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The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?

The Americans with Disabilities Act of 1990 (ADA),¹ signed into law on July 26, 1990, has been heralded by its proponents as the "Emancipation Proclamation"² for individuals with disabilities, and criticized by its opponents as the "Lawyer's Employment Law."³ The ADA's opponents fear that it will flood the courts with litigation and impose financial burdens which will destroy small businesses.⁴ The duties imposed under Title I of the ADA will undoubtedly have an impact on small businesses, and the terms of the Act are likely to result in litigation, as have all civil rights laws, and indeed most legislation. Yet, these worries have been to some degree exaggerated⁵ and are outweighed signifi-

1 42 U.S.C.S. § 21,101 (Law. Co-op. Supp. Feb. 1991).

2 Tucker, *The Americans with Disabilities Act: An Overview*, 4 U. ILL. L. REV. 923, 923 (1989). See Elsasser, *Senate Ok's Rights Bill for Disabled*, Chi. Trib., Sept. 8, 1989, § 1, at 1, col. 2; Horvath, *Disabled Rights Bill Praised and Feared*, Newsday, Sept. 9, 1989, at 2, col. 3.

3 *Review and Outlook: The Lawyers' Employment Act*, Wall St. J., Sept. 11, 1989, at A18, col. 1. See also *What's Wrong with the New Civil Rights Bill*, Wash. Post, Sept. 2, 1989, at A23, col. 3 (accusing the ADA of encouraging adversarial relationships and litigation as opposed to cooperative efforts to eliminate discrimination); Tucker, *supra* note 2 at 929.

4 135 CONG. REC. 10,773 (1989) (statement of Sen. Helms (R-N.C.)). See, e.g., Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229 (1990).

5 Tucker, *supra* note 2, at 930 (employers who currently employ workers with disabilities report that there is no significant cost difference in hiring individuals with disabilities as opposed to individuals who do not have disabilities). A 1982 study showed that only 22% of employees with disabilities required accommodations, 51% of which were achieved at no additional cost, 30% of which were at a cost of less than \$500. Also, the cost of insurance for the employer did not increase when individuals with disabilities were hired. *Id.* See also I BERKELEY PLANNING ASSOCS., A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS 20, 29 (1982); LOUIS HARRIS & ASSOCS., INC., THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 9 (1987) (Study No. 864009); *Hiring the Handicapped: Overcoming Physical & Psychological Barriers in the Job Market*, 1986 J. AM. INS., at 13, 17; Nathanson, *The Disabled Employee: Separating Myth from Fact*, HARV. BUS. REV., May-June 1977, at 6; Comment, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1513 (1973).

cantly by the benefits of the ADA⁶.

The ADA is designed to establish a "clear and comprehensive prohibition of discrimination on the basis of disability."⁷ Congress found that some 43,000,000 Americans have one or more physical or mental disabilities and that discrimination against such individuals is a serious and pervasive social problem.⁸ Furthermore, persons with disabilities have often had no legal recourse against discrimination.⁹ Prompted by these findings, Congress created the ADA to prohibit discrimination against individuals with disabilities and to establish a means of enforcing the mandate.¹⁰

Individuals with disabilities have faced various and sometimes unique forms of discrimination ranging from outright exclusion to the discriminatory effects of architecture, transportation, and communication barriers. They have been subjected to unequal treatment and relegated to an inferior and politically powerless position in society. This treatment is based upon characteristics which are beyond the control of individuals with disabilities and stereotypic assumptions which are not truly indicative of the individual abilities of persons with disabilities to participate in and contribute to our society.¹¹ Congress created the ADA to combat those stereotypic assumptions and to enable Americans with disabilities to participate in and contribute to society according to their abilities.

A part of the congressional findings regarding the ADA, based on statistics from a 1989 report of the Census Bureau, indicates that the numbers of men and women with disabilities in the workforce is declining as is the earned income of those individuals.¹² These statistics are a product not only of discrimina-

6 See generally Tucker, *supra* note 2, at 930-31.

7 S. REP. NO. 558, 101st Cong., 2d Sess. 1 (1990).

8 *Id.* at 3. Congress did not intend the term "Americans" to imply that the ADA applies only to United States citizens. The Act applies to all individuals with disabilities regardless of citizenship, status, or nationality. 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.1(a)) (proposed Feb. 28, 1991).

9 S. REP. NO. 558, 101st Cong., 2d Sess. 3 (1990). Individuals with disabilities have been protected by the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. (1988). The Rehabilitation Act limits protection to individuals with disabilities who work for employers who receive federal financial assistance or who were government contractors. 29 U.S.C. §§ 793-94.

10 S. REP. NO. 558, 101st Cong., 2d Sess. 3 (1990).

11 *Id.* at 3-4.

12 For instance, in 1988, only 23.4% of men with disabilities worked full-time (down from 29.8% in 1981) and 13.1% of women with disabilities worked full-time (up from 11.4% in 1981), and the earnings of men with disabilities fell from 77% of what all

tion in hiring practices, but also of a lack of equal opportunity in promotions and privileges in employment. Congress therefore designed Title I of the ADA to remedy these pervasive discriminatory employment practices.

Title I of the ADA provides that no employer covered by the Act¹³ 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.”¹⁴

Section 12,112(b) defines the term “discrimination,” and includes seven specified actions which are discriminatory.¹⁵ This Note concerns primarily the fifth act, or nonact,¹⁶ which includes

workers made in 1981 to 64% of what all workers made in 1988 while the earnings of women with disabilities fell from 69% of all in 1981 to 62% of all in 1988. Tucker, *supra* note 2, at 926. See *Study on Disabled and Jobs Finds Work and Good Pay Are Scarce*, N.Y. Times, Aug. 16, 1989, at A22, col. 3; Hey, *Study finds Workers with Disabilities Losing Ground*, Christian Sci. Monitor, Aug. 17, 1989, at 7, col. 2. See also 56 Fed. Reg. 8,578, 8,579 (1991) (Introduction to Preliminary Regulatory Impact Analysis for proposed regulations implementing Title I of the ADA, to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991); DIGEST OF DATA ON PERSONS WITH DISABILITIES, CONGRESSIONAL RESEARCH SERVICE, June 1984 (using a 1978 Social Security Administration survey reporting the unemployment rate of disabled individuals).

13 The ADA applies to any employer, employment agency, labor organization, or joint labor-management committee. An employer is generally defined as a person engaged in industry affecting commerce who employs 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C.S. § 12,111(5)(A) (Law. Co-op. Supp. Feb. 1991). The ADA excludes the United States, a corporation wholly owned by the United States, an Indian tribe, a bona fide private club, and for the first two years after the effective date of the act, any employer who has less than 25 employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of that person. 42 U.S.C.S. § 12,111(5)(B). This exclusion is consistent with Title VII of the Civil Rights Act of 1964.

14 42 U.S.C.S. § 12,112(a) (Law. Co-op. Supp. Feb. 1991).

15 Discrimination includes: (1) limiting, segregating, or classifying an individual because of a disability in a manner which adversely affects the opportunities of that person; (2) entering into contractual relationships or arrangements which result in subjecting the disabled individual to prohibited discrimination; (3) using administrative standards or methods that have the effect of discrimination or that perpetuate discrimination; (4) denying equal jobs or benefits to a person because of that person's relationship to or association with a disabled person; (5) not making reasonable accommodations or denying employment opportunities because of the need to accommodate; (6) using qualification standards, tests or selection criteria, not job-related or necessary to the business, which tend to screen out disabled individuals; and (7) failing to select or administer such tests in a manner which accurately reflects the abilities of applicants or employees with impaired sensory, manual or speaking skills rather than reflecting the disability itself. 42 U.S.C.S. § 12,112(b) (Law. Co-op. Supp. Feb. 1991).

16 The duty to provide reasonable accommodation is an affirmative duty, thus the

(1) an employer's failure to provide reasonable accommodations when such accommodations do not impose an undue hardship on the operation of the business, or (2) an employer's denial of job opportunities to an individual with disabilities where the employer bases the denial on the need to accommodate the individual.¹⁷ This provision has caused much of the discussion and controversy surrounding the enactment of the ADA.¹⁸ Although Congress provided definitions of "reasonable accommodation" and "undue hardship," those definitions are broad and require further interpretation. The potentially broad implications of the employer's duty under the ADA worry small businesses, and the uncertain meaning of the terms provoked some to call this Act a "lawyer's dream."¹⁹

This Note explores the scope of an employer's duty to provide reasonable accommodations to employees or prospective employees with disabilities and estimates when that duty will cause an undue hardship on the operation of the business. Part I of this Note explores the scope of persons affected by Title I of the ADA, specifically, those covered as employers and individuals with disabilities. Parts II and III examine the meanings of "reasonable accommodation" and "undue hardship" respectively, focusing on the Equal Employment Opportunity Commission's proposed regulations implementing Title I of the ADA (ADA regulations),²⁰ and the use and interpretation of these and related terms under the Rehabilitation Act of 1973.²¹ These parts also examine some state statutes which use similar language and case law interpreting these statutes.²² Part IV concludes that the benefits to Americans with disabilities provided by the ADA far outweigh the costs to employers who will no longer be able to exclude individuals with disabilities from their employ.

failure to act is discriminatory inaction.

17 42 U.S.C.S. § 12,112(b)(5)(A) & (B) (Law. Co-op. Supp. Feb. 1991).

18 See generally *supra* notes 2-4.

19 Elsassner, *supra* note 2, at 4 (quoting Sen. David Pryor (D. Ark.)).

20 Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 8,578 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991).

21 29 U.S.C. §§ 701 et seq. (1988).

22 Congress has clearly stated that the ADA is based on the Rehabilitation Act of 1973 and should be interpreted accordingly. However, the Supreme Court of the United States has had limited opportunity to interpret the relevant provisions of the Rehabilitation Act and the lower federal court sometimes arrive at conflicting results due to the fact specific nature of the law. Many state courts have much more experience with disability law, especially in the private sector. Thus, it is beneficial to consider state court decisions where the terms of the state statutes are sufficiently similar to the ADA.

I. WHO HAS THE DUTY TO WHOM?

While Congress purportedly based the reasonable accommodation section of the ADA on the Rehabilitation Act,²³ the ADA is a much broader emancipation for individuals with disabilities. This is primarily due to the broad definition of “employer” contained in the ADA and also in part to the definition of “disability.” The broad scope of the Act is the source of the controversy surrounding burdens feared by businesses.

A. Covered entities under the ADA

The ADA creates a field of employment opportunity for qualified individuals with disabilities that knows almost no bounds. The Act tries to ensure that social prejudice and ignorance do not limit individuals with disabilities in employment opportunities. Qualified individuals with disabilities can now enter the private sector without fear of discrimination or at least with a means of recourse against any discrimination they might encounter. Until the ADA was enacted, this guaranteed protection existed only under the Rehabilitation Act and some state laws. Under the Rehabilitation Act, the protection applies only when employers receive federal financial assistance, or are government contractors.²⁴ The Rehabilitation Act provides in part that:

[n]o otherwise qualified individual with handicaps in the United States, . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.²⁵

Furthermore, “[s]mall providers are not required . . . to make significant structural alterations to their existing facilities for the

23 Lindsay, *Discrimination against the Disabled: The Impact of the New Federal Legislation*, 15 EMP. REL. L.J. 333, 334 (Winter 1989-90) (report issued by the Senate Labor Committee indicates that the ADA is modeled after the Rehabilitation Act as it has been interpreted by courts and federal agencies). The regulations implementing the ADA are also modeled on the regulations implementing section 794 of the Rehabilitation Act, as amended. 56 Fed. Reg. 8,578 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991).

24 29 U.S.C. §§ 793-94 (1988).

25 29 U.S.C. § 794 (1988).

purpose of assuring program accessibility, if alternative means of providing the services are available."²⁶

The ADA, on the other hand, prohibits similar discrimination, but extends the prohibition to employers within the private sector who do not receive federal assistance or are not government contractors.²⁷ The ADA completely excludes small employers, those having fifteen or less employees.²⁸ Essentially, the ADA has created the possibility of employment for individuals with disabilities in nearly all employment areas, not only those related to the federal government.

Prior to the ADA, individuals with disabilities seeking jobs from employers not covered by the Rehabilitation Act had to rely on state laws for protection against discrimination.²⁹ State anti-discrimination legislation varies regarding both the scope of employers covered and the individuals protected. While most states have broad anti-discrimination laws in this area which apply to the private employer,³⁰ the laws vary regarding the size of employers subject to the laws' requirements. Some states do not exempt small employers at all, while others have a lower minimum number of employees for exclusion.³¹ Fourteen states include all employers in their disability laws, but most of the others exclude businesses with less than fifteen employees.³²

The enactment of the ADA does not affect the rights and remedies available to individuals with disabilities under current

²⁶ *Id.*

²⁷ See *supra* note 13 and accompanying text.

²⁸ Also, for the first two years after the Act becomes enforceable, employers with less than twenty-five employees are excluded from compliance. See *supra* note 13.

²⁹ *E.g.*, CAL. GOV'T CODE §§ 12,921, 12,932, 12,940, 12,994 (West 1980 & Supp. 1991); DEL. CODE ANN. tit. 19, § 721 et. seq. (1985 & Supp. 1990) (very similar to ADA); Michigan Handicapper's Civil Rights Act, MICH. COMP. LAWS ANN. § 37.1101 (West 1985 & Supp. 1990) (also similar); N.M. STAT. ANN. §§ 28-1-2 to 28-1-7 (1987 & Supp. 1989); WIS. STAT. ANN. § 111.34 (1988 & Supp. 1990) (similar to ADA). See Singer, *Employment Rights of the Handicapped under State Law*, 1983 L. NOTES 115 (provides cites to all but fourteen-state disability laws).

Attempts to obtain relief under the common law or the United States Constitution have been generally unsuccessful. See, *e.g.*, *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982). See Chin, *Discrimination Against the Handicapped: The Duty of Reasonable Accommodation*, 1989 N.Y.U. 42D ANN. NAT'L CONF. ON LAB. § 14.02.

³⁰ Frierson, *Determining Coverage Under the Handicapped Employment Laws*, 40 LABOR L.J. 630, 630 (1989) (the laws of Alabama and Arkansas apply only to government units, and Mississippi covers government units and contractors).

³¹ *Id.*

³² *Id.*

federal and state statutes and common law.³³ As stated in the proposed ADA regulations, the ADA "does not invalidate or limit the remedies, rights, and procedures" of the law of any jurisdiction "that provides greater or equal protection for the rights of individuals with disabilities" than the ADA provides.³⁴ Thus, an employer may not use in his defense a law which imposes a lesser standard than the ADA. On the other hand, the employer may not use the ADA as a defense for failing to meet a higher standard of another law to which the employer is subject.³⁵ The appendix to the proposed regulations states, as an example, that the ADA would not be a defense to an employer who failed to collect information required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act.³⁶ Nevertheless, if another Federal law requires a challenged action, or prohibits an action which would otherwise be required by the ADA, the employer may be able to use that law as a defense.³⁷ Furthermore, the only remedies available to individuals seeking redress under Title I of the ADA are the remedies of Title VII of the Civil Rights Act of 1964.³⁸

B. *Who are the Disabled?*

The classification of individuals with disabilities under the ADA is very similar to that under the Rehabilitation Act. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment."³⁹ An individual must satis-

33 *Americans with Disabilities Act of 1990: Law and Explanation*, 320 Lab. L. Rep. (CCH), 43 (No. 395, July 31, 1990) [hereinafter *Law and Explanation*]. Agencies enforcing the Rehabilitation Act and the ADA should make efforts to avoid inconsistent and conflicting standards. *Id.* Also, the provision in the ADA concerning employees in food handling positions, *infra* note 35, contains a provision which makes clear that state and local public health laws and regulations are not preempted by the ADA. *Id.* at 39.

34 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. pt. 1630.1(c)(2)) (proposed Feb. 28, 1991).

35 *Id.* (to be codified at 29 C.F.R. app. 1630.1(a)).

36 *Id.*

37 *Id.*

38 *Law and Explanation, supra* note 33, at 39. "[I]t is probable that the simultaneous broadening of anti-discrimination coverage by Congress and the Supreme Court's narrowing of legal redress for victims of civil right's violations, in almost contrary ways will effect how lawyers and advocates attempt to represent their clients and promote legal change." Parry, 1989 and *Persons with Disabilities: A Year of Change without Real Progress Overall*, 13 MENTAL AND PHYSICAL DISAB. L. REP. 498, 498 (1989).

39 42 U.S.C.S. § 12,102(2) (Law. Co-op. Supp. Feb. 1991). See 56 Fed. Reg. 8,578,

fy at least one of these parts in order to be an individual with a disability under the ADA.⁴⁰

To determine whether an individual satisfies one part of the definition, courts and employers will have to understand what each part means. Each part contains terms which require further clarification. The courts and the federal agencies responsible for enforcing the ADA will likely interpret the Act in accordance with the ADA regulations.⁴¹ Consistent with legislative intent, the ADA regulations are modeled after the regulations implementing the Rehabilitation Act (Rehabilitation Act regulations) set by the Departments of Justice, Health & Human Services, and Education as well as the Equal Employment Opportunity Commission (EEOC) and the Department of Labor.⁴² The proposed ADA regulations also define terms not previously explained by the Rehabilitation Act regulations such as "substantially limits," "essential functions," and "reasonable accommodation."⁴³

In drafting the ADA regulations, the EEOC used the Rehabilitation Act regulations and case law to establish parameters which they intended to serve as guidelines for the case by case inquiries that determinations under the ADA may require.⁴⁴ It is therefore useful for courts and employers to reference both the ADA regulations and the Rehabilitation Act regulations and case law when confronted with issues under the ADA.

Both sets of regulations address the three prongs of the definition of "disability." The first prong of the definition, a physical or mental impairment which substantially limits one or more of an individual's major life activities, presents three interpretive hurdles: "physical or mental impairment," "substantially limits," and "major life activity." According to the ADA regulations, "physical or mental impairment" means

8,587 (1991) (to be codified at 29 C.F.R. pt. 1630.2(g)) (proposed Feb. 28, 1991). Cf. 29 U.S.C. § 706(8)(B) (1988) ("individual with handicap" includes "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.").

⁴⁰ 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.2(g)) (proposed Feb. 28, 1991).

⁴¹ *Id.*

⁴² This is the intent of the House Committee on Education and Labor as stated in H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 50 (1990). See also Frierson, *supra* note 30, at 631.

⁴³ 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.2(g)) (proposed Feb. 28, 1991).

⁴⁴ *Id.*

- (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.⁴⁵

This interpretation is consistent with the Rehabilitation Act regulations.⁴⁶ The ADA regulations are also consistent with the Rehabilitation Act regulations regarding "major life activities." "Major life activities" includes functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁴⁷ This list is not exhaustive.⁴⁸

While consistent with the ADA definitions of the previous two terms, the Rehabilitation Act regulations do not adequately define "substantially limits." This term is essential to any determination that an individual has a disability. For, although an individual may have one or more impairments, the impairment, or the combination of impairments, does not rise to the level of a disability unless it substantially limits one or more of the individual's major life activities.⁴⁹ Under the ADA regulations, "substantially limits" means:

- (i) Unable to perform a major life activity that the average

45 *Id.* (to be codified at 29 C.F.R. app. 1630.2(h)) (proposed Feb. 28, 1991).

46 The ADA regulations state in the Appendix that the term adopts the Rehabilitation Act regulation at 34 C.F.R. pt. 104 (1990). 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.2(i)) (proposed Feb. 28, 1991). Under the Rehabilitation Act regulations, the term "physical or mental impairment" includes "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body's systems (including the reproductive and the 'skin' systems) and any mental or psychological disorder." See Department of Justice Regulations, 28 C.F.R. § 41.31(b)(1) (1990); EEOC Regulations, 29 C.F.R. §§ 1613.701(a), 702(b) (1990); Department of Education Regulations, 34 C.F.R. § 104.3 (1990); Department of Health & Human Services Regulations, 45 C.F.R. § 84.3(j)(2)(i) (1990). See also Lindsay, *supra* note 23, at 336.

47 56 Fed. Reg. 8,578, 8,587 (1991) (to be codified at 29 C.F.R. pt. 1630.2(ii)) (proposed Feb. 28, 1991). The Rehabilitation Act defines "major life activity" in the same terms. See 28 C.F.R. § 41.31 (b)(2) (1990); 29 C.F.R. § 1613.702(c) (1990); 45 C.F.R. § 84.3(j)(2)(ii) (1990). A similar definition of "life activities" is available at 41 C.F.R. § 60-741, App. A (1990).

48 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.2(i)) (proposed Feb. 28, 1991). Others may include sitting, standing, lifting and reaching. *Id.*

49 *Id.* at 8,593 (1991) (to be codified at 29 C.F.R. app. 1630.2(j)).

person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁵⁰

For example, a paraplegic is unable to walk and therefore is substantially limited in the major life activity of walking. Similarly, a person who needs medication or enabling devices to perform a major life activity is significantly restricted in that activity. For instance, an individual who needs prosthetic devices to walk, or a diabetic who needs insulin regularly to prevent lapsing into a coma are significantly restricted.⁵¹

However, if the impairment limits the individual in a way that brings that person to the level of an average individual, then the individual is not substantially limited.⁵² For example, if the individual formerly had exceptionally keen eyesight, and the impairment limits him or her to an average range of vision, that person is not substantially limited in the major life activity of seeing.

The ADA regulations further provide a list of factors for courts and employers to consider in determining whether an individual is substantially limited in a major life activity. They should consider:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.⁵³

The term "duration" refers to the length of time an impairment persists, and "impact" refers to the residual effects of the impairment.⁵⁴ For example, a broken collar bone which takes three weeks to heal is an impairment of limited duration. But if the bone heals improperly, the impairment may have the impact of permanent decrease in the range of arm mobility.

After lengthy discussion and dispute, Congress concluded that this part of the disability definition in the ADA includes individu-

50 *Id.* at 8,587 (to be codified at 29 C.F.R. pt. 1630.2(j)(1)).

51 *Id.* at 8,593 (to be codified at 29 C.F.R. app. 1630.2(j)).

52 *Id.*

53 *Id.* at 8,587 (to be codified at 29 C.F.R. pt. 1630.2(j)(2)).

54 *Id.* at 8,593 (to be codified at 29 C.F.R. app. 1630.2(j)).

als infected with the Human Immunodeficiency Virus (HIV).⁵⁵ “[A] person infected with the [HIV virus] is covered under the first prong of the definition of the term ‘disability’ because of a substantial limitation to procreation and intimate sexual relationships.”⁵⁶

Although the Rehabilitation Act regulations do not generally address the definition of “substantially limits,” they do address the term when it applies to the major life activity of working. Under the Rehabilitation Act the “phrase ‘substantially limits’ means the degree that the impairment affects employability. An individual with a disability who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited.”⁵⁷

The ADA regulations clarify this area stating that when considering the major life activity of “working:”

(i) The term “substantially limits” means significant restricted [sic] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.⁵⁸

Courts and employers determining the issue of whether an individual is substantially limited in the major life activity of working should also consider the following factors:

55 However, the ADA contains a provision whereby employers of individuals engaged in food handling services will not be required to hire individuals with infectious diseases which can be transmitted to others through the handling of foods, the threat of which cannot be eliminated through reasonable accommodations. The Secretary of Health and Human Services is to establish and continuously update a list of diseases covered by this exemption. 42 U.S.C.S. § 12,113(d) (Law. Co-op. Supp. Feb. 1991). Placing the disease on the list does not automatically exempt an employer from complying with the ADA, however, for the parties in question will still have to make determinations as to disability, reasonable accommodation, and undue hardship. 136 CONG. REC. H4598 (daily ed. July 12, 1990) (Joint Explanatory Statement, Report 101-596). It is yet to be seen whether AIDS will be included in the list. 136 CONG. REC. S9538-9540 (daily ed. July, 11, 1990) (remarks of Mr. Hatch).

56 Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 52 (1990) (noting statement of the Department of Justice regarding the same definition under the Rehabilitation Act in “Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals,” September 27, 1988, at 9-11). See also 136 CONG. REC. H2442 (daily ed. May 17, 1990) (remarks of Mr. Weiss).

57 Department of Labor, Office of Federal Contract Compliance Programs, 41 C.F.R. § 60-741.2 (interpreting § 793, or § 503, of the Rehabilitation Act).

58 56 Fed. Reg. 8,578, 8,587 (1991) (to be codified at 29 C.F.R. pt. 1630.2(j)(3)) (proposed Feb. 28, 1991).

- (A) The geographical area to which the individual has reasonable access;
- (B) The job from which the individual has been disqualified because of an impairment and the number of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class or jobs); and/or
- (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).⁵⁹

For example, a person with a fear of heights may not be able to work as an accountant on the top floor of the Sears Tower, but could work as an accountant in other offices. Therefore, that person is not substantially limited in the major life activity of working. Furthermore, an individual is not substantially limited in working because he or she is no longer able to perform a specialized job or profession requiring extraordinary skill, prowess, or talent.⁶⁰ Thus, an opera singer whose voice changes as a result of a throat ailment may not be able to gain employment as an opera singer any longer, but he or she is not substantially limited in working merely because he or she can no longer perform that chosen specialty. The range of jobs that the former opera singer is unable to perform is narrow. The former singer can apply the opera training to other positions in the same class (administrator or critic, perhaps). The same applies to professional athletes and specialized surgeons who sustain injuries which end their specialized careers (for example, serious hand injuries to quarterbacks and brain surgeons). Each can apply their skill and knowledge to some other aspect of the field, such as coaching or teaching. And because the individuals are not limited in other major life activities, they can gain employment in other classes of jobs as well.⁶¹

On the other hand, the limitation in working does not have to be complete.⁶² An individual will be substantially limited in

59 *Id.* (to be codified at 29 C.F.R. pt. 1630.2(j)(3)(ii)).

60 *Id.* at 8,593 (to be codified at 29 C.F.R. app. 1630.2(j)(3)).

61 *Id.* See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), *vacated sub nom.* *E.E. Black, Ltd. v. Donovan*, 27 Empl. Prac. Dec. (CCH) § 32,199 (D. Haw. 1981).

62 56 Fed. Reg. 8,578, 8,593 (1991) (to be codified at 29 C.F.R. app. 1630.2(j)(3))

the major life activity of working if the individual is significantly restricted in a whole class of jobs or a broad range of jobs in many classes.⁶³ For instance, a person with asthma who is restricted from heavy labor jobs, which is a whole class of jobs, is substantially limited in working. Similarly, a person who is claustrophobic may be unable to ride elevators. Therefore, that person would be restricted from a broad range of jobs in many classes which require the individual to work in offices near the top of high rise buildings. That person also is substantially limited in the major life activity of working.

Essentially, the question of whether a condition is a disability depends on the effect it has on the individual's lifestyle and work and whether it limits a major life activity.⁶⁴ When the conditions, manner, or duration under which a person can perform a major life activity is substantially limited, that person has a disability under the ADA.⁶⁵ Both the cause and the ability to mitigate the effect of the disability are irrelevant to the determination of whether a person has a disability.⁶⁶ For instance, even though a hearing aid will improve the hearing of some people, and even though medication can control the limiting effects of diabetes and other diseases, the ADA still covers individuals with these disabilities.⁶⁷

However, mere cuts and bruises or minor and temporary problems, such as a sprained finger, are not disabilities. Simple physical characteristics such as eye or hair color, a large nose, or crooked teeth also are not disabilities. Nonetheless, the ADA is expected to receive liberal construction in even this area, as the proponents of the Act asserted that the "physically unattractive members of our society" deserve protection.⁶⁸ The broad definition of disability allows this liberal construction. For instance, while a person with temporary problems is not limited in a major life function, employers may perceived that person as having such a limitation, and he or she therefore has a disability under one of the other prongs of the definition.⁶⁹

(proposed Feb. 28, 1991).

63 *Id.*

64 *See supra* note 47.

65 *Law and Explanation, supra* note 33, at 12.

66 *Id.* at 3.

67 *Id.*

68 *Id.* at 336-37. *See also Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035 (1985).

69 For instance a burn victim with severe disfigurement may be regarded as having

Thus, if an individual has a physical or mental impairment which substantially limits a major life activity, that individual has a disability under the first part of the ADA's definition. But, if the person does not fit this part of the definition, he or she still may be an individual with a disability under one of the other two parts of the definition.

The second prong of the disability definition includes a person having a record of an impairment. Having a record of such impairment means having a history of, or having been classified as having, a mental or physical disability which substantially limits a major life activity.⁷⁰ This classification would include, for example, an individual with a history of a heart condition or mental illness. To satisfy this prong of the definition, an employer must have relied on records, such as education, medical, or employment records, which indicate, correctly or not, that the individual has or has had an impairment which substantially limits a major life activity.⁷¹ This section has been incorporated into the ADA, as it was in the Rehabilitation Act, because attitudes in the workforce toward a person with a previous disability might result in the individual having difficulty securing, retaining, or advancing in employment.

For similar reasons, the category of individuals regarded as having a disability was added to the Rehabilitation Act and is in-

an impairment and thus be substantially limited in the life activity of working due to social or employer attitudes, even though the disfigurement, absent the disabling perception, does not limit such activity. *Law and Explanation, supra* note 33, at 14.

70 56 Fed. Reg. 8,578, 8,587 (1991) (to be codified at 29 C.F.R. pt. 1630.2(k)) (proposed Feb. 28, 1991). This is consistent with the Rehabilitation Act regulations. *See* 28 C.F.R. § 41.31(b)(3) (1990); 29 C.F.R. § 1613.702(d) (1990); 45 C.F.R. § 84.3(j)(2)(ii) (1990). According to 41 C.F.R. § 60-741, App. A (1990), this phrase includes individuals who have completely recovered from mental or physical impairment.

California law has a similarly broad definition of handicap, at least in terms of the manner in which the California courts have interpreted ANN. CAL. GOV. CODE § 12920 (West 1980 & Supp. 1991). In *Am. Nat'l Ins. Co. v. Fair Employment and Hous. Comm.*, 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982), the California Supreme Court found that high blood pressure is a disability under that law. In dismissing the argument that only currently disabling problems are covered, the court stated that "[t]o limit 'handicap' to present disabilities would . . . proscribe discrimination based on current, manifest, physical dysfunction while allowing exclusion on the basis of conditions—like high blood pressure—that may handicap in the future but have no presently disabling effect." 651 P.2d at 1155.

71 56 Fed. Reg. 8,578, 8,593-94 (1991) (to be codified at 29 C.F.R. app. 1630.2(k)) (proposed Feb. 28, 1991). The fact that an individual is considered "disabled" for the purposes of another law does not mean that the individual automatically is considered as having a disability for the purposes of the ADA. *Id.*

cluded in the ADA.⁷² This category includes an individual who:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having such an impairment.⁷³

The first part of this category includes a person who has an impairment which is not substantially limiting, but is treated by an employer as if the impairment were so.⁷⁴ In such cases, an employer may offer an accommodation for the individual's impairment when no accommodation is necessary.⁷⁵ For instance, an employer may reassign a laborer with a limp to lighter duty when in fact the limp does not affect the individual's work. This individual is regarded as having a disability.

The next category of individuals regarded as having disabilities are those who are substantially limited, but only because of other people's attitudes toward their condition or impairment.⁷⁶ This includes individuals who have disfigurements or scars or other noticeable characteristics. Employers may discriminate against such individuals due to unfounded fears that the reactions of customers or co-workers may be damaging to business or productivity. While the individual is not limited in any major life activity, the employer regards the individual as having a disability and acts according to that perception.⁷⁷

Finally, in the third category of individuals regarded as having disabilities are individuals who are believed to have disabilities, but, in fact, do not.⁷⁸ For instance, if an employer discriminates

72 42 U.S.C.S. § 12,102(2)(C) (Law. Co-op. Supp. Feb. 1991).

73 56 Fed. Reg. 8,578, 8,587-88 (1991) (to be codified at 29 C.F.R. pt. 1630.2(l)) (proposed Feb. 28, 1991). This is consistent with the Rehabilitation Act regulations. See 28 C.F.R. § 41.31(b)(4) (1990); 29 C.F.R. § 1613.702(e) (1990); 41 C.F.R. § 60-741, App. A (1990); 45 C.F.R. § 84.3(j)(2)(iv) (1990).

74 56 Fed. Reg. 8,578, 8,594 (1991) (to be codified at 29 C.F.R. app. 1630.2(l)) (proposed Feb. 28, 1991).

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

against an employee based on an unfounded rumor that the employee has hepatitis or is mentally unstable, that individual is regarded as having a disability. The employer has discriminated against the individual on the basis of that disability.⁷⁹

To consider an individual as having a disability under this third part of the definition, the ADA assumes that employers similar to the discriminating employer (same class of jobs or geographic area) would also regard the individual as having a disability.⁸⁰ For instance, suppose a farmer will not hire people with red hair as field laborers because he fears that absences for severe sunburn will decrease productivity. The farmer regards people with red hair as having a disability when in fact they do not have a physical or mental impairment, and they are not limited in any major life activity. Under the ADA, all farmers in the area are presumed to regard red haired people as having a disability. This is a necessary provision because an employer would otherwise be able to use discriminatory disqualifying criteria so long as other employers in the industry or area would not use the same criteria and would hire the individual.⁸¹ If other similar employers would hire the individual, then that individual would not be limited in the major life activity of working. If other farmers in the area would hire a red haired individual, then that individual is not substantially limited in working. Then the individual could not, by definition, be discriminated against on the basis of disability. It is therefore necessary to make the above assumption.⁸²

Through these last categories of "disabilities," it is possible for an individual who does not have a physical or mental impairment to be discriminated against on the basis of disability. Obviously, this broad definition of disability and the potential breadth of construction will present employers and practitioners with some difficulty in deciding who will be covered by the definition. Furthermore, the question of whether an individual has a disability is closely related to the issue of whether he or she is "otherwise qualified" for the position sought. Thus, courts and employers will also have to consider the need for accommodation when deciding the issue of disability. This aspect of disability is discussed in more detail below.⁸³

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *See infra* Part II.

Nonetheless, the ADA has expressly limited the definition in some areas.⁸⁴ For instance, it does not cover individuals currently engaged in the use of illegal drugs⁸⁵ as did the Rehabilitation Act.⁸⁶ Also excluded from the scope of "disability" are homosexuality or bisexuality, transvestism, transsexualism or other sexual disorders, compulsive gambling, kleptomania, or pyromania.⁸⁷ These conditions do not limit major life activities within the meaning of the ADA.⁸⁸ Furthermore, temporary, non-chronic impairments of short duration and little or no long-term impact such as broken limbs, sprained joints, concussions, appendicitis, and influenza are not disabilities.⁸⁹ Obesity is also not a disability except in rare and limiting circumstances.⁹⁰

As has been noted, the ADA definition of disability is similar to the section 706(7) definition under the Rehabilitation Act.⁹¹ Sections 793 and 794,⁹² which use the section 706(7) definition,

84 The regulations list the exceptions to the definition at 56 Fed. Reg. 8,578, 8,588-89 (1991) (to be codified at 29 C.F.R. pt. 1630.3) (proposed Feb. 28, 1991).

85 42 U.S.C.S. § 12,114(a) (Law. Co-op. Supp. Feb. 1991).

86 Cases interpreting the Rehabilitation Act have held that individuals with drug and alcohol addiction have a disability. *E.g.*, *Fuller v. Frank*, 916 F.2d 558 (9th Cir. 1990). See *Lindsay*, *supra* note 23, at 337. However, the Rehabilitation Act was also amended to exclude current drug or alcohol abusers. 29 U.S.C. § 706 (1988), as amended by Pub. L. No. 99-506, 100 Stat. 1807 (1986) (effective October 21, 1986). However, this amendment only applies to §§ 793 and 794, not to § 791.

Another amendment excluded persons with infectious diseases who would constitute a "direct threat to the health or safety" of others. 29 U.S.C. § 706 (1988), as amended by The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (effective March 22, 1988).

87 S. REP. NO. 933, 101st Cong., 1st Sess., 511 (1989), 135 CONG. REC. 10,954, 10,961 (1989). That these conditions are enumerated does not mean that some which are not mentioned are necessarily covered. 135 CONG. REC. 10,785 (1989) (remarks of Mr. Armstrong). See also *Tucker*, *supra* note 2, at 925-26.

88 Of course, if people within the class of enumerated exclusions also have a covered disability, they cannot be discriminated against using this provision as a pretext to discrimination based on the disability.

89 56 Fed. Reg. 8,578, 8,592 (1991) (to be codified at 29 C.F.R. app. 1630.2(g)) (proposed Feb. 28, 1991).

90 *Id.*

91 For a discussion of particular disabilities see 97 A.L.R. Fed. 40 (1990), discussing musculoskeletal disabilities or impairments, sensory function disabilities, cardiovascular and circulatory disabilities, neurological disorders, respiratory impairments, contagious diseases, congenital birth defects, kidney impairments, diabetes, tobacco smoke sensitivity, unspecified transitory illness, mental or psychological disorders, and drug and alcohol addiction. See also *Haines, E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527 (1983) (exploring the ambiguity of the term "handicapped").

92 This section was previously section 504 and has been widely written about as

have been the subject of extensive litigation. The results of this litigation have been incorporated into the ADA regulations⁹³ and will apply to the interpretation of "disability" under the ADA.⁹⁴ Many state disability statutes also use a similar definition of disability or handicap, although the state courts and lower federal courts tend not to be as liberal in their interpretations of the term.⁹⁵ The prior treatment of the term will be useful to those concerned and to the courts.

Ultimately courts will have to decide the question of who has a disability on a case by case basis. As a district court noted in *E.E. Black, Ltd. v. Marshall*:⁹⁶

the real focus must be on the individual job seeker, and not solely on the impairment or the perceived impairment. This necessitates a case-by-case determination of whether the impairment or perceived impairment of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment.⁹⁷

II. THE DUTY TO REASONABLY ACCOMMODATE

Title I of the ADA outlaws many forms of discrimination based upon disability.⁹⁸ The broad language used to define discrimination under the ADA will both protect individuals with disabilities in more ways and will reciprocally impose a broader burden on employers than has any prior federal law, including the

section 504, but this Note will refer to the section under its amended section number, 794.

93 56 Fed. Reg. 8,578 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991).

94 See Tucker, *supra* note 2, at 925.

95 Frierson, *supra* note 30, at 630.

96 497 F. Supp. 1088 (D. Haw. 1980), *vacated sub nom.* E.E. Black, Ltd. v. Donovan, 27 Empl. Prac. Dec. (CCH) ¶ 32,199 (D. Haw. 1981).

97 *Id.* at 1100. *Black* provides one of the most comprehensive studies of the term "handicap" under the Rehabilitation Act. The Court of Appeals for the Sixth Circuit disapproved of the language in *Black* stating that "the court did not adequately analyze the focus and relationship of the definitional elements of the statute—impairment, substantial limitation of major life activity and qualified person." *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985) (the court agreed with the result in *Black* and with the focus on the individual job seeker, but disapproved of the scope of the analysis).

The Supreme Court of the United States addressed the definition of "handicapped individual" under the Rehabilitation Act in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (whether a person afflicted with the contagious disease of tuberculosis is "handicapped" under § 504).

98 See *supra* note 15.

Rehabilitation Act. This Note focuses on discrimination based upon an individual with a disability's need for reasonable accommodations. Under the ADA, the term "discriminate" includes:

- (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
- (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.⁹⁹

For an individual to receive protection from these types of discrimination under the ADA, an individual with a disability must be qualified for the job with or without reasonable accommodations.¹⁰⁰ This means that if an individual can perform the essential functions of the job with reasonable accommodation,¹⁰¹ the person qualifies for the job. If the individual qualifies for the job, the employer must provide the reasonable accommodation and cannot deny employment because of the disability or the need for such accommodation.¹⁰²

These terms present some interpretive hurdles. Specifically, employers and courts will have to determine who is "otherwise qualified." To determine that, they will have to decide the prerequisite job qualifications, the "essential functions" of the job, and the "reasonable accommodations" that might qualify an individual with a disability for the position. Then the employer must examine the available accommodations to determine which ones the employer can reasonably provide.

The proposed ADA regulations and courts' interpretations of

99 42 U.S.C.S. § 12,112 (Law. Co-op. Supp. Feb. 1991).

100 This language was also used under the Rehabilitation Act in *Coley v. Secretary of Army*, 689 F. Supp. 519, 521-22 (D.C. Md. 1987), holding that a person who can perform the essential functions of a position with or without reasonable accommodations is a "qualified handicapped person."

101 The definition also includes individuals who can perform the essential functions of the job without any accommodation.

102 Of course, the ADA imposes no duty if the accommodation would result in an undue hardship on the operation of the business (discussed *infra* Part III). Some state laws which do not require reasonable accommodation require the individual to be qualified despite the handicap. See Frierson, *supra* note 30, at 638.

these terms under the Rehabilitation Act shed light on how courts will interpret the terms under the ADA. One fear that employers have expressed regarding the ADA is that it will be difficult to determine who is an otherwise qualified individual with a disability and what constitutes a reasonable accommodation. There is no doubt that employers will need to make these determinations, but they are given some concessions to alleviate the possible burden of this duty and the transaction costs associated with it. For instance, under the ADA, as under the Rehabilitation Act, an employer need only accommodate known disabilities.¹⁰³ Thus, it is generally up to individuals with disabilities to inform employers of their disabilities and their need for accommodation.¹⁰⁴ Of course knowledge of obvious impairments, such as use of a wheelchair,¹⁰⁵ will be imputed to the employer.¹⁰⁶

A. *"Otherwise Qualified" and "Reasonable Accommodation"*
Under the ADA and the Rehabilitation Act

Not surprisingly, the regulations and case law under the Rehabilitation Act that address the issue of reasonable accommodation center around the terms "otherwise qualified," "essential functions of the job," and "reasonable accommodation." Congress has clearly stated that the reasonable accommodation provision in section 12,112 (b)(5) of the ADA is to be applied as it was under section 794 of the Rehabilitation Act.¹⁰⁷ Thus, the decisions under the Rehabilitation Act are a clear source of guidance for decisions under the ADA. Furthermore, the ADA regulations, using the Rehabilitation Act regulations and case law as guidance, clarify these terms and provide further assistance in interpreting them.

103 42 U.S.C.S. § 12,112(b)(5)(A) (Law. Co-op. Supp. Feb. 1991).

104 56 Fed. Reg. 8,578, 8,599 (1991) (to be codified at 29 C.F.R. app. 1630.9) (proposed Feb. 28, 1991); *Law and Explanation*, *supra* note 31, at 24.

105 56 Fed. Reg. 8,578, 8,599 (1991) (to be codified at 29 C.F.R. app. 1630.9) (proposed Feb. 28, 1991).

106 Still, the duty to accommodate generally arises at the request of the individual with the disability. If no request is made, it is unlawful to provide an accommodation which would be detrimental to the individual. Yet, discussion of the possibility of accommodation with the individual is appropriate. *Law and Explanation*, *supra* note 33, at 24.

107 Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 70 (1990).

1. Qualified with or without accommodation

The ADA, like the Rehabilitation Act, provides that an employer may not discriminate against an “otherwise qualified individual with a disability.”¹⁰⁸ The ADA regulations outline two steps for determining whether an individual is otherwise qualified. First, determine if the individual satisfies the prerequisites for the position, such as education, licenses, experience, or skill.¹⁰⁹ Second, determine whether the individual can perform the essential functions of the job with or without reasonable accommodations.¹¹⁰

Embodied in the term “otherwise qualified” is the presumption that an individual must qualify for the job. This is the first step of the ADA regulations’ two step approach. If an individual with a disability does not meet the legitimate prerequisites of the job, for example a blind woman who applies for a position as a CPA, but who is not a licensed CPA, then the ADA does not protect the individual.¹¹¹ To be eligible for a job, an individual must meet the legitimate qualification standards of the job.¹¹²

108 “Qualified individual with a disability” is defined at 42 U.S.C.S. § 12,111(8) as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Deference is given to the employer for determining what functions of the job are essential, and any description written before a position is advertised will be considered as evidence.

The ADA regulations define “qualified individual with a disability” as “an individual with a disability who satisfies the requisite skill, experience and education requirements” of the position, “and who, with or without reasonable accommodation, can perform the essential functions” of the position. 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(m)) (proposed Feb. 28, 1991).

Compare the definition in the EEOC regulations at 29 C.F.R. § 1613.702(f) (1990), which excludes individuals who would endanger the health and safety of themselves or others. The regulations also specifically require that the individual meet the experience and/or education requirements for the desired position, or meet the criteria for appointment under one of the special appointing authorities for handicapped persons.

109 56 Fed. Reg. 8,578, 8,594 (1991) (to be codified at 29 C.F.R. app. 1630.2(m)) (proposed Feb. 28; 1991).

110 *Id.*

111 Similarly, the employer has the opportunity to show that the individual was fired or passed over in hiring for legitimate reasons other than the disability. *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (epilepsy did not prevent employee from meeting the physical requirements of the job). Educational requirements necessary to the job are an example of legitimate reasons for disqualification. See *supra* note 108.

112 Qualification standards means “the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be

Thus, the prima facie case for an individual with a disability will include a showing that he or she: qualifies for the job, has a disability and, therefore, belongs to a protected class; applied for a job for which there was a vacancy, and was rejected. This raises the presumption that the employer did not hire, or fired, the individual because of the disability.¹¹³ The employer then can overcome the presumption by showing that the individual does not meet the employer's qualification standards and that the employer determined that the individual did not qualify based on a nondiscriminatory evaluation of the individual's competency.¹¹⁴ The employer may also show, as a defense to disparate treatment charges, legitimate alternative grounds for dismissal which are nondiscriminatory.¹¹⁵

Yet, qualification criteria are not always obviously valid or discriminatory. Some cases under the Rehabilitation Act have provided guidelines for determining whether a job requirement is discriminatory. In *Davis v. Meese*,¹¹⁶ the court established that requirements for a specific position must be (1) directly connected with and (2) substantially promote legitimate safety and job performance concerns and (3) be tailored to those concerns.¹¹⁷ In that case, an insulin-dependant diabetic was held not otherwise qualified to be a Special Agent of the FBI.¹¹⁸ The decision rested primarily on the court's estimation of the potential risk of an insulin-dependant diabetic having a severe hypoglycemic occurrence while on a dangerous duty assignment. The court tried to determine an acceptable degree of risk by weighing the nature of the job and the probability of an occurrence, but the results were too uncertain.¹¹⁹ The court noted that "[n]o known method es-

eligible for the position held or desired." 56 Fed. Reg. 8,578, 8,588 (to be codified at 29 C.F.R. pt. 1630.2(q)) (proposed Feb. 28, 1991).

113 *Rosiak v. United States Dept. of Army*, 679 F. Supp. 444, 449-50 (M.D. Pa. 1987), *aff'd without op.*, 845 F.2d 1014 (3d Cir. 1988); *Strathie v. Dept. of Trans.*, 716 F.2d 227 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981).

114 *See Gurmankin v. Costanzo*, 411 F. Supp. 982, 992 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) (Rehabilitation Act not addressed on appeal).

115 56 Fed. Reg. 8,578, 8,590 (1991) (to be codified at 29 C.F.R. pt. 1630.15(a)) (proposed Feb. 28, 1991).

116 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

117 *Id.* at 517. *See Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (diabetes).

118 *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988) (court considered the nature of the job and determined that the danger and often out-of-the-way places agents operate in outweighed the rarity of hypoglycemic occurrences).

119 *Id.* at 516.

establishes within reasonable medical certainty, that the risk as to any individual is nonexistent, minimal, or even very small, or any basis to quantify such risk in any and all situations reasonably likely to occur on the job."¹²⁰ The court also noted that the worst case scenario could be devastating to the government, co-workers, the public, and the diabetic agent.¹²¹ Based on this fact, the court rejected a case-by-case determination for the position and allowed a blanket exclusion based on the relevant, legitimate, physical requirement.¹²² Thus, one could say that a legitimate prerequisite qualification, or preliminary disqualifying criteria, for the position of Special Agent is not to have diabetes. Since diabetics are a safety risk in this particular position, the requirement is legitimate under the court's reasoning.

Consistent with *Davis*, the ADA regulations include safety standards as an example of legitimate qualification standards.¹²³ The regulations provide that an employer "may require, as a qualification standard, that an individual not pose a direct threat to

120 *Id.* at 517. See *Salmon Pineiro v. Lehman*, 653 F. Supp. 483 (D.C. Puerto Rico 1987) (Navy criminal investigator with epilepsy found not qualified by reasoning similar to *Davis*). Cf. *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (court looked to the individual diabetic and his work history).

121 692 F. Supp. at 516.

122 *Davis v. Meese*, 692 F. Supp. at 517. See *Southeastern Comm. College v. Davis*, 442 U.S. 397, 407 (1979) (the Supreme Court emphasized that "legitimate physical qualifications may be essential to participation in particular programs."). In this case, the Supreme Court noted that the term "otherwise qualified," with respect to legitimate physical qualifications, would mean qualified "in spite of" the handicap. In support of their position the Court cites the Department of HEW:

The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all of the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms 'qualified' and 'otherwise qualified' are intended to be interchangeable.

Id. (citing 45 C.F.R. § 84, app. A, at 405 (1990)).

The ADA specifically states that an individual's qualification is to be determined despite the disability. See *supra* notes 100-02 and accompanying text. However, the Supreme Court's interpretation of the narrow class of cases involving legitimate physical requirements is not inconsistent with the spirit of the ADA. If a physical requirement is necessary to the job, and no accommodation will enable the disabled individual to meet the requirement, then the individual will not be qualified nor "otherwise qualified."

123 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(q)) (proposed Feb. 28, 1991).

the health or safety of himself/herself or others."¹²⁴ As with any other qualification, the safety requirement must apply equally to all employees and job applicants. Furthermore, an employer must consider whether any reasonable accommodation would reduce the threat posed by the individual to an acceptable level.¹²⁵

Unlike the ADA regulations, the regulation defining "qualified handicapped person" under the Rehabilitation Act does not mention risk considerations.¹²⁶ However, "courts which have applied section [794] unanimously have held that a handicapped individual cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."¹²⁷ The courts have used a variety of tests including the "reasonable probability of substantial harm" test and the "elevated risk" test to determine whether an individual qualifies for a position when he or she poses a safety risk.

In *Jansen v. Food Circus Supermarket, Inc.*,¹²⁸ the supermarket fired an epileptic butcher after determining that he posed a safety threat to himself and his co-workers. The supermarket arrived at this conclusion because medical experts could not "guarantee" that epileptics would not harm themselves or others while cutting meat.¹²⁹ Nonetheless, the Supreme Court of New Jersey held that the employer had violated the state disability law¹³⁰ since it had the burden of proving that the epilepsy presented a "materially enhanced risk of serious injury" to the individual with the disability or other employees.¹³¹ The supermarket had not met that burden because the medical experts who testified for the supermarket did not make an "individualized assessment" of

124 *Id.* (to be codified at 29 C.F.R. app. 1630.2(r)).

125 *Id.*

126 See 45 C.F.R. § 84.3(k)(1) (1990).

127 *Chiari v. League City*, 920 F.2d 311, 316 (5th Cir. 1991) (professional engineer with Parkinson's disease not qualified to be a construction inspector).

128 110 N.J. 363, 541 A.2d 682 (1988).

129 *Id.* *Jansen*, the meat cutter, only had a mild form of the disease and had only had one mild seizure at work.

130 The court was interpreting New Jersey's Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-2.1, 10:5-4.1 (West 1989 & Supp. 1990). Specifically, the court considered the part of the law which states that an employer may terminate "the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment." N.J. STAT. ANN. § 10:5-2.1.

131 110 N.J. at 376, 541 A.2d at 689. The medical expert's report was deficient, in part, because it failed to distinguish between the probability of future seizures and the risk of harm resulting from seizures. 110 N.J. at 377, 541 A.2d at 690. See Frierson, *supra* note 30, at 639.

Jansen's disability and the risk of harm he posed, but they drew conclusions about epileptics generally.¹³²

A similar case involving epilepsy under the Rehabilitation Act also followed the "reasonable probability of substantial harm" test.¹³³ In that case, an epileptic applied for a position with the Postal Service that involved use of a letter sorting machine. The Postal Service declined to hire the individual on the basis of a medical exam which disclosed the condition and the doctor's recommendation that the individual not be allowed to use machines with moving parts. The district court applied the "elevated risk" test (the medical condition created an elevated risk of future injury), and determined that the individual was not otherwise qualified.¹³⁴

The court of appeals reversed the district court, applying the "reasonable probability of substantial harm" test, requiring the employer to gather substantial information regarding the work and medical history of the applicant.¹³⁵ In this case, that history showed that the applicant had worked with machinery significantly in the past without incident or complaint. The history further showed that the applicant had had no daytime seizures in the past few years, and that the few seizures which occurred at work caused no injury to anyone. Thus, the court found the applicant qualified because no probability of substantial harm existed.¹³⁶

132 110 N.J. at 377, 541 A.2d at 690. The ADA regulations require an individual assessment, which means an "individual assessment of both the *particular* job at issue, and of the specific physical or mental limitations of the *particular* individual in need of reasonable accommodations." 56 Fed. Reg. 8,578, 8,599 (1991) (to be codified at 29 C.F.R. app. 1630.9) (proposed Feb. 28, 1991) (emphasis added). *But cf.* Chicago & N.W.R.R. v. Labor & Industry Review Comm., 91 Wis.2d 462, 283 N.W.2d 603, *aff'd*, 98 Wis.2d 592, 297 N.W.2d 819 (1980) (medical testimony regarding epileptics generally allowed to support conclusion that no reasonable probability of future seizures existed for the railroad welder).

133 *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985). *Accord*, *Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986); *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 614 P.2d 891 (1979); *Higgins v. Maine Central R.R. Co.*, 471 A.2d 288 (Me. 1984); *Lewis v. Remmele Eng'g, Inc.*, 314 N.W.2d 1 (Minn. 1981); *Rose v. Hanna Mining Co.*, 94 Wash.2d 307, 616 P.2d 1229 (1980); *Chicago & N.W.R.R. v. Labor & Indus. Review Comm.*, 98 Wis.2d 592, 297 N.W.2d 819 (1980) (welder's epileptic seizure disorder did not present a reasonable probability of hazard on date of his disqualification). *See Frierson*, *supra* note 30, at 640.

134 767 F.2d 1416.

135 *See also Mikucki v. United States Postal Serv.*, 41 Empl. Prac. Dec. (CCH) ¶ 36,635 (D.C.S.D. Mass.), *dismissed, on reconsid.*, 42 F.E.P. Cas. (BNA) 338 (D.C. Mass. 1986) (court cannot determine if a reasonable probability of substantial harm exists without examining the work and medical records of the applicant).

136 *Id. Cf. Chiari v. League City*, 920 F.2d 311 (5th Cir. 1990) (testimony of three

When determining whether a safety risk renders an individual not otherwise qualified, the court must evaluate findings of fact based on reasonable medical judgements about the nature, duration, and severity of risk and probabilities that the disability will cause harm. For instance, in *Arline v. School Board of Nassau County*,¹³⁷ the court determined that a school teacher with a history of tuberculosis was otherwise qualified to teach school children within the meaning of the Rehabilitation Act.¹³⁸ The court found that she posed no threat of communicating the disease to the children, she was on medication, her family had not tested positive for the disease, exposure to the children was for a limited time, and experts testified that she had been cured. The court noted that the School Board did not base its decision to fire the teacher on reasonable medical advice, but rather on "society's accumulated myths and fears about [tuberculosis]."¹³⁹ Neither the threat of injury to others nor the risk to the handicapped individual can be "based on unfounded fears or stereotypes."¹⁴⁰ Thus, courts generally consider individuals with disabilities and their special circumstances in light of the specific job sought. Based on that thoughtful consideration, if the individual legitimately poses a safety risk, the court will determine that the individual is not qualified for the job. In many other cases, the courts have similarly determined that when such a risk is present, the individual is not otherwise qualified for the position.¹⁴¹

physicians as to Chiari's specific condition supported finding that he was unqualified because he posed a safety risk); *Samens v. Labor & Indus. Review Comm.*, 117 Wis.2d 646, 345 N.W.2d 432 (1984) (due to hazardous nature of job and unpredictability of epileptic seizures and ease of triggering seizure, electric company's refusal to hire epileptic as groundman was rationally related to obligation to public safety). See generally Frierson, *supra* note 30, at 639.

137 692 F. Supp. 1286 (M.D. Fla. 1988). Cf. *Foss v. Chicago*, 817 F.2d 34 (7th Cir. 1987).

138 This case has a long history, and the Supreme Court of the United States addressed it several times. For the Supreme Court's discussion of the definition of "handicapped individual" under § 504 of the Rehabilitation Act see *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

139 *Id.* at 284. Note that this is a relevant holding for other communicable diseases including AIDS.

140 *Chiari v. League City*, 920 F.2d 311, 317 (5th Cir. 1990).

141 See, e.g., *Chiari*, 920 F.2d 311 (a significant risk of personal injury can disqualify a person from a job if the employer cannot eliminate the risk). See Frierson, *supra* note 30, at 638.

Similarly, under California law individuals are not protected "where the employee, because of his or her physical handicap, is unable to perform his or her duties, or cannot perform such duties in a manner which would not endanger his or her health or

The ADA regulations adopt the “significant risk of substantial harm” criteria.¹⁴² A speculative, slightly increased, or remote risk is insufficient grounds for firing or denying employment to an individual with a disability.¹⁴³ The regulations confirm that employers and courts should base a determination that an individual with a disability poses a “direct threat” on “a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.”¹⁴⁴ Employers must identify the specific risk posed, as well as the behavior or aspect of the disability which creates the risk.¹⁴⁵ When making the determination, courts and employers should consider:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm; and
- (3) The likelihood that the potential harm will occur.¹⁴⁶

Furthermore, the ADA regulations, consistent with *Arline*, warn against using generalized fears and stereotypic assumptions to determine that an individual with a disability is a “direct threat.”¹⁴⁷

In addition to safety qualifications, courts interpreting the Rehabilitation Act have held other physical qualifications valid. Individuals with disabilities who were denied employment because

safety or the health or safety of others.” ANN. CAL. GOV. CODE § 12940(a)(1) (West 1980 & Supp. 1991). Under that law, the employer is required to show more than a mere possibility of future injury. *Sterling Transit v. Fair Employment Practice Comm.*, 28 Emp. Prac. Dec. § 32,543 (1981) (truck driver with prior back injury not disqualified because evidence did not conclusively show a risk of future injury). *See also* *Dauten v. Muskegon County*, 128 Mich. App. 435, 340 N.W.2d 117 (1983) (lifeguard with back spasms not protected by Michigan law because frequent confrontation with life-saving situations may endanger lives of guard and victim); *Samens v. Labor & Indus. Review Comm.*, 117 Wis.2d 646, 345 N.W.2d 432 (1984) (safety-based nature of electric company’s hiring standards were valid grounds for excluding epileptic from position of groundman); *Chicago & N.W.R.R. v. Labor & Indus. Review Comm.*, 98 Wis.2d 592, 297 N.W.2d 819 (1980) (substantial evidence supported finding that epileptic welder did not present a reasonable probability of harm on date of disqualification from railroad); *Bucyrus-Erie Co. v. State*, 90 Wis.2d 408, 280 N.W.2d 142 (1979) (Supreme Court of Wisconsin stated that ability to efficiently perform duties includes ability to perform without a materially enhanced risk of death, or serious injury to employee or others in future).

142 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(r)) (proposed Feb. 28, 1991).

143 *Id.* at 8,596 (to be codified at 29 C.F.R. app. 1630.2(r)).

144 *Id.*

145 *Id.* at 8,597 (to be codified at 29 C.F.R. app. 1630.2(r)).

146 *Id.*

147 *Id.*

they were not otherwise qualified include a policeman who became a paraplegic,¹⁴⁸ and a park technician with a heart condition that prevented him from walking over rough ground, handling disorderly park visitors, or safely operating a motor boat alone.¹⁴⁹ In the first case, *Simon v. St. Louis County*, the court also confirmed that an employer may require a person to meet legitimate physical qualifications which are essential to the job. In this case, an active commissioned police officer needed to be able to make a forcible arrest and transfer prisoners. The court used the following test: (1) are the requirements reasonable, legitimate, and necessary,¹⁵⁰ (2) are they uniformly required, (3) did the employer consider the impairment, experience, and function the individual could perform, and (4) are the accommodations necessary for the individual unreasonable.¹⁵¹ The appellate court hinted that physical requirements may not have been essential to all positions on the force. However, it noted that the officer did not apply for any other position and that the trial court ruling was not clearly erroneous. Because the paralyzed officer did not meet the legitimate physical prerequisite for the position, he was not qualified for the position.¹⁵²

Thus, employers need not fear the burden of having to hire unqualified individuals solely because they have disabilities. The ADA only requires covered employers to hire qualified individuals with disabilities based on nondiscriminatory job qualifications. For example, in one Rehabilitation Act case, the court found that an employer had discriminated against a dyslexic job applicant by

148 *Simon v. St. Louis County*, 735 F.2d 1082 (8th Cir. 1984).

149 *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (once it is established that the individual was denied the job because of the disability, the burden shifts to the employer to show that the criteria used are job related and that the plaintiff could not perform the essential functions of the job safely and efficiently. Furthermore, the accommodation necessary for the plaintiff to perform the essential functions of the job would have been burdensome to the park since it would have required doubling up of limited park workers.).

150 The employer bears the burden of proof on this point. *Simon*, 735 F.2d at 1084.

151 *Id.* at 1083.

152 The Rehabilitation Act case law in this area overlaps questions of preliminary qualifications and essential functions of the job. The first step of the ADA analysis, preliminary qualifications, is sometimes referred to in the Rehabilitation Act case law as determining whether an individual is "otherwise qualified." 56 Fed. Reg. 8,578, 8,594 (1991) (to be codified at 29 C.F.R. app. 1630.2(m)) (proposed Feb. 28, 1991). The same terms are sometimes used when determining whether an individual is able to perform the essential functions of the job. Since the ADA regulations separate the issues into a two step analysis, this Note follows that pattern, but uses case law which may be appropriate to both issues.

failing to provide him with an oral exam to determine his qualifications as a heavy equipment operator.¹⁵³ In that case, the job applicant applied for a job which had nothing to do with reading and writing. Nevertheless, the employer required a written exam to determine job qualifications. Because the applicant was dyslexic, he could not pass the written exam. The written exam masked the individual's qualification for the job, thus the refusal to provide an oral exam was discriminatory. Therefore, when eliminating an individual with a disability from a position, employers should be sure that the decision to do so rests upon valid, non-discriminatory reasons.

2. The Essential Functions of the Job

The second step outlined in the ADA regulations is to determine whether the individual can perform the essential functions of the job with or without reasonable accommodations.¹⁵⁴ Both the ADA and the Rehabilitation Act define "qualified individual with a disability" as one who "can perform the essential functions of the employment position that such individual holds or desires."¹⁵⁵ For instance, while the Rehabilitation Act required the Postal Service to reasonably accommodate a worker with arthritis, the court found that the Postal Service had not discriminated against him by firing him for poor attendance. The worker

153 *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983).

154 56 Fed. Reg. 8,578, 8,594 (1991) (to be codified at 29 C.F.R. app. 1630.2(m)) (proposed Feb. 28, 1991).

155 42 U.S.C.S. § 12,111(8) (Law. Co-op. Supp. Feb. 1991); 29 C.F.R. § 1613.702(f) (1990) (regulations defining qualified individual with a handicap under the Rehabilitation Act).

State laws also require that the individual be capable of performing the duties of the job. *See, eg.*, *Ashworth v. Jefferson Screw Prod., Inc.*, 176 Mich. App. 737, 440 N.W.2d 101, *appeal denied*, 433 Mich. 837, 447 N.W.2d 690 (1989) (grinder operator with leg in cast could not return to work when recalled from layoff due to need of therapy and conceded that he would be unable to perform duties in present condition—handicap directly related to job performance, therefore not protected); *Bowerman v. Malloy Lithographing, Inc.*, 171 Mich. App. 110, 430 N.W.2d 742 (1988) (employee incapable of performing job duties not "handicapped" under Michigan Handicappers' Act); *Allen v. Southeastern Mich. Transp. Auth. (SEMTA)*, 132 Mich. App. 533, 349 N.W.2d 204 (1984) (refusal to employ is justified if disability is related to ability to perform the duties of the job); *Beauregard v. Clarke-Gravelly Corp.*, 131 Mich. App. 559, 346 N.W.2d 48 (1982) (plaintiff must be physically and mentally able to perform the job efficiently to satisfy the Act, and there must be a job available that plaintiff could perform); *Bucyrus-Erie Co. v. State*, 90 Wis.2d 408, 280 N.W.2d 142 (1979) (Supreme Court of Wisconsin stated that an employer is not required to retain or hire an employee who is physically or otherwise unable to efficiently perform the job up to standards set by the employer.).

was not qualified for the job due to his poor attendance.¹⁵⁶ One who does not show up for work cannot perform any job functions, essential or otherwise.¹⁵⁷

Thus, the second step in ADA analysis of "otherwise qualified individual" should focus on the essential functions of the job and reasonable accommodations. Generally, the essential functions of a job are the "primary job duties that are intrinsic to the employment position."¹⁵⁸ They do not include "the marginal or peripheral functions of the position that are incidental to the performance of the primary job functions."¹⁵⁹

The appendix to the ADA regulations presents two issues for consideration when determining whether a job function is essential. First, one must consider whether the employer actually requires employees in that position to perform the function in question.¹⁶⁰ For instance, an employer may not require a drivers license for a job which does not require driving and then refuse to hire a person who cannot drive because of a disability.¹⁶¹ Second, if employees are required to perform the function, courts and employers should determine whether eliminating the function would fundamentally alter the position.¹⁶² Congress stated that the ADA will not entitle employers to rely on tasks in the job description which are incidental to the actual job and which the individual with a disability cannot perform.¹⁶³

The regulations list several reasons for which courts and employers may consider a job function "essential:"

- (i) The function may be essential because the reason the position exists is to perform that function;

156 King v. United States Postal Serv., 47 Empl. Prac. Dec. (CCH) ¶ 38,181 (D.D.C. 1988).

157 Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd without op.*, 831 F.2d 298 (6th Cir. 1987) (postal worker fired for absenteeism failed to make prima facie case that he was qualified employee with a disability and could not establish disparate impact case since he did not comply with Executive Order 5396 requiring that he give prior notice of absenteeism caused by disability in order for the absence not to count against him).

158 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)) (proposed Feb. 28, 1991).

159 *Id.*

160 *Id.* at 8,575 (to be codified at 29 C.F.R. app. 1630.2(n)) (proposed Feb. 28, 1991).

161 136 CONG. REC. H2623 (daily ed. May 22, 1990) (statement of Mr. Fish).

162 56 Fed. Reg. 8,578, 8,595 (1991) (to be codified at 29 C.F.R. app. 1630.2(n)) (proposed Feb. 28, 1991).

163 136 CONG. REC. H2623 (daily ed. May 22, 1990) (statement of Mr. Fish).

- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.¹⁶⁴

The first and third reasons are nearly self-evident. Obviously, if an employer hires an individual to repair bicycles, then the individual must be able to repair bicycles since that is the reason the job exists. Repairing bicycles is the essential function of the job. Similarly, if an employer hires an individual to cut diamonds because of that individual's expertise in the field, then the individual must be able to cut diamonds. Cutting diamonds is the essential function of the job.

The second reason one may consider a function of a job essential, limited number of employees available to do the job, is equally understandable. *Treadwell v. Alexander* provides an example of the second reason.¹⁶⁵ In that case, a park technician with a heart condition was unable to perform all the functions of the job safely, such as walking over rough terrain or handling disorderly park visitors. If the park retained the technician, other park employees would have had to have taken over some of his duties. Since the park only had a limited number of employees, this would have required some of them to double their duties, thus reducing the efficiency of their jobs and the safety of the park.¹⁶⁶

*Dexler v. Tisch*¹⁶⁷ presents another example of how a job function might be essential due to a limited number of employees. In this case, the problem does not rest in a low number of available employees, but in the fast-paced and heavy workload characteristic of a large central Post Office.¹⁶⁸ The nature of the job made it necessary for Mr. Dexler to be able to perform all the functions of the job efficiently, especially when the flow of mail through the facility was particularly heavy. Each person had

164 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)(2)) (proposed Feb. 28, 1991). This list is not a limitation on the possible reasons a job function may be essential. *Id.*

165 707 F.2d 473 (11th Cir. 1983). See *supra* note 149 and accompanying text.

166 *Id.* See the discussion of this case *infra* note 314 and accompanying text.

167 660 F. Supp. 1418 (D. Conn. 1987). See *infra* notes 301-11 and accompanying text.

168 *Id.* at 1428.

to be able to work a full load at all times.¹⁶⁹ If one person slowed down or slacked off, either the work would not get done, or the other employees would be burdened with extra work.¹⁷⁰ Thus, all the job functions were essential because no other person could reasonably be expected to perform them.

Just as many reasons exist to consider a function essential to a job, there are also many factors which may provide evidence that a function is essential. When determining whether a function is essential to a position, courts may consider the following:

- (i) The employer's judgement as to which functions are essential;
- (ii) Written job descriptions prepared for advertising or interviewing job applicants for the job.¹⁷¹

The second factor, the written job description, can be crucial to a court's determination of the essential functions of a job. Under the Rehabilitation Act, the court in *Guinn v. Bolger*¹⁷² determined that an employee is entitled to rely upon the standard job description that the employer provided. The central issue was the scope of "essential functions" under the Rehabilitation Act.¹⁷³ In *Guinn*, a postal worker working as a multi-position letter sorting machine operator had permanent osteoarthritis (swelling pain and stiffness of knee joints), and had to avoid long periods of standing. Although at the time of her dismissal she was able to perform all of the functions in the standard position description set out by the Postal Service, her employer claimed that the description was incomplete as to the true nature of the position. The employer claimed that she was unqualified because she was unable to perform other functions of the job not listed which required long periods of standing.¹⁷⁴ The court held that the essential functions of the job were those for which the employee was hired, those in the SPD, and that the employee was entitled to rely on that job description.¹⁷⁵

169 *Id.*

170 See the discussion of this case *infra* note 307 and accompanying text.

171 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)(3)) (proposed Feb. 28, 1991).

172 598 F. Supp. 196 (D.D.C. 1984).

173 *Id.* at 201.

174 *Id.*

175 *Id.* Furthermore, the court noted that the fact that the employee previously performed the duties not included in the job description did not justify the Postal Service dismissing her when she became unable to perform those duties which were outside the

The ADA appears to incorporate *Guinn* because section 101(8) states specifically:

consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.¹⁷⁶

But, as this section states, and as the ADA regulations reaffirm, the job description is only evidence of the essential functions of the position.¹⁷⁷ The employer's judgment about the essential functions, the first enumerated factor, should also be considered.¹⁷⁸ In *Guinn*, the court had to consider not only the written description, but also the employer's verbal opinion. The court gave greater weight to the written description provided by the employer, which the employee relied on, than to the employer's after the fact statements.

The goal in examining these factors is to insure that individuals with disabilities are not eliminated from positions when they are able to perform the essential functions of a job, but unable to perform tasks incidental or peripheral to the job. As the court stated in *Bentivegna v. United States Department of Labor*,¹⁷⁹ "if a job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote, 'business necessity and safe performance.'"¹⁸⁰ The ADA reflects this decision stating that the "standard, test or other selection criteria, . . . [must] be job-related" and "consistent with business necessity."¹⁸¹

scope of the job description. *Id.* at 201-02.

176 42 U.S.C.S. § 12,111(8) (Law. Co-op. Supp. Feb. 1991).

177 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)(3)) (proposed Feb. 28, 1991).

178 *Id.* See *supra* note 171.

179 694 F.2d 619 (9th Cir. 1982).

180 *Id.* at 622 (quoting 29 C.F.R. § 32.14 (b)). See, e.g., *Wallace v. Veterans Admin.*, 683 F. Supp. 758 (D. Kan. 1988) (hospital's only evidence was conjecture about risks and morale, despite the fact that the plaintiff established her prima facie case). In *Wallace* the court found that the hospital's refusal to accommodate a recovering nurse who was formerly addicted to drugs was based on "conclusory statements that are being used to justify reflexive reactions grounded in ignorance and capitulation of public prejudice." *Id.* at 767 (quoting *School Bd. of Nassau County v. Arline*, 772 F.2d 759, 765 (11th Cir. 1985)).

181 42 U.S.C.S. § 12,112(b)(6) (Law. Co-op. Supp. Feb. 1991). See 56 Fed. Reg. 8,578 (1991) (to be codified at 29 C.F.R. pt. 1630.15(b) and (c)) (proposed Feb. 28, 1991).

Furthermore, the job requirement should focus on the result and not the means of accomplishing it.¹⁸² Congress referred to a case under the Rehabilitation Act to exemplify the intent in this regard.¹⁸³ In that case, the Postal Service job description required that an employee be able to use both arms to perform the task of lifting and carrying mail. Due to a disability which limited the mobility of the left arm, the employee was unable to use both arms, but was able to do the job. The court found that the employee was able to perform the essential functions of the job despite the job description.¹⁸⁴

Thus, it appears that while a job description will constitute the essential functions of a position, it may not be valid if it includes incidental or unrelated functions—a determination apparently left to the courts. The written description is not considered binding. The employee can challenge the description by presenting evidence attempting to show, for instance, that it includes incidental functions. But it also prevents courts from arbitrarily substituting their judgment for the employer's as to the essential functions because the description will reflect the employer's judgment and will act as a starting point for a court's evaluation.¹⁸⁵ The weight of the written description depends on "how closely tailored it is to the essential duties of the actual job."¹⁸⁶ Thus, an employer should be careful when drafting such a job description to include all functions thought essential by the employer, but should also be careful not to include unnecessary and irrelevant skills. "Writing down discriminatory criteria certainly does not shield [employers]," and the description so written may be

182 *Id.*

183 *Prewitt v. United States Postal Serv.*, 662 F.2d 292 (5th Cir. 1981).

184 *Id.*

185 136 CONG. REC. H2469 (daily ed. May 17, 1990) (statement of Mr. McCollum, who introduced the amendment). The appendix to the ADA regulations states that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." 56 Fed. Reg. 8,578, 8,595 (1991) (to be codified at 29 C.F.R. app. 1630.2(n)) (proposed Feb. 28, 1991). For example, an employer can require a typist to type 75 words per minute and not have to explain why the requirement is not lower, as long as the employer in fact imposes that requirement on its employees. *Id.* But, if the employer allegedly imposes the higher standard for the purpose of excluding individuals with disabilities, the employer may have to show nondiscriminatory reasons for imposing that standard. *Id.*

186 136 CONG. REC. H2469 (daily ed. May 17, 1990) (statement of Mr. Edwards of California).

used as evidence against them.¹⁸⁷

Thus, the courts need to consider factors other than the employer's opinion or the written job description to make an informed decision as to the essential functions of any particular job. Other factors may include:

- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The work experience of past incumbents in the job; and/or
- (vi) The current work experience of incumbents in similar jobs.¹⁸⁸

The third factor, the amount of time spent performing the function, is considered in a Rehabilitation Act case, *Hall v. United States Postal Service*.¹⁸⁹ In that case, the court indicated that heavy lifting would be an essential function of a postal clerk's job if it were done "repetitively every day."¹⁹⁰ *Hall* also considers the fifth factor, the work experience of past incumbents in the job.¹⁹¹ *Hall* stated that when she worked as a clerk in the early 1970's, she never observed other clerks doing any heavy lifting, nor did she do any herself. The court indicated that this was a material fact, noting that "if lifting were 'essential' to the position, she most likely would have had to do some lifting herself, or at least would have observed others doing heavy lifting."¹⁹² The court remanded for findings of fact on these issues.¹⁹³

Because job descriptions may change over time, it is also relevant for courts to consider the sixth factor, the work experience of current incumbents in the job. For instance, in *Hall*, the court may have found that heavy lifting was essential to the position if the Postal Service were able to show that they required distribution clerks today to do heavy lifting and that the clerks

187 *Id.*

188 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(n)(3)) (proposed Feb. 28, 1991).

189 857 F.2d 1073 (6th Cir. 1988). See 56 Fed. Reg. 8578 (1991) (to be codified at 29 C.F.R. app. 1630) (proposed Feb. 28, 1991). See also H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess. 58 (1990).

190 857 F.2d at 1079. The case was remanded for further findings of fact.

191 857 F.2d at 1079.

192 *Id.* The heavy lifting requirement in the case was lifting seventy pounds, and *Hall* could only lift twenty-five to thirty. *Id.*

193 *Id.* at 1080.

acutally do such work.

The final factor to consider is the fourth mentioned in the ADA regulations—the consequence of not requiring the employee to perform the function. As an example, the ADA regulations mention a fire fighter who is unable to carry heavy people. While a fire fighter may not have to do so often, the consequence of not requiring that individual to carry a heavy person out of a burning building could be tragic. Thus, it is an essential function of the fire fighter's job. This shows the highly fact specific nature of any inquiry into the essential functions of a job. While the amount of time spent on a function may be a significant factor in one case, like *Hall*, it could be outweighed significantly by other factors in another case, such as the fire fighter case.

The factors in this list are not dispositive, but are evidence for courts and employers to consider. Furthermore, any determination of the issue is not limited to this list of considerations.¹⁹⁴ Essentially, courts will have to determine the issue on a case-by-case basis, considering all relevant evidence.¹⁹⁵ Courts should not give greater weight to the enumerated factors, but should consider all factors in light of the circumstances of the individual case.¹⁹⁶

The case law generated under the Rehabilitation Act and state disability laws clearly demonstrates that courts have been intent on judicious enforcement of disability laws. The ADA is "not intended to limit the ability of covered entities to choose and maintain a qualified workforce."¹⁹⁷ As long as an employer's qualification standards for a position are legitimate in light of the job in question, an applicant or employee with a disability must be able to efficiently meet that standard. An employer does not have to hire an unqualified person. If the individual with a disability shows that he or she is an otherwise qualified individual with a disability, that individual has met the threshold requirement of the ADA. The employer then must comply with the ADA by accommodating the individual or by showing that no reasonable accommodation would have been appropriate under the circumstances of the individual case.

194 *Id.*

195 *Id.*

196 *Id.*

197 56 Fed. Reg. 8,578, 8,597 (1991) (to be codified at 29 C.F.R. app. 1630.4) (proposed Feb. 28, 1991).

B. Reasonable Accommodations

The court stated in *Hall v. United States Postal Service*:¹⁹⁸

It is evident from a review of the case law in this area that the "otherwise qualified" inquiry requires a consideration not only of the handicapped applicant's ability to perform the job's essential function, but also whether a reasonable accommodation by the employer would enable the handicapped person to perform those functions.¹⁹⁹

Thus, in determining whether an individual is qualified for the job, the employer will have to consider the possible reasonable accommodations that would enable the individual to perform the essential functions.²⁰⁰ This naturally leads to the inquiry into what constitutes a reasonable accommodation.

The Act specifies that reasonable accommodations *may* include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.²⁰¹

This broad, generic definition will inevitably require further clarification by the courts. Since it is not meant to be a limitation on the range of acceptable accommodations, the potential for judicial challenge is increased. This requires the persons in charge of personnel in businesses to be cautious and prudent in hiring decisions which involve individuals with disabilities. They will need to

198 857 F.2d 1073 (6th Cir. 1988).

199 *Id.* at 1078. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (the court must consider whether any reasonable accommodation by the employer would enable the person to perform the essential functions of the job).

200 *E.g.*, *Shelby Township Fire Dep't v. Shields*, 115 Mich. App. 98, 320 N.W.2d 306 (1982) (superseded by statute as stated in *Carr v. Gen'l Motors Corp.*, 135 Mich. App. 226, 353 N.W.2d 489 (1984), *rev'd*, 425 Mich. 313, 389 N.W.2d 686 (1986)) (fire fighter's discharge was improper under Michigan law when he was not given the chance to establish that accommodations were available which would allow him to perform his duties with a beard).

201 42 U.S.C.S. §§ 12,111(9) (Law. Co-op. Supp. Feb. 1991). See 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(o)(2)) (proposed Feb. 28, 1991).

research and become familiar with disability law, both developed and new, to make decisions which will not subject them to litigation. Although the plaintiff must initially come forward with evidence, the employer will bear the ultimate burden of showing that no reasonable accommodation could have qualified the individual to perform the essential functions of the job.²⁰² This determination will in some cases require significant transaction costs and time because of the employer's need to learn about the disability, the possible accommodations, available outside financial resources, and also the relevant law. But, it has been noted that difficult and complex determinations will be the exception.²⁰³ Furthermore, it is likely that the individual with a disability will have most of the information necessary to determine the options for accommodation, thereby cutting down on transaction costs and making the determination easier for the employer.²⁰⁴

Recognizing that appropriate accommodations will not always be obvious to the employer or even to an employee with a disability, the Senate Committee on Labor and Human Resources suggested an informal four-step approach to the situation, which is also discussed in the appendix to the ADA regulations.²⁰⁵ The first step is to identify barriers to equal opportunity. This includes an assessment of the essential and non-essential tasks of the position sought, the work environment, and the abilities and limitations of the individual with a disability. The employer should then determine how these factors interact and what barriers that interaction creates.²⁰⁶ Second, the employer and the individual with a disability should identify possible accommodations. The employer can enhance this process by consulting appropriate State Voca-

202 *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983); 29 C.F.R. § 1613.704 (1990). See *Carter v. Bennett*, 651 F. Supp. 1299 (D.D.C. 1987), *aff'd*, 840 F.2d 63, 65-66 (D.C. Cir. 1988) (the plaintiff must show in the prima facie case that reasonable accommodation is possible, then the burden shifts to the employer to present credible evidence which shows an inability to accommodate, then the burden shifts back to the plaintiff for rebuttal).

203 See *supra* note 5.

204 Report from the Committee on Labor and Human Resources, S. REP. NO. 116, 101st Cong., 1st Sess., 34-35 (1989). The ADA becomes effective two years after enactment, so employers will also have that time to become familiar with the act and to consider the impact it will bear on business. Also, before the summer of 1991, the proposed EEOC regulations for the ADA should be implemented in final form.

205 S. REP. NO. 116, 101st Cong., 1st Sess., 34-35 (1989); 56 Fed. Reg. 8,578, 8,599-600 (1991) (to be codified at 29 C.F.R. App. 1630.9) (proposed Feb. 28, 1991). See also *Id.* at 8,588 (to be codified at 29 C.F.R. pt. 1630.2(o)(3)).

206 S. REP. NO. 116, 101st Cong., 1st Sess., 34-35 (1989).

tional Rehabilitation Service agencies, the Job Accommodation Network operated by the President's Committee on Employment of People with Disabilities, as well as other employers and organizations.²⁰⁷

Once possible accommodations have been suggested, the third step is to assess the reasonableness of the proposal in terms of effectiveness and equal opportunity, considering such factors as reliability, timing, and availability.²⁰⁸ Finally, the employer should implement the accommodation if it does not impose an undue hardship on the employer and if it is appropriate for the individual with a disability and the job in question.²⁰⁹

While this four-step approach will help employers organize their evaluations of individuals with disabilities, they still will need to interpret the ADA's terms throughout the evaluation process, especially "reasonable accommodation."

The ADA regulations expand the analysis of this definition providing better guidance for its interpretation. Furthermore, this term is not without precedent. The Rehabilitation Act and several state statutes have used the term "reasonable accommodation" providing both federal and state courts an opportunity to interpret its meaning.²¹⁰ In addition to the regulations, adjudications under the ADA will have the Rehabilitation Act decisions, as well as the numerous articles written on the topic, as a base upon which to formulate a more exacting definition of the reasonable accommodation standard.²¹¹ Employment personnel troubled by

207 *Id.*

208 *Id.*

209 *Id.* If more than one option is available, the employer may choose the easiest and least expensive accommodation so long as it meets the needs of the employee. *Id.*

210 For examples of state statutes requiring reasonable accommodations see CAL. GOV'T CODE § 12,994 (West 1980 & Supp. 1991) (not required to provide accommodation which would be an undue hardship); DEL. CODE ANN. tit. 19, §§ 722(6), 732, 725 (1) (1985 & Supp. 1990) (defining reasonable accommodation and exceptions, outlining the duties of the employer to provide requested accommodations, and naming affirmative defenses); Michigan Handicappers' Civil Rights Law, MICH. COMP. LAWS ANN. § 37.1102(102)(2) (West 1985 & Supp. 1990) ("A person shall accommodate a handicapper for purposes of employment"); N.M. STAT. ANN. § 28-1-7(J) (1987 & Supp. 1989) (discriminatory for employer to "refuse or fail to accommodate" an individual's disability); WIS. STAT. § 111.34(1)(b) (1988 & Supp. 1990) (it is discriminatory to refuse "to reasonably accommodate an employee's or prospective employee's handicap").

211 Congress has repeatedly stated that Title I of the ADA is modeled after the Rehabilitation Act and is to be interpreted in a similar manner. *See, eg.*, Report from Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 70 (1990).

the definition can also look to the previous interpretations of the term and the proposed ADA regulations for guidance in their decision-making.

1. The EEOC Regulations Implementing the ADA

According to the ADA regulations, "reasonable accommodation" means:

- (i) Any modification or adjustment to a job application process that enables a qualified individual with a disability to be considered for the position such qualified individual desires, and which will not impose an undue hardship on the . . . business; or
- (ii) Any modification or adjustment to the work environment, or to the manner or circumstances under which the position . . . is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position . . . ; or
- (iii) Any modification or adjustment that enables a covered entity's employee with a disability to enjoy the same benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities, and which will not impose an undue hardship on the operation of the . . . business.²¹²

Specific types of accommodations are included in the ADA and are also listed in the regulations as mentioned above.²¹³ This list is by no means exhaustive.²¹⁴ The ADA may require many other possible accommodations depending on specific situations.

Yet, the obligation to provide an individual with disabilities a reasonable accommodation only applies to modifications or accommodations which are job-related.²¹⁵ A job-related accommodation is one which "specifically assists the individual in performing the duties of a particular job."²¹⁶ The job-related accommodation applies to all services or programs provided by the employer and to all non-work facilities such as break rooms, cafeterias or

212 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(o)(1)) (proposed Feb. 28, 1991).

213 See *supra* note 201 and accompanying text.

214 56 Fed. Reg. 8,578, 8,595 (1991) (to be codified at 29 C.F.R. app. 1630.2(o)) (proposed Feb. 28, 1991).

215 *Id.* at 8,598 (to be codified at 29 C.F.R. app. 1630.9) (proposed Feb. 28, 1991).

216 *Id.*

health clubs.²¹⁷ While these areas are not a part of the job *per se*, they are related to an individual's employment and are, therefore, job-related for ADA purposes. However, an employer is not required to provide an accommodation of a strictly personal nature, or one which is helpful on and off the job.²¹⁸ The appendix to the ADA regulations lists as examples, a prosthetic limb, wheelchair, or eyeglasses.²¹⁹ All are devices which help individuals with disabilities throughout his or her daily activities, and they are, therefore, not strictly job-related.²²⁰

Nonetheless, neither the ADA nor the regulations prohibit employers from providing accommodations beyond those required by the Act.²²¹ Additional accommodations mentioned in the appendix to the regulations include permitting an employee to accrue paid leave or providing the employee with additional unpaid leave for necessary treatment.²²² Furthermore, an employer may make employer provided transportation accessible, provide personal assistants (i.e. page turner or travel attendant), and reserve parking spaces.²²³ Whether these accommodations are required or not depends on the specific factual circumstances of each case. It is, therefore, helpful to consider the Rehabilitation Act case law in conjunction with the ADA regulations to gain greater insight into the significance of the duty to provide reasonable accommodations to individuals with disabilities.

2. Risk to health and safety considered

One of the most obvious criteria for reasonableness is safety. While the court must determine on one hand whether reasonable accommodations will qualify an individual with a disability for a given position, the court must also consider whether the accommodation will pose a safety risk to the individual or to others at the job site.²²⁴ In other words, employers must consider whether placing the individual in the position and accommodating the

217 *Id.* at 8,599.

218 *Id.* at 8,598.

219 *Id.*

220 *Id.*

221 *Id.* at 8,599.

222 *Id.* at 8,595 (to be codified at 29 C.F.R. app. 1630.2(o)).

223 *Id.*

224 This is distinguished from the individual himself or herself posing a safety risk, which would disqualify the individual from the job, as discussed *supra* notes 118-47 and accompanying text.

person for the position will expose the individual or others to a risk of future injury. If an accommodation poses such a threat, courts have generally found that the accommodation is not reasonable even though it would qualify an individual with a disability for a job.

For example, in *Dexler v. Tisch*,²²⁵ an individual with achondroplastic dwarfism²²⁶ argued that the accommodation of a \$300 step stool enabled him to reach a height necessary to sort mail for the United States Postal Service. With this accommodation he would be "otherwise qualified" for the position. Nevertheless, the court determined that the stool was not a *reasonable* accommodation because it presented a safety hazard and reduced the efficiency with which the job was to be accomplished.²²⁷

It is evident that employers need not fear the burden of exposing their employees to danger, nor worry about increased liability from hiring individuals with disabilities. Any accommodation that is a safety hazard is not reasonable and, therefore, is not required under the ADA.²²⁸

3. Other Determinations of Reasonableness

Safety is a significant factor involved in determining the reasonableness of accommodations. Yet, safety is not the only limitation on reasonableness. Unfortunately, it is difficult to determine the line between reasonable and unreasonable outside of safety limits. Under the Rehabilitation Act, the United States Supreme Court gave some guidance by stating what is not reasonable: "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."²²⁹

Generally, the precedent in this area presents a case-by-case analysis of what is not reasonable, thereby chipping away at the employer's duty. The employer is not required to accommodate

225 660 F. Supp. 1418 (D. Conn. 1987).

226 "Achondroplastic dwarfism is a growth disorder that affects all four extremities and results in short limbs and short stature." *Id.* at 1419.

227 *Id.*

228 Also, an individual with a disability is not qualified if he or she is a direct threat. *See supra* note 144 and accompanying text.

229 *Alexander v. Choate*, 469 U.S. 287, 300 (1985). It is important to note that while there may not be a duty to accommodate employees or prospective employees by fundamental or substantial modifications under Title I of the ADA, Title III, Public Accommodations and Services Operated by Private Entities, may require businesses to make those changes to accommodate a disabled client or the general public.

the employee's every request,²³⁰ or to undergo a major restructuring of the work facilities,²³¹ or to hire a full-time physician and provide on-site laboratory facilities,²³² or to eliminate essential functions of the job.²³³ In *Southeastern Community College v.*

230 *Carter v. Bennett*, 651 F. Supp. 1299, 1301 (D.D.C. 1987), *aff'd*, 840 F.2d 63 (D.C. Cir. 1988). A blind employee of the Department of Education was fired for unsatisfactory work in answering congressional inquiries. The employee claimed that he had been transferred to a position that he could not be accommodated to perform. Yet, his employer provided readers, special equipment and office space, and decreased his workload. The employee wanted the reader of his choice, more advanced equipment, easier access and more office space, but he failed to show the court that these additional accommodations were necessary. The court found that he was reasonably accommodated and that a blind person so accommodated could perform the essential functions of the position. The appellate court stated that the only accommodations necessary are those needed to enable him to perform the essential functions of the position. *Id.* at 67.

231 *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985). A civil engineering technician sued the Army Corps of Engineering for denying his request for assignment to Saudi Arabia due to his diagnosis as a manic depressive. Although the plaintiff's condition could be controlled through medication and regular blood tests, the essential prerequisites for treating him did not exist in Al Batin. The court found that the lack of medical facilities in Saudi Arabia would endanger the plaintiff and his fellow workers. The court further found that the Army could not be reasonably required to build a hospital to accommodate the plaintiff and that anything less would have been inadequate to insure safety. *Id.* at 1280. *See also* *Rosiak v. United States Dep't of Army*, 679 F. Supp. 444 (M.D. Pa. 1987), *aff'd without op.*, 845 F.2d 1014 (3d Cir. 1988) (dustless and fumeless environment could not be provided for person suffering from hypersensitivity to inhaled hydrocarbons or "fumes," related chemicals, and dust). The court decided that because no accommodation was available, although many were tried, the individual was not an otherwise qualified individual with a disability. *Id.* at 451.

Cf. Marsh v. Dep't of Civil Serv., 173 Mich. App. 72, 433 N.W.2d 820 (1988), *appeal denied*, 432 Mich. 874 (1989) (accommodation under Michigan law is limited to alteration of physical structure to allow access and modification of peripheral duties to allow job performance).

232 *Gardner*, 752 F.2d at 1283-84. The cost of this accommodation, given the nature of the construction project, would have been unreasonable.

233 *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985). A postal worker with strabismus (cross-eyes) was not able to work the machine which he was hired to operate due to his condition. The fact that he could perform the other job functions was not enough to satisfy the requirement of ability to perform the essential functions of the job. The court warned practitioners not to confuse accommodation with elimination. *Id.* at 1251. *See* *Salmon Pineiro v. Lehman*, 653 F. Supp. 483 (D.C. Puerto Rico 1987) (accommodations considered unreasonable where Navy would have had to substantially change the duties of a criminal investigator in order to modify the position for a person with epilepsy). *See also* *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). The court stated that if the record contains a factual basis demonstrating that accommodation would "require a modification of the essential nature of the program" then the accommodation is not reasonable. Accommodating a drug user in the police department would be a substantial modification of the essential functions of the job and would cast doubt on the integrity of the police force. Therefore, the drug using officer cannot be properly accommodated and is thus not otherwise qualified. *Id.* at 1149.

Davis,²³⁴ the Supreme Court found that section 794 of the Rehabilitation Act does not require an employer to lower or make substantial modifications of its standards to accommodate individuals with disabilities.²³⁵ The Court acknowledged that "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" will not always be clear.²³⁶ For instance, the court may find that a refusal to modify a program is unreasonable and discriminatory if it stems from insistence on traditional requirements which are outdated or unwillingness to incorporate technological advances which could make accommodations reasonable.²³⁷

Other cases under the Rehabilitation Act have limited an employer's duty by holding that the employer is not required to make other employees perform part of the work of the employee with a disability,²³⁸ or to provide the individual who has a disability with a completely different job.²³⁹ A Michigan court interpret-

Nevertheless, the court will look at the job description carefully, and in some instances the court has found that the part of the job which would have to be restructured or eliminated was not a reasonable, necessary, and legitimate requirement of the job and its elimination would be a reasonable accommodation. See *Norcross v. Sneed*, 573 F. Supp. 533 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir. 1985) (blind woman applying for school librarian position which required planning of field trip; driving not necessary for that function).

234 442 U.S. 397 (1979).

235 *Id.* at 413. This case involved a deaf nursing student who was denied admittance to the college's nursing program because of her hearing impairment. The court found that the school would have had to make major adjustments to its program to accommodate the student, and that some of the accommodations would be contrary to the purpose of the program. *Id.*

236 *Id.* at 412.

237 *Id.* at 412-13.

238 *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (discussed *supra* note 149 and accompanying text). It seems inevitable, however, that when nonessential parts of a job are eliminated to qualify an individual with a disability, another employee will have to pick up the slack. While that slack legally may not be a part of the individual's job, in reality, the other employee is doing work that the individual with the disability would be doing if that individual did not have a disability. It is, therefore, not completely accurate to say that an employer will not be required to make another employee perform a part of the work originally assigned to the individual who has a disability. Although one can argue semantics, this scenario may arise where the job description of the disabled individual is disputed. See *supra* Section II(A)(2).

239 *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987). The court found a custodian-laborer with asthma concededly unable to perform the duties of a custodian which required exertion and generated dust. *Id.* at 467. The employer could not be required to reassign the disabled individual, but he could reapply for a different position. In this case, the individual did reapply, and the employer did not hire him for reasons unrelated to his asthma. *Id.* In *Chiari v. League City*, 920 F.2d 311 (5th Cir. 1990), the disabled individual argued that he could have been accommodated by giving him part-time work instead

ing that state's law²⁴⁰ found that the obligation to accommodate did not require an employer to do everything reasonably necessary to place an employee, who could no longer perform his original job due to an injury received on the job, in a new position.²⁴¹

On the other hand, the ADA lists reassignment to another vacant position as a potential accommodation.²⁴² This accommodation is only available to current employees, not to applicants.²⁴³ It should be considered only when accommodations for the current position are unduly burdensome.²⁴⁴ Furthermore, an employer need only consider reassignment if the alternative position is vacant, and if the individual is qualified for the new position.²⁴⁵

Similarly, under Wisconsin law, transfer to a different position may be required. In *McMullen v. Labor and Industry Review Commission*,²⁴⁶ the court outlined a test to determine whether a transfer would constitute a reasonable accommodation. The court may consider the relationship between the two positions, their nature and physical location, and the ability of the individual with a disability to perform the responsibilities of the new position.²⁴⁷ Such an accommodation may not be inconsistent with the ADA so long as the relation between the two positions is significant, so as not to result in significant alteration of the nature of the job, and no other employee is "bumped."

Nevertheless, it is discriminatory to reassign an individual

of his current full-time position. The court stated that the employer did not have to create a new job for the individual. "All the City must do is demonstrate that a part-time schedule would not accommodate Chiari's performance of the job that he is currently doing." *Id.* at 318. Fewer hours still would not have enabled him to perform the essential functions of his current job (due to Parkinson's disease, the construction inspector could not climb buildings). *Id.*

Cf. Marsh v. Dep't of Civil Serv., 173 Mich. App. 72, 433 N.W.2d 820 (1988), *appeal denied*, 432 Mich. 874 (1989) (duty to accommodate under Michigan law does not include new job placement or vocational rehabilitation).

240 Michigan Handicapper's Civil Rights Act, MICH. C.L. ANN. § 37.1102 (West 1985 & Supp. 1990).

241 *Rancour v. Detroit Edison Co.*, 150 Mich. App. 276, 388 N.W.2d 336 (1986), *appeal denied*, 428 Mich. 860 (1987).

242 *Id.*

243 *Id.* An applicant must be qualified for the job for which he or she is applying, else the applicant should apply for the vacant position for which he or she is qualified.

244 *Id.*

245 *Id.*

246 148 Wis.2d 270, 434 N.W.2d 830 (Wis. Ct. App. 1988).

247 *Id.*

with a disability for the purpose of limiting or segregating that individual.²⁴⁸ Thus, the new position must be equal in status and pay to the former position. A lower grade position will only be acceptable if no other reasonable accommodation would enable the individual with a disability to perform a position of equal status.²⁴⁹ Furthermore, an employer will not be required to promote an individual with a disability solely because no accommodation will qualify him or her for the position held or requested and no other position of equal status is available.²⁵⁰

The ADA also seems to deviate from prior disability law in the area of job restructuring. The ADA, section 101(9)(B), specifically mentions "job restructuring, part-time or modified work schedules" as examples of reasonable accommodations. This seems contrary to some of the interpretations under the Rehabilitation Act and state laws which do not require an employer to create new jobs.²⁵¹ But, the intent in this area appears to be to provide individuals with disabilities scheduling flexibility, not to eliminate functions of their jobs. The focus is on the job schedule and not on the nature of the tasks involved with the job. Congress noted that "[s]ome people with disabilities are denied employment because they cannot work a standard schedule."²⁵² As examples, Congress mentioned persons with epilepsy who may require constant shifts rather than rotation from night to day shifts,²⁵³ persons who depend upon public transportation which is not yet fully accessible to mobility impaired people, or persons who need additional unpaid leave days for medical treatment. In light of this express intent, it does not appear that this section of the ADA will deviate from the Rehabilitation Act and require employers to eliminate essential functions of a job, or to arrange a person's schedule so as to completely alter the nature of the position.

This point is expressly stated in the appendix to the ADA regulations. An employer will not be required to reallocate essen-

248 *Id.*

249 *Id.*

250 *Id.*

251 *See supra* notes 239-40.

252 Report from the Committee on Labor and Human Resources, H.R. REP. NO. 116, 101st Cong., 1st Sess. 31 (1989).

253 "Bumping" of other employees to accommodate an employee with a disability is not intended nor required. Report from the Committee on Labor and Human Resources, H.R. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989).

tial functions of the job.²⁵⁴ Yet, the regulations do indicate that an employer may be required to reallocate non-essential or marginal functions of the job.²⁵⁵ As stated previously, an individual with a disability will not be disqualified from a position because he or she is unable to perform such peripheral functions. Yet, such functions presumably will have to be performed by someone if the workplace is to function efficiently. Thus, an employer may have to reallocate those nonessential functions to another employee when the employee with a disability cannot perform them.²⁵⁶

Not surprisingly, the decisions interpreting "reasonable accommodation" are as varied as the situations under which they arise. For instance, courts have found violations of the Rehabilitation Act when an employer refused to allow a dyslexic applicant to take an oral general aptitude test instead of a written one as a prerequisite for employment as a heavy equipment operator,²⁵⁷ and where the Pennsylvania Department of Transportation refused to provide a driver's license to a school bus driver with a hearing impairment even though the impairment could be corrected with a hearing aid.²⁵⁸

On the other hand, the court in *Franklin v. United States Postal Service*²⁵⁹ determined that an individual suffering from paranoid schizophrenia (a condition controllable by medication) is not otherwise qualified when that individual does not take medication.²⁶⁰ The plaintiff-employee was a postal worker who dis-

254 56 Fed. Reg. 8,578, 8,595-96 (1991) (to be codified at 29 C.F.R. app. 1630.2(o)) (proposed Feb. 28, 1991).

255 *Id.*

256 *Id.* at 8,596.

257 *Stutts v. Freeman*, 694 F.2d 666, 669 (11th Cir. 1983).

258 *Strathie v. Dep't of Transp.*, 716 F.2d 227 (3d Cir. 1983). *Cf. Lewis v. Metro. Transit Comm.*, 320 N.W.2d 426 (Minn. 1982) (bus driver with vision impairment not qualified). *See also Harrison v. Marsh*, 691 F. Supp. 1223 (W.D. Mo. 1988); *Bruegging v. Burke*, 696 F. Supp. 674 (D.D.C. 1987), *cert. denied*, *Bruegging v. Wilson*, 488 U.S. 1009 (1989); *Perez v. Philadelphia Housing Auth.*, 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd without op.*, 841 F.2d 1120 (3rd Cir. 1988) (lumbosacral sacroiliac sprain with radiculopathy could have been reasonably accommodated with a straight-back chair, use of an elevator, and coverage for regular breaks); *Trimble v. Carlin*, 633 F. Supp. 367 (E.D. Pa. 1986) (knee injury affecting only a few aspect of the relevant job description could have been reasonably accommodated).

259 687 F. Supp. 1214 (S.D. Ohio 1988).

260 *Id.* Some state cases have also interpreted the term "otherwise qualified." For instance, according to the Supreme Court of Minnesota, a bus driver with significant vision problems was not otherwise qualified for that occupation. *Lewis v. Metro. Transit Comm.*, 320 N.W.2d 426 (Minn. 1982). Also, an employee suffering from paranoia was qualified because the condition did not effect his work. *Chambers v. Illinois Fair Em-*

played antisocial, dangerous, and sometimes illegal behavior while on the job. The court decided that the best accommodation would have been for the employee to take her medication. Noting that the Postal Service had demonstrated the utmost patience tolerating the employee's behavior, the court determined that her refusal to take her medication rendered her not only unqualified, but unwilling to perform the essential functions of the job. Thus, her dismissal was not discrimination based on her disability.²⁶¹

In other cases under the Rehabilitation Act, courts have noted that an accommodation will not be reasonable if it requires an employer essentially to hire two people to do the same job.²⁶² For instance, where the job consists of interviewing applicants and filling out forms for them, it would not be reasonable for an employer to accommodate a person with apraxia²⁶³ in such a position by hiring another to fill out the forms.²⁶⁴ This is an important consideration in situations where an accommodation involves hiring qualified readers or interpreters for blind or deaf individuals or individuals with similar disabilities.²⁶⁵ In every instance, the determination of reasonableness depends on the circumstances of the specific situation.

In addition to these limitations on what is a reasonable accommodation, the Department of Labor has given some guidance

ployment Practices Comm., 96 Ill. App. 3d 884, 422 N.E.2d 130 (1981). *See also* Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987) (federal case in which epilepsy did not prevent employee from performing physical tasks involved in the job).

261 687 F. Supp. 1214. However, a qualified individual with a disability is not required to accept any accommodation. 56 Fed. Reg. 8,578, 8,589 (1991) (to be codified at 29 C.F.R. pt. 1630.9(d)) (proposed Feb. 28, 1991). Yet, as this case demonstrates, if the refused accommodation is necessary to enable the individual to perform the essential functions of the job, the refusal may render the individual unqualified. *Id.*

262 *E.g.*, Arenson v. Heckler, 879 F.2d 393 (8th Cir. 1989) (court of appeals acknowledged that "it is beyond the expectations of the Rehabilitation Act that the [agency] be required to hire another person capable of actually performing Arenson's job." The court did indicate that it might be acceptable if Arenson only needed someone to proofread his work.) *See* Lindsay, *supra* note 23, at 341-43.

263 Apraxia is a neurological disorder that results in "an impaired ability to concentrate and to simultaneously perform motor and cognitive tasks . . . difficulty with comprehending spoken and written language . . . difficulty in acquiring and processing data . . . poor handwriting skills, poor reading skills and poor organizational skills." Lindsay, *supra* note 23, at 341 (quoting Arenson, 879 F.2d 393, 395).

264 The dissent in Arenson noted that a proofreader would not be able to adequately proofread Arenson's work unless he or she had been present at the interview to make sure that Arenson had properly taken down the information. 879 F.2d at 399-400 (Whipple, J., dissenting).

265 This type of accommodation is specified at 42 U.S.C.S. §§ 12,102(1)(A)-(B) (Law. Co-op. Supp. Feb. 1991).

as to what factors should be considered in deciding whether an accommodation is reasonable or not:

- (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and budget;
- (2) the type of agency operation, including the composition and structure of the agency's work force; and
- (3) the nature and the cost of the accommodation.²⁶⁶

While these guidelines are directed at government agencies under the Rehabilitation Act, they are nearly identical to the factors listed in the ADA's definition of reasonable accommodation.²⁶⁷ In general, both the ADA and Rehabilitation Act regulations indicate that more will be expected of larger companies with larger budgets. This is an issue which will be handled under the consideration of undue hardships discussed below.²⁶⁸ Once again, the court will have to determine on a case-by-case basis whether an accommodation is reasonable under the circumstances, taking into consideration not only the disabled individuals and the jobs they seek, but also the financial means and the nature of the employer and its business as well.²⁶⁹

The entire analysis requires the trial court to make adequate findings of fact.²⁷⁰ Each element involves a factual inquiry which will differ from case to case.²⁷¹

The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well informed judgement grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to pub-

266 Department of Labor Regulations, 29 C.F.R. § 32.13 (1990); 29 C.F.R. § 1613.704(c) (1990).

267 42 U.S.C.S. § 12,111(10)(B) (Law. Co-op. Supp. Feb 1991).

268 See *infra* Part III.

269 For this reason many fear that the ADA will become a "free-for-all." See Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 252 (1990); *A Big, Big Mistake*, Pitt. Press, Oct. 3, 1990, at B2, col. 4 (ADA offers "considerable room for mischief").

270 See *Mantolette v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (court erred by failing to consider evidence that any necessary accommodation would be simple and inexpensive). Note that one court has found that where the uncontradicted facts before an employer indicate that an employee was not otherwise qualified, the employer was not guilty of discrimination even though those facts were later proved erroneous. *Walker v. Atty. Gen. of the United States*, 572 F. Supp. 100 (D.D.C. 1983).

271 See Chin, *supra* note 29, § 14.04[4].

lic prejudice.²⁷²

Note, however, that courts interpreting the Rehabilitation Act have stated that the issue of whether an employer provided a reasonable accommodation is a mixed question of law and fact.²⁷³ Thus on review, courts will view the fact determinations under a clearly erroneous standard, but the question of whether an employer satisfied the reasonable accommodation mandate is a legal determination "subject to more rigid appellate scrutiny."²⁷⁴

The broad definition of reasonable accommodation, coupled with the vast range of disabilities subject to the reasonable accommodation requirement, makes the duty appear formidable to employers. But the ADA does not require employers to lower their standards nor to hire individuals who are unqualified or unable to perform the essential functions of the job. The result in the workplace, therefore, should not be negative as some employers fear. Furthermore, the means to compliance with the ADA and employment of individuals with disabilities will not be unduly burdensome to employers, as the following Section shows.

III. WHEN ACCOMMODATIONS CREATE AN UNDUE BURDEN

Justice Marshall, writing for a unanimous court, wrote of the Rehabilitation Act that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds."²⁷⁵ The same might be said of the ADA. Congress appears to have drafted the ADA with an ear to the Supreme Court's statement. Within the broad statement of the rights of Americans with disabilities, Congress included limitations which are intended to curb the potential adverse effects the ADA may have on some employers.²⁷⁶ Specifically,

272 *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 764-65 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987); *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988).

273 *Carter v. Bennet*, 840 F.2d 63, 64 (D.C. Cir. 1988). See *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) ("questions in which . . . the issue is whether the facts satisfy the statutory standard" are mixed).

274 *Carter v. Bennet*, 840 F.2d at 65.

275 *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (addressing the question of whether Congress intended § 504 to encompass all claims of disparate-impact discrimination).

276 Certainly some will argue that these limits are drawn with terms which will in effect increase the burden of the ADA by forcing litigation over their meanings. See, *eg.*, *Barnard*, *supra* note 4.

these limitations include the reasonableness requirement for accommodations discussed above and the employer's defense of undue hardship.

Under the ADA, as under the Rehabilitation Act and many state disability laws, an employer will not be required to accommodate an employee or applicant with a disability if the necessary accommodation "would impose an undue hardship on the operation of the business."²⁷⁷ The ADA states that an undue hardship is "an action requiring significant difficulty or expense" when considered with several specified factors.²⁷⁸ Those factors are:

- (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 and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, adminis-

277 42 U.S.C.S. § 12,112(b)(5)(A) (Law. Co-op. Supp. Feb. 1991). See Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 70 (1990) (on the relation between sections using terms "undue hardship" and "reasonable accommodation"). See also 29 C.F.R. 1613.704(a) (1990) (regulation regarding undue hardship under the Rehabilitation Act). Cf. CAL. GOV'T CODE § 12,994 (West 1980 & Supp. 1991) (no duty "to make any accommodation for an employee who has a physical handicap that would produce undue hardship to the employer"); DEL. CODE ANN. tit. 19, § 722(6)(e) (1985 & Supp. 1990) (employer not required to "[m]ake any changes that would impose on the employer an undue hardship, provided that the costs of less than 5 percent of an employee's salary or annualized wage . . . shall be presumed not to be an undue hardship"); Michigan Handicapper's Civil Rights Act, MICH. COMP. LAWS ANN. § 37.1102.102(2) (West 1985 & Supp. 1990) (accommodation required "unless the person demonstrates that the accommodation would impose an undue hardship"); N.M. STAT. ANN. § 28-1-7(J) (1987 & Supp. 1989) (it is discriminatory for "any employer to refuse or fail to accommodate . . . an individual's physical or mental handicap . . . unless such accommodation is unreasonable or an undue hardship"); WIS. STAT. § 111.34(1)(b) (1988 & Supp. 1990) (it is discriminatory to refuse to accommodate "unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business"). All of the above are statutes which require the employer to provide reasonable accommodations to qualified individuals with disabilities.

278 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(1)) (proposed Feb. 28, 1991).

trative, or fiscal relationship of the facility or facilities in question to the covered entity.²⁷⁹

Note the similarity between these factors and those outlined in the regulations concerning whether an accommodation is reasonable or not.²⁸⁰ If an accommodation presents an undue hardship on the operation of the business, it will not be reasonable.²⁸¹ But, as noted above, there are many other factors which will render an accommodation unreasonable.²⁸² Thus, although it may not create an undue hardship, an accommodation may be unreasonable.

Nonetheless, the consideration of an accommodation's effect on the business is an integral part of a finding of reasonableness. This is the most significant protection afforded businesses by the ADA, and it is also the primary reason why the fear that this Act will destroy small businesses is unfounded.²⁸³ Courts will give great weight to the effect on the business in determining whether an employer has violated the Act by failing to accommodate. If an employer can show that providing an accommodation would impose an undue hardship on the operation of the business, such showing may be a defense to a charge of discrimination under the ADA.²⁸⁴ However, personnel should be aware that the better

279 42 U.S.C.S. § 12,111(10)(B) (Law. Co-op. Supp. Feb. 1991); 56 Fed. Reg. 8,578, 8,588 (1991) (to be codified at 29 C.F.R. pt. 1630.2(2)) (proposed Feb. 28, 1991).

280 See *supra* note 266 and accompanying text.

281 See, *eg.*, Carr v. Gen. Motors Corp., 135 Mich. App. 226, 353 N.W.2d 489 (1984), *rev'd*, 425 Mich. 313, 389 N.W.2d 686 (1986) (duty to accommodate person whose handicap is job related unless it imposes undue hardship); Wardlow v. Great Lakes Express Co., 128 Mich. App. 54, 339 N.W.2d 670 (1983) (trial court erred by failing to consider employer's duty to accommodate driver with back problems who requested "over-the-road" work and case remanded giving employer burden of showing that to do so would be an undue burden).

282 See *generally supra* Part II.

283 This section was a compromise in the ADA. The original draft required reasonable accommodation unless the accommodation would threaten the existence of the employer's business; the so-called "bankruptcy" provision. See *Americans with Disabilities Act of 1989: Hearings before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 90 (1989). See also Tucker, *supra* note 2, at 927. That obviously would have been a much harder standard to meet, and is also evidence that undue hardship means something less than threatened existence.

For a detailed discussion of the economic impact of the ADA see the Preliminary Regulatory Impact Analysis, 56 Fed. Reg. 8,578, 8,579 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991).

284 56 Fed. Reg. 8,578, 8,591 (1991) (to be codified at 29 C.F.R. pt. 1630.15(d)) (proposed Feb. 28, 1991). When one accommodation is unduly burdensome, there may be others which are also reasonable and adequate, but are not unduly burdensome. In that situation, the employer will be required to provide the alternative accommodation.

off a covered entity is financially, the harder it will be to show an undue hardship, at least economically. This is especially true of large businesses or franchises which have more than one location. In such a situation, employers and courts may face the issue of whose financial resources should be considered, the individual facility where the individual with a disability seeks employment or the entire corporation. Generally, the resources of the entire corporation will be considered.²⁸⁵ But this issue will depend upon the relationship between the facility and the covered entity as a whole. In some situations, the particular facility or site may have very limited access to the financial resources of the whole. In those cases, an account of the resources of the entire entity would be inappropriate.²⁸⁶

Some fear that the accommodation costs required under the ADA will be significant.²⁸⁷ Furthermore, as the determinations under the ADA will be made on a case-by-case basis, employers will have to guess at how a court might interpret the above factors in their case.²⁸⁸ Fearing the consequences of a wrong guess, "employers will err on the side of caution and will stretch their resources"²⁸⁹ to accommodate their employees who have disabilities.

Another twist in the cost analysis of undue hardship stems from a Senate statement, reaffirmed in the ADA regulations, indicating that employers need to investigate outside sources which may be available to alleviate the cost of accommodating employ-

The fact that one possible accommodation is unduly burdensome is not a complete defense for the employer. *Id.*

285 *Id.* at 8,596 (to be codified at 29 C.F.R. app. 1630.2) (proposed Feb. 28, 1991).

286 *Id.*

287 See Lindsay, *supra* note 23, at 340 (The holding in *TWA v. Hardison*, 432 U.S. 63 (1977), that an employer is not obligated to incur more than a de minimis expense is "dead letter with respect to an employer's obligations under the ADA.") That case involved accommodation of an employee's religious beliefs under Title VII of the Civil Rights Act of 1964.

The House Committee clearly stated that the standard under the ADA is significantly higher than that expressed by the Supreme Court in *Hardison*, and that that case is not applicable to the ADA. This was deemed necessary due to the "crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities." Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 1st Sess., pt. 2, at 68-69 (1990).

288 As in the Rehabilitation Act, the burden is on the employer to show an undue hardship. Report from the Committee on the Judiciary, H.R. REP. NO. 485, 101st Cong., 1st Sess., pt. 3, at 40-42 (1990).

289 Lindsay, *supra* note 23, at 342.

ees with disabilities.²⁹⁰ If an outside agency, for instance the State Vocational Rehabilitation Agency, is available to pay for a portion of the accommodation, then the employer will be required to pay the portion of the cost which would not impose an undue hardship.²⁹¹ This will increase the paperwork and transactional costs involved in hiring an employee with significant needs for accommodation by adding the need to research the benefits available to the individual and outside agencies that are willing to help. However, the number of persons requiring significant accommodations is low, and the situations foreseen by the opponents of the ADA in this area will probably be the exceptions to the usual scenario.²⁹²

While the complex cases will probably be rare, even in the simpler cases the determination of undue hardship will have to be decided on a case-by-case basis according to the particular facts involved. Undue hardship is a factual determination. The weight given to each express factor varies depending upon the facts of the particular situation and "turns on both the nature and cost of the accommodation in relation to the employer's resources and operations."²⁹³ The list of factors reflects the flexible approach of the Rehabilitation Act, which has been operating for over seventeen years. The factors are all relative to one another. Thus, an accommodation which may seem burdensome in the abstract may not be so when considered in light of the factors listed.²⁹⁴

Furthermore, the list of factors to be considered is not exclu-

290 S. REP. NO. 116, 101st Cong., 1st Sess. 36 (1989). See also Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 68-69 (1990) (House Committee in accord); 56 Fed. Reg. 8,578, 8,596 (1991) (to be codified at 29 C.F.R. app. 1630.2) (proposed Feb. 28, 1991).

291 S. REP. NO. 116, 101st Cong., 1st Sess. 36 (1989). See 56 Fed. Reg. 8,578, 8,596 (1991) (to be codified at 29 C.F.R. app. 1630.2) (proposed Feb. 28, 1991). Failure to receive technical assistance does not relieve an employer from compliance with the ADA. *Id.* at 8,589 (to be codified at 29 C.F.R. pt. 1630.9(c)).

292 See *supra* note 5 and accompanying text. See also Fagin, McAvoy, & Dorman, *New Federal Legislation Creates Challenges, Benefits for Business*, Nat'l L.J., Sept. 3, 1990, at 18, col. 2 (not all accommodations are expensive and many cost less than fifty dollars).

293 Report from the Committee on Labor and Human Resources, H.R. REP. NO. 116, 101st Cong., 1st Sess. 36 (1989). This section is designed as a response to fears that the need to undertake significant investments to comply with this law would compel business operating in depressed regions or operating at the margin or at a loss to fold rather than comply. Congress does not intend the ADA to "result in the closure of neighborhood stores or in the loss of jobs." Report from the Committee on the Judiciary, S. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 40-42 (1990).

294 Report from the Committee on the Judiciary, S. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 40-42 (1990).

sive. Courts and administrators may consider other relevant factors appropriate to a given situation. Some additional factors expressed by Congress include the number of employees or applicants potentially benefitting from an accommodation,²⁹⁵ the availability of outside funding,²⁹⁶ or the applicant's willingness to pay the portion of the accommodation which would be burdensome to the employer.²⁹⁷

The factors considered in determining undue hardship under the ADA are the same ones used in section 794 of the Rehabilitation Act.²⁹⁸ Under the Rehabilitation Act the courts have stated that the determination of undue hardship "is highly fact specific."²⁹⁹ The court is required to make a specific inquiry in each case to "ensure that the employer's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives."³⁰⁰

The court in *Dexler v. Tisch*,³⁰¹ discussed two of the factors outlined in the regulations under the Rehabilitation Act and in the ADA. In light of the facts of that case, the court considered the type of operation involved and the nature and costs of accommodation. In *Dexler*, a postal service employee with achondroplastic dwarfism was denied a position with the postal service due to his disability.³⁰² He asserted that his disability could be accommodated by restructuring the position or by pro-

295 Congress noted that the very nature of an accommodation is individualized; it enables a specific person with a specific disability to perform a specific job. Thus, the fact that an accommodation benefits only one person is not a negative consideration that would prompt a finding of undue hardship. Report from the Committee on Education and Labor, H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 68-69 (1990).

296 An entity which is eligible for outside funding or tax credits must take those monies into consideration when determining the undue hardship. The employer should only consider the net cost of the accommodation. Also, lack of outside funding is not a defense to the duty to accommodate. *Id.*

297 *Id.*

298 Compare 42 U.S.C.S. § 12,111(10)(B) (Law. Co-op. Supp. Feb. 1991) to 45 C.F.R. § 84.12(c) (1990) (DHHS regulation). Congress has stated that this provision is based on and should be interpreted consistently with the regulations implementing sections 791 and 794 of the Rehabilitation Act. Report from the Committee on Labor and Human Resources, S. REP. NO. 116, 101st Cong., 1st Sess. 36 (1989).

299 *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1080 (6th Cir. 1988) (lower court failed to make an individualized inquiry on the issue of accommodation and undue hardship).

300 *Id.* at 1080 (quoting *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987)).

301 660 F. Supp. 1418 (D. Conn. 1987).

302 *Id.* at 1420. See also *supra* notes 167-70.

viding a three hundred dollar footstool, thereby enabling him to perform the job.³⁰³

The court first considered the feasibility of restructuring the position. The type of operation involved is deadline oriented and "task oriented."³⁰⁴ If the postal service restructured his job to eliminate certain tasks, then Mr. Dexler would have nothing to do at some times and too little to do at others.³⁰⁵ This would be unduly burdensome due to the heavy flow of mail through the facility and the need for every individual to work a full load at all times.³⁰⁶ Furthermore, hiring a taller person to assist Mr. Dexler would be burdensome "doubling up."³⁰⁷

The court next considered the step stool accommodation. While the above problems could be eliminated by the provision of a step stool, that accommodation is also burdensome. The step stool would create an undue burden because it would fail to eliminate the inefficiency in Mr. Dexler's job performance.³⁰⁸ It would take time for him to move the stool from place to place as needed, and while the actual cost of the stool is minimal, the cost in terms of lost efficiency is greater.³⁰⁹ Also, the stool presents a safety risk which not only makes unreasonable, but unduly burdensome as well.³¹⁰

The court finally noted that "[w]hile none of these hardships is conclusive or overwhelming, taken together they demonstrate that accommodating Mr. Dexler would unduly interfere with the operation of the New Britain Post Office."³¹¹ Thus, the determination of undue hardship involves a broad inquiry. Courts will not take a narrow view of an employer's situation and mandate compliance with the ADA simply because the employer is financially able to do so. Precedent indicates that courts look at all relevant circumstances. While this broad inquiry is likely to generate litigation, it provides a significant protection for employers.

Generally, courts will measure undue hardship by the economic burden the duty imposes.³¹² However, as *Dexler* illustrates,

303 *Id.* at 1423-24.

304 *Id.* at 1428.

305 *Id.*

306 *Id.*

307 *Id.* See *supra* note 170 and accompanying text.

308 *Id.*

309 *Id.*

310 *Id.* See *supra* Part I(B)(2).

311 *Id.* at 1429.

312 *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (cost of employ-

courts have also considered administrative burdens,³¹³ the burden of “doubling up” where manpower is limited,³¹⁴ the burden of increased safety risks,³¹⁵ impediments to the basic functioning of an organization,³¹⁶ and the burden of continuing to change accommodations as an employee’s condition worsens.³¹⁷

The appendix to the ADA regulations mention other non-financial burdens which may render an accommodation unreasonable or which an employer may use as a defense. In addition to accommodations which would be unduly costly, the regulations consider those which would be unduly extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.³¹⁸ As an example, the appendix mentions that a nightclub will not have to switch from dim lighting to bright lighting to accommodate an individual with a vision impairment if doing so would destroy the ambiance of the club.³¹⁹

Congress mentioned specifically in the context of the ADA that special circumstances of a particular employer should be considered when determining whether a reasonable accommodation would present an undue hardship.³²⁰ As an example, Congress

ing readers for blind employees was not an undue hardship considering the size of the state department’s administrative operating budget). *See also* *Coleman v. Casey County Bd. of Educ.*, 510 F. Supp. 301 (W.D. Ky. 1980) (bus driver with one leg qualified to drive with minimal accommodations which were not a burden on the school board since the state Bureau of Rehabilitation Services would provide the necessary accommodations without cost). *But cf.*, *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596 (1984) (applying the Michigan Handicappers’ Civil Rights Law finding that employer was not confined to introducing a cost analysis specific to employee’s situation to prove an undue burden of accommodation).

313 442 U.S. at 412 (individual is not otherwise qualified if accommodation would result in undue administrative burden).

314 *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983) (where park technician with heart problems could not perform all of the functions of a job, and accommodation would require other technicians to perform part of his duty, the doubling up would be an undue hardship on the employer given the limited resource of employees).

315 *See generally, supra* Part I(B)(2).

316 *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff’d*, 865 F.2d 592 (3d Cir. 1989) (FBI not required to accommodate special agents with diabetes by placing them on permanent limited duty since that would, among other things, impede the basic functions of the FBI).

317 *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988), *aff’d without op.*, 888 F.2d 1385 (4th Cir. 1989) (labor relations specialist’s abilities and restrictions were no longer compatible with potential job opportunities in the department despite past accommodations, and the agency could not be forced to endure hardship of further accommodations).

318 56 Fed. Reg. 8,578, 8,596 (1991) (to be codified at 29 C.F.R. app. 1630.2) (proposed Feb. 28, 1991).

319 *Id.*

320 Report from the Committee on the Judiciary, S. REP. NO. 485, 101st Cong., 2d

mentioned the special circumstances the construction industry faces with certain types of temporary worksites. In such a circumstance it may be unduly burdensome to require physical alterations to accommodate. For example, accommodations for an individual in a wheelchair would be unduly burdensome when the terrain of the site changes daily.³²¹ On the other hand, the same alteration may be reasonable for a permanent office building.

One major difference between the ADA and the Rehabilitation Act is the influence of collective bargaining agreements or labor contracts. Agreements and contracts which conflict with the duties under the ADA may be considered as one factor in determining reasonable accommodation and undue hardship. Yet, under the Rehabilitation Act, such considerations were almost always defenses.³²² In other words, if the duty to provide accommodation to employ an individual with a disability conflicts with the employer's obligation under the collective bargaining agreement, that factor is no longer an absolute defense to the duty to accommodate. Yet, the courts and the employer may still take those agreements into consideration when deciding the scope of the employer's obligation under the ADA.

While some place great weight on the word "may" as an indication that the ADA will encourage courts to disregard collective

Sess., pt. 3, at 40-42 (1990).

321 *Id.* See *Chiari v. League City*, 920 F.2d 311 (5th Cir. 1991) (professional engineer with Parkinson's disease not qualified to be construction inspector due to safety risks). This factor should put to rest the fears of individuals who commented on the "mischief" to be done by the ADA in cases such as that of Donald Keister in Baltimore, Maryland. Mr. Keister is a 640 pound building contractor whose work is hindered by his weight—he says he falls through floorboards at construction sites. *A Big, Big Mistake*, Pitt. Press, Oct 3, 1990, at B2, col. 4 (expressing the fear that when Mr. Keister brings an action under the ADA he will be declared a "minority" and the City of Baltimore, which grants a percentage of its contracts to minorities, will have to give him a contract). While this situation involves an interesting interplay between the ADA and the law of government contracts which deserves more attention, it is also a prime example of how the fears expressed by opponents of the ADA are unrealistic. The ADA does declare individuals with disabilities to be "minorities," 42 U.S.C.S. § 12,101(a)(7) (Law. Co-op. Supp. Feb. 1991), and this potentially places them within the class of persons to whom Baltimore must award 25% of its contracts. Nevertheless, the ADA is not intended to affect the rights and remedies available under current state and federal statutes. *Law and Explanation*, *supra* note 33, at 43. Furthermore, the ADA does not function to protect every individual with disabilities in every situation, it protects "otherwise qualified individuals with disabilities." So it is possible that Mr. Keister will be declared a member of a class of minorities for the purposes of the ADA, but if he should bring an action under this act, the fundamental question that the ADA addresses is whether he is qualified for the job he seeks.

322 See, e.g., *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989).

bargaining agreements,³²³ such fears are mere conjecture. Since the Senate also suggested that future conflicts be avoided by ensuring that agreements entered into after the ADA was enacted allow for compliance with the law, there is equal room to speculate that the Senate expected existing agreements to continue to be valid defenses to compliance. Thus, such agreements may be defenses where they existed prior to the enactment of the ADA, but future agreements will not be considered.³²⁴

Generally, this area of the Act should work to calm the fears of businesses as it was included in the spirit of compromise. While the employer's duty under the ADA is broad in scope, the limitations built into the Act are designed to prevent undue hardship on businesses. An employer will not be required to hire an individual who is not qualified for the position, and the employer will not have to provide accommodations which are unnecessary or unreasonable—and unreasonable includes those which are too expensive for the business to bear, as well as those which disrupt the functioning or the purposes of the business.

IV. CONCLUSION

Under Title I of the ADA, a covered employer cannot discriminate against an "otherwise qualified individual with a disability." A person is "otherwise qualified" if he or she can perform the essential functions of a job with or without "reasonable accommodations." The employer is required to provide reasonable accommodations unless doing so imposes an undue hardship on the operation of the business.

The ADA will guarantee rights for individuals with disabilities which have been available for over twenty years to other groups of people who have traditionally been victims of discrimination. Yet the scope of this anti-discrimination law is significantly different from others because it includes an affirmative duty for employers to accommodate the disabilities of employees or applicants. It is this difference which has caused controversy over a law which is designed to eradicate a social evil. The controversy centers not only on money, but also on safety and administrative burdens. The fear is that the duty to hire individuals with disabilities

323 See Lindsay, *supra* note 23, at 343.

324 See the second category of discrimination under Title I of the ADA, *supra* note 15 and accompanying text.

who are capable of performing the essential requirements of the jobs in question, especially when those individuals require accommodations, will prove to be so costly and burdensome as to destroy small businesses.

Under the ADA, however, these economic concerns should not manifest themselves into unjust realities because the ADA has built-in limits that were drawn with an eye to protect business and to alleviate those fears. For instance, an individual must be qualified for the position sought, accommodations must be reasonable, and accommodations will not be reasonable if they are financially burdensome, unsafe, or burdensome in other ways which impair the operation of the business. Thus, the ADA is unlikely to cripple American businesses as it emancipates individuals with disabilities.

The only criticism of the Act which is likely to manifest itself is the flood of litigation which will be necessary to interpret its meaning. But legislation has always been, and always should be, subject to judicial interpretation. Furthermore, the class of people with disabilities who need protection is so broad and varied, as is the range of jobs sought by these individuals, that the legislature could not possibly predict and provide for every factual situation. Such an act needs breadth and flexibility for its medicine to work on a pervasive social ill.

Counselors to employers ought to recognize that the courts will likely interpret the ADA in accord with the ADA regulations, and also with a view to the voluminous federal and state case law already existing from the Rehabilitation Act and state acts. With such guidance, employers should successfully arrange their affairs to satisfy the requirements of the ADA.

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