential function of many jobs, and it is an arguable prerequisite to some, absenteeism is a fact of business life.

Some level of absenteeism is regularly tolerated by employers. Many, if not most, American organizations already provide for workers' absenteeism by overstaffing.[102] For example, most employers provide maternity leave, jury duty leave, disability leave, and other types of unpredictable or long-term leave, either with or without pay, on a regular basis. If presence were truly an essential function, none of these types of leave could be available. Furthermore, many other types of accommodations are available, such as flex-time, job sharing, at-home work, telecommuting, and part-time work.

IV. THE APPROPRIATE APPROACH

A. Focus on Technical Skills During the "Qualified Individual" Inquiry

Courts should discard the idea that presence is an essential function and confine their inquiry to technical skills when determining whether a plaintiff is a "qualified individual." Significantly, the legislative history of the ADA does not mention attendance in its discussions of job qualifications. Instead, those discussions focus on necessary technical skills, such as typing speed.[103] Moreover, the legislative history specifically mentions the granting of additional unpaid leave as a possible accommodation.[104]

Thus, there is virtually no authority for disqualifying a disabled individual on the basis of attendance requirements. Instead, the legislation inherently requires a court to focus only on technical skills

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101. *Wimbley*, 642 F. Supp. at 485.

102. Stephen M. Crow, *Excessive Absenteeism and the Disabilities Act*, 48 ARB. J. 65 (1993).

103. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 348.

104. *Id.* at 63, *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

during the "qualified individual" phase of the ADA inquiry. Once the plaintiff has shown that he possesses the requisite skills for the job, the court can then inquire into whether any accommodation is required by the employer and, if so, whether that accommodation would impose an undue hardship.

In essence, this approach is nothing more than the case-by-case analysis that is mandated by the ADA. "[P]erfect attendance is not a necessary element of all jobs . . . . [T]he necessary level of attendance and regularity is a question of degree depending on the circumstances of each position."[105] Furthermore, "the degree of [necessary attendance] . . . requires close scrutiny. . . . What is material is that the job gets done. . . . This is necessarily a fact intensive determination."[106]

B. Acknowledge Accommodations Available to the Employee With Disability-Related Absenteeism Problems

Reasonable accommodations for individuals with disability-related absenteeism abound. Examples of such accommodations include flextime, job sharing, at-home work, telecommuting, part-time work, vacation time or leave without pay, advance sick leave, and allowing the employee to work weekends or other scheduled days off to make up the time. If the nature of the work does not permit any of the above options, the employer may be able to arrange a transfer to another, more flexible position. In cases where no reasonable accommodation exists within the disabled person's line of work, vocational rehabilitation counseling can be made available.[107] In this way, the disabled employee may be retrained for a more flexible line of work.

Telecommuting, in particular, has been found to have significant benefits for employers, employees, and society. Contrary to the myth that working at home results in a substantial reduction in productivity and quality,[108] most companies that have experimented with telecommuting and other work-at-home arrangements have found exactly the opposite.[109] For example, Pacific Bell, Sears & Roebuck, Hewlett

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105. Walders v. Garrett, 765 F. Supp. 303, 309-10 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992).

106. EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

107. In the United States, each state is required by law to have a public agency that is responsible for providing vocational rehabilitation services. The federal government provides financial support for those services. RESOURCES FOR REHABILITATION, INC., MEETING THE NEEDS OF EMPLOYEES WITH DISABILITIES 6-7 (1991).

108. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995).

109. *See, e.g.*, JACK M. NILLES, MAKING TELECOMMUTING HAPPEN 10 (1994); PHILLIP E. MAHFOOD, HOME WORK: HOW TO HIRE, MANAGE & MONITOR EMPLOYEES WHO

Packard, and Aetna Casualty are among the companies currently taking advantage of the benefits of telecommuting.[110] Hence, courts should not be so quick to dismiss work-at-home solutions from a list of reasonable accommodations.[111]

C. *Require Quantification of Undue Hardship Claims*

Finally, courts should not allow employers to circumvent the undue hardship analysis by simply making a conclusive statement that they cannot reasonably accommodate absenteeism. Often, by the time these cases reach the court, the employer has already been accommodating the employee's disability for some time. In these circumstances, plaintiffs can argue that if this accommodation has been taking place, it must be reasonable.[112] Therefore, the employer should document, to the extent practicable, factors such as financial loss, disruption of the work environment, specific instances of loss of business or productivity, and morale problems that would be caused by continuing to accommodate the disabled employee's absenteeism. Although the courts are not *required* to weigh the factors listed in the statute and the EEOC regulations, future litigants would benefit from such an analysis. Stating a prima facie case would be facilitated for plaintiffs, and ultimately, employers would also benefit by being able to predict with some certainty what evidence will suffice to show undue hardship and successfully defend an ADA claim.

Although it is possible, and perhaps probable, that many of the cases discussed in this Comment would have yielded the same results under this alternative analysis, the potential to predict outcomes and thus encourage out-of-court settlements would be beneficial to all concerned.

WORK AT HOME 8-15 (1992); MEG HAFER, TELECOMMUTING: AN ALTERNATE ROUTE TO WORK §§ 1-1 to 1-9 (1992). Although telecommuting may not be a viable alternative for every disabled employee, the realities of today's workplace are making this option more feasible and beneficial than ever before. *See* NILLES, *supra*, at 1-6.

110. *See* HAFER, *supra* note 109, at 1-5 to 1-9.

111. The District of Columbia Circuit agrees. *See* Langon v. Department of Health & Human Serv., 959 F.2d 1053 (D.C. Cir. 1992); *cf. Vande Zande*, 44 F.3d at 544 (holding that, while an employer is not *required* to allow disabled workers to work at home, an accommodation that allows a disabled worker to work at home, at full pay, subject to a slight loss of sick leave, is reasonable as a matter of law).

112. *See* Laura Hartman, Note, *The Disabled Employee and Reasonable Accommodation Under the Minnesota Human Rights Act: Where Does Absenteeism Attributable To the Disability Fit Into the Law?*, 19 WM. MITCHELL L. REV. 905, 925 (1993).

V. CONCLUSION

A rule that precludes an entire class of disabled individuals is antithetical to a statute whose stated purpose is to assure the disabled "equality of opportunity, full participation, independent living, and economic self-sufficiency."[113] However, the "presence is an essential function" myth precludes ADA coverage for an entire class of disabled individuals—those whose disabilities make it impossible for them to adhere to a regular work schedule. If presence is an essential function, then virtually any level of absenteeism would deprive a disabled individual from the protection of the ADA.

According to a recent EEOC analysis of ADA claims, the law seems to be missing its targeted group.[114] Experts say many disabled people do not know how the ADA can be used to gain work.[115] Yet even where disabled people understand the ADA, the "presence is an essential function" rule will discourage many from seeking work or from fighting discriminatory practices where they occur. As a result, highly qualified people whose disabilities could probably be accommodated may be discouraged from working. When disabled people do not work, there is a tremendous cost to society, not only in the obvious drain on public funds, but also in human costs, such as loss of dignity, self-sufficiency, and a sense of purpose. This loss is senseless in light of the overwhelming evidence that disabled workers are often highly qualified and motivated.[116]

By perpetuating the "presence is an essential function" line of reasoning, courts are ignoring the fact that the chronically ill were intended to be covered by the ADA. Sporadic, unpredictable, and sometimes lengthy absences are the natural result of many chronic illnesses. Does this mean that the chronically ill can never be accommodated? By perpetuating the myth that presence is an essential function, courts seem to be saying "No—individuals with disability-related absenteeism will not be protected by the ADA." At the very least, there are no clear guidelines for predicting the outcome of

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113. 42 U.S.C.A. § 12101(a)(8) (West 1994).

114. Jay Matthews, *Disabilities Law Appears To Be Missing Targeted Group*, THE NEWS TRIB. (Tacoma), Apr. 16, 1995, at A8.

115. *Id.*

116. For example, productivity at Carolina Fine Snacks increased to 90% after the hiring of several disabled individuals through a local vocational rehabilitation center. *Small Business and the Americans With Disabilities Act* (CNN television broadcast, July 30, 1994) *available in* Westlaw, ALLNEWS, 1994 WL 3825086.

litigation on this issue.[117] In order to alleviate the incongruous results reached in the past, courts must discard the idea that presence is an essential function and focus on whether the disability can be reasonably accommodated.

Although employers clearly have an interest in having productive employees, the plain language of the ADA requires employers to modify policies based on able-bodied norms to accommodate the disabled. Furthermore, absenteeism can be, and is, accommodated all the time. Finally, in the litigation context, employers can and should be required, as far as is practicable, to quantify undue hardship.

If the ADA is to live up to its mandate for the elimination of discrimination against individuals with disabilities rather than evolving into a mere token, courts must take responsibility for applying its provisions in a manner that remains true to the spirit in which the legislation was created. In a political climate that has become increasingly hostile to any measure perceived as special treatment for discrete groups, courts may be the only institutions capable of enforcing the mandate against discrimination. Consequently, courts, like employers, have an affirmative duty to accommodate chronically ill employees by setting aside preconceived notions and allowing plaintiffs the opportunity for full and fair consideration of their claims.

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117. The ability to predict the outcome of litigation in ADA cases may become even more critical given the backlog of discrimination cases the EEOC currently faces. This backlog means that plaintiffs will increasingly seek private lawyers to pursue complaints. Peter T. Kilborn, *EEOC Struggles to Trim Backlog, Bureaucracy*, THE NEWS TRIB. (Tacoma), Nov. 26, 1994, at A1.