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Reasonable Accommodation in the Americans with Disabilities Act

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ADMINISTRATIVE LAW: REASONABLE ACCOMMODATION IN THE AMERICANS WITH DISABILITIES ACT[1]

INTRODUCTION

To establish a *prima facie* discrimination claim under Title I of the Americans with Disabilities Act ("ADA")[2] the plaintiff "must show that (1) she is a disabled person within the meaning of the ADA, (2) she is able to perform the essential functions of the job with or without reasonable accommodation, and (3) she suffered an adverse employment decision because of . . . her disability."[3] This survey examines the Tenth Circuit's consideration of what constitutes a "reasonable accommodation" as addressed in element two of a *prima facie* discrimination claim under the Americans with Disabilities Act.[4]

During the survey period, the Tenth Circuit published[5] thirteen cases that address the interpretation of what constitutes a reasonable accommodation.[6] Other circuits heard a comparable number of similar cases.[7]

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994). The ADA was enacted on July 26, 1990.

2. *See generally* Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product and Performance*, 35 IDAHO L. REV. 205 (1999). Senator Craig was a member of Congress during the debate and enactment of the ADA, and thus provides an authentic view of the ADA provisions. Title I relates to employment and is the focus of this survey.

3. Barnett v. U.S. Air, Inc., 157 F.3d 744, 748 (9th Cir. 1998).

4. The survey period runs September 1, 1998 through August 31, 1999.

5. This survey does not discuss at least seventeen unpublished cases dealing with unreasonable accommodation during the same survey period.

6. Some of the cases dealt only with "reasonable accommodation" as an ancillary issue. The thirteen cases are Anderson v. Coors Brewing Co., 181 F.3d 1171 (10th Cir. 1999) (discussed in Part IV); Butler v. Prairie Village, 172 F.3d 736 (10th Cir. 1999) (relating to ADA cases without direct evidence of discrimination and the applicability of the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999) (relating to the burden that a plaintiff must carry); Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999) (relating to accommodation in an arrest situation); Hardy v. S.F. Phosphates Ltd., 185 F.3d 1076 (10th Cir. 1999) (relating to the analytical framework of *McDonnell Douglas* and the ability of an employer to defend by showing a nondiscriminatory reason for the employer's action); J.B. *ex rel* Hart v. Valdez, 186 F.3d 1280 (10th Cir. 1999) (abstaining from exercising jurisdiction over a proposed class action suit by handicapped children in the custody of the state in order to avoid undue interference with the state's conduct of its own affairs); Marcus v. Kansas, 170 F.3d 1305

This would indicate that the courts are giving considerable attention to what constitutes a reasonable accommodation.

Part II of this survey examines the background of the ADA and reviews the ADA's pertinent parts. Part III examines *Smith v. Midland Brake, Inc.*,[8] a case in which the Tenth Circuit reconsidered and expanded the reasonable accommodation concept. Part IV analyzes the reasoning of other Tenth Circuit reasonable accommodation cases, and Part V compares the Tenth Circuit's reasoning to the reasoning of the two circuits in disagreement with the Tenth Circuit.

Finally, Part VI of this survey concludes that the Tenth Circuit's reasoning is not only in harmony with the majority of the other circuits, but that the Tenth Circuit might have established itself as a leader in this important ADA adjudication area.

I. BACKGROUND OF THE ADA

A. *History and Development of the ADA*

The National Council on the Handicapped in the Department of Health, Education, and Welfare (the "National Council") compiled the studies and prepared the report that led to the development of the ADA.[9] Congress' findings[10] and the ADA's purpose as stated in its preamble[11]

(10th Cir. 1999) (considering a suit brought by disabled citizens protesting the imposition of a fee for parking placards); Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999) (joining the Second, Fourth, Seventh, Ninth, and Eleventh Circuits in holding that the ADA, in requiring states not only to avoid discrimination but to require reasonable accommodations to the known disabilities of employees, does not run afoul of the "congruent and proportional requirement" of Boerne v. Flores, 521 U.S. 507 (1997)); McGuinness v. University of N.M. School of Med., 170 F.3d 974 (10th Cir. 1998) (discussed in Part IV); Nielsen v. Moroni Feed Co., 162 F.3d 604 (10th Cir. 1998) (affirming that the Company President's unsatisfactory conduct due to addiction to prescription pain-killing drugs did not warrant protection under ADA); Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999) (relating to sleeping being a major life activity); Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228 (10th Cir. 1999) (relating to an HIV infection imposing significant limitations on major life activities and whether a major life activity is a legal issue); Roberts v. Progressive Independence, Inc., 183 F.3d 1215 (10th Cir. 1999) (relating to the employer failing to provide reasonable accommodation for an employee with cerebral palsy going on a business trip).

7. The number of the other circuits' "reasonable accommodation" cases, published within this survey period, are as follows: First Circuit—seven; Second Circuit—twelve; Third Circuit—eight; Fourth Circuit—eleven; Fifth Circuit—fifteen; Sixth Circuit—thirty-five; Seventh Circuit—sixteen; Eighth Circuit—twenty-seven; Ninth Circuit—seventeen; and Eleventh Circuit—eight. Part IV, *infra*, further considers these cases.

8. 180 F.3d 1154 (10th Cir. 1999).

9. *See* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 389 (1991) (revealing former Senator Weicker's perspective, as an original Senate sponsor of the ADA, on the history and background leading to the introduction of the ADA).

10. *See* 42 U.S.C. § 12101(a)(1) (1994).

11. The ADA states its purpose as:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

are the direct result of the National Council's report.[12] Congress enacted the ADA to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[13] To accomplish this, the ADA expanded the basic principles of the Rehabilitation Act of 1973,[14] which pertained only to federal government employees, recipients of federal financial assistance, and federal contractors.[15] The ADA strives both to eliminate discrimination against people with disabilities and to create a cause of action for qualified[16] people who have faced discrimination. Courts rely on cases involving the Rehabilitation Act to interpret the more recently enacted ADA,[17] each having the common purpose "to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens."[18]

B. *Pertinent Provisions of the ADA*

The ADA states, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[19]

Although the ADA contains several important concepts and definitions,[20] this Tenth Circuit survey focuses only on the concept of "reasonable accommodation," which may include:

> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
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> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(1-4).

12. *See* Weicker, *supra* note 9, at 390. The National Council issued its report in February 1986. *See* Weicker, *supra* note 9, at 390.

13. 42 U.S.C. § 12101(b)(1).

14. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (1994).

15. *See* Weicker, *supra* note 9, at 387-88.

16. *See* 42 U.S.C. § 12111(8) (defining "a qualified individual with a disability").

17. *See, e.g.*, Coleman v. Zatechka, 824 F.Supp. 1360, 1367 (D.Neb. 1993).

18. Galloway v. Superior Ct., 816 F.Supp. 12, 20 (D.D.C. 1993).

19. 42 U.S.C. § 12112(a).

20. *See generally* Louis C. Rabaut, *The Americans with Disabilities Act and the Duty of Reasonable Accommodation*, 70 U. DET. MERCY L. REV. 721 (1993).

making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(2) 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.[21]

Whereas Title VII of the Civil Rights Act of 1964 encouraged employers to hire people based on their job qualifications, rather than based on *race*, *sex*, or other factors unrelated to the position, [22] the Rehabilitation Act provided protection from discrimination to *disabled persons*.[23] Similarly, the Age Discrimination in Employment Act of 1967 ("ADEA") prohibited certain acts of discrimination against *older individuals*.[24] Thus, the ADA *requires* consideration of a person with a disability while Title VII *does not permit* consideration of a personal characteristic such as sex or race in making employment decisions. Further, the ADA draws a number of its terms and definitions both from the Rehabilitation Act and from Title VII.[25] Thus, the "employment decisions covered by this nondiscrimination mandate [are] to be construed in a manner consistent with the regulations implementing section 504 of the

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21. 42 U.S.C. § 12111(9).

22. Title VII makes the following unlawful:

> [T]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's *race, color, religion, sex, or national origin* . . . or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988).

23. The Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, *solely by reason of her or his disability*, 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.

29 U.S.C. § 794(a) (1988 & Supp. V 1993) (emphasis added).

24. *See* 29 U.S.C. § 623(a)(1) (1988 & Supp. V 1993) (stating that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*") (emphasis added).

25. *See* 29 C.F.R. pt. 1630 app. (1999).

Rehabilitation Act of 1973."[26] Further, the ADA expressly provides that Title VII's "powers, remedies, and procedures" apply.[27]

C. *Reasonable Accommodation under the ADA*

1. ADA's Definition of Reasonable Accommodation

The ADA defines "qualified individual with a disability" 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 . . . ."[28]

The ADA requires employers to provide some "reasonable accommodation" to applicants or employees with known physical or mental disabilities who are "otherwise qualified individuals" unless doing so will create an "undue hardship" for employers.[29] Rather than defining exactly what an employer must do to comply, the ADA gives examples of what a reasonable accommodation might include.[30] The result is that an employer might recognize a requirement to provide a reasonable accommodation, but the ADA does not clearly define the required extent of the employer's involvement.

2. Congress' Requirement of the EEOC

Congress requires the EEOC to issue regulations to carry out the ADA's goals.[31] Regarding reasonable accommodations, the EEOC regulations, like the ADA, discuss only potential accommodations and what the accommodations might include.[32]

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26. 29 C.F.R. app. § 1630.4.

27. 42 U.S.C. § 12117(a) (1994).

28. 42 U.S.C. § 12111(8).

29. *See generally* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877 (1997). A reasonable accommodation is a "modification or adjustment to a workplace process or environment that makes it possible for a qualified person with a disability to perform essential job functions, such as physical modifications to a work space, flexible scheduling of duties, or provision of assistive technologies to aid in job performance." *Id.* at 892.

30. According to the ADA, the term "reasonable accommodation" may include:

> [M]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and 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.

42 U.S.C. § 12111(9).

31. *See* 42 U.S.C. § 12116 (1994) (stating that the EEOC "shall issue regulations . . . to carry out this subchapter . . . .").

32. *See* 29 C.F.R. pt § 1630.2(o)(2), (3).

To further clarify its regulations, the EEOC has issued an "interpretive guidance" appendix.[33] According to the appendix, an employer has a duty to make reasonable efforts to determine an appropriate accommodation once an employee has requested such accommodation.[34] However, the interpretive guidance specifically states that employers need only accommodate "known" disabilities.[35] The guidance also notes the importance of communication between the employer and employee in order to determine a reasonable accommodation.[36] To further assist employers to determine what constitutes a proper reasonable accommodation, the interpretive guidance suggests a four-step process: (1) the employer ascertains a job's essential functions; (2) the employer consults with the disabled individual to determine the individual's limitations and possible ways to accommodate those limitations; (3) the employer further consults with the disabled employee to weigh the potential effectiveness of the possible accommodations; and (4) the employer selects a reasonable accommodation that does not create an undue hardship for the employer.[37]

3. Summary of the Interpretation of Reasonable Accommodation

Because the concept of "reasonable accommodation" originated in regulations issued by the EEOC in implementation of the Rehabilitation Act of 1973, courts look to the decisions interpreting the EEOC regulations for clues to the meaning of the same terms in the ADA.

Seventh Circuit Judge Richard Posner explained that the term "accommodation" plainly means that the "employer must be willing to consider making changes in ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work," but that the term "reasonable" is more difficult.[38] The judge interpreted the modifier "reasonable" as qualifying or weakening the word "accommodation,"[39] adding that the court must also consider costs to decide what is reasonable.[40]

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33. *See* 29 C.F.R. pt § 1630.9 App. (1999).

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. Vande Zande v. Wisconsin, 44 F.3d 538, 542 (7th Cir. 1995).

39. *See Vande Zande*, 44 F.3d at 542 (stating that "in just the same way that if one requires a 'reasonable effort' of someone this means less than the maximum possible effort, or in law that the duty of 'reasonable care,' the cornerstone of the law of negligence, requires something less than the maximum possible care").

40. *See id.* (suggesting Judge Learned Hand's negligence formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947) be used to "flesh out the meaning of the word 'reasonable' in the term 'reasonable accommodations.'"). Judge Posner further explains the economic aspects:

> It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even

In the absence of statutory guidance, courts differ on the need for an employer to participate in an interactive process. Courts not deferring to the EEOC regulations apply the traditional Title VII burden-shifting formula[41] to ADA cases, requiring the disabled individual to show that actual accommodations exist. Under the burden-shifting formula, an employee first must prove that a reasonable accommodation is possible.[42] The burden then shifts to the employer to show that providing such an accommodation would create an undue hardship.[43] Ultimately, the employee must show both an ability to perform the job and that the employer failed to provide a reasonable accommodation.[44]

II. TENTH CIRCUIT DECISION—SMITH V. MIDLAND BRAKE, INC. ["MIDLAND BRAKE II"][45]

The Tenth Circuit, in *Midland Brake II*, reconsidered what constitutes a "reasonable accommodation."[46] Section A of this Part recites the facts of both *Midland Brake* cases. Section B discusses the findings of *Mid-*

> that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit. Even if an employer is so large or wealthy . . . that it may not be able to plead "undue hardship," it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.

Vande Zande, 44 F.3d at 542-43. Judge Posner justifies this conclusion by analyzing the wording of the ADA, reasoning:

> If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history. The preamble actually "markets" the Act as a cost saver, pointing to "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." § 12101(a)(9). The savings will be illusory if employers are required to expend many more billions in accommodation than will be saved by enabling disabled people to work.

Id. at 543.

41. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (defining the three-step process of ordering and allocating burdens of proof. First, the plaintiff must establish a *prima facie* case of discrimination. Second, the burden shifts to the defendant/employer to articulate a legitimate, nondiscriminatory reason for the employment decision. Third, the plaintiff again has the burden to prove that the employer's reason was mere pretext.).

42. *See* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (stating that the plaintiff must produce "evidence sufficient to make a facial showing that accommodation is possible").

43. *See id.*

44. *See id.* (stating that the ultimate burden of persuasion rests with the employee/plaintiff).

45. 180 F.3d 1154 (10th Cir. 1999) (hereinafter "Midland Brake II").

46. *See id.*

land Brake I.[47] Section C discusses the findings in *Midland Brake II*.[48] Finally, Section D analyzes the holdings of both *Midland Brake* cases.

A. *Facts of Midland Brake I*[49]

Plaintiff Smith encountered various chemicals on a daily basis during seven years of employment at Midland Brake in the light assembly department.[50] Eventually, Smith developed a chronic dermatitis on his hands so severe that Smith's physicians considered him 'permanently disabled' and unfit to work in the light assembly department."[51] Because of the inability to accommodate his medical problem in the light assembly department, Midland Brake fired Smith.[52]

The district court granted Midland Brake's summary judgment motion on Smith's claims alleging violations of the ADA, the ADEA, and the Kansas Retaliatory Discharge Law.[53]

B. *Decision of Midland Brake I*[54]

In *Midland Brake I,* the Tenth Circuit affirmed the district court's judgment. The court held that Smith was not a "qualified individual with a disability"[55] because no amount of accommodation would allow Smith to perform his *existing* job.[56]

C. *Decision of Midland Brake II*[57]

One year later, in *Midland Brake II,* the Tenth Circuit, *en banc*, considered two ADA questions.

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47. *See* Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998) (hereinafter "Midland Brake I").

48. *Midland Brake II*, 180 F.3d 1154.

49. *Midland Brake I*, 138 F.3d 1304.

50. *See id.* at 1307. Smith's employment began in 1987, three years before enactment of the ADA. *See id.*

51. *Id.* at 1308.

52. *See id.* at 1307.

53. *See id.* at 1306. Smith's wife substituted herself as the Plaintiff/Appellant, because Smith died while awaiting appeal. *See* Midland Brake II, 180 F.3d at 1160 n.2.

54. *Midland Brake I*, 138 F.3d 1304.

55. *See* 42 U.S.C. § 12111(8) (1994) ("The term 'qualified individual with a disability' means 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.").

56. *See Midland Brake I*, 138 F.3d at 1312.

57. *Midland Brake II*, 180 F.3d 1154.

1. First Question of *Midland Brake II*[58]

First, the court considered "whether an employee can be a 'qualified individual with a disability,' when that employee is unable to perform the essential functions of his or her present job, regardless of the level of accommodation offered, but could perform the essential functions of other available jobs within the company with or without a reasonable accommodation."[59]

The court relied on the ADA's statutory framework to decide the first question.[60] Here, the court focused on the last two words—"or desires"—of the definition of a "qualified individual with a disability."[61] The court reasoned that the ADA's plain language meant that Midland Brake should not have limited the job search to a job within Smith's division, otherwise the words "or desires" would be superfluous.[62] Consequently, the court held that Smith was a qualified individual with a disability.[63]

2. Second Question of *Midland Brake II*

Second, the court considered the scope of the employer's obligation to offer a qualified individual with a disability a different job if an employee cannot perform an existing job.[64] The court carefully examined the language of other circuit decisions, the EEOC Interpretive Guidance, the ADA, and the ADA's legislative history,[65] which states:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker.[66]

Then, the court focused on the "re" in the word reassignment.[67] The court reasoned that the statute's plain language implied that the employee already had an assignment in the company, and thus would be an existing employee.[68] Further, stating "*reassignment*" rather than "*consideration of* a reassignment" means "something more than the mere opportunity to

58. *See id.*
59. *Id.* at 1159.
60. *See id.* at 1160.
61. *See id.*; *see also supra* note 55.
62. *See Midland Brake II*, 180 F.3d at 1160.
63. *See id.*
64. *See id.* at 1161-70.
65. *See id.* at 1162.
66. *Id.*
67. *See id.* at 1163-64.
68. *See id.* at 1164 (rejecting Midland Brake's assertion that the phrases only apply to applicants and not to present employees).

apply for a job with the rest of the world."[69] Therefore, the court concluded both that the company must reassign the disabled employee to the position and that the disabled employee need not compete with other employees or job applicants.[70] Consequently, the court held that Midland Brake must offer Smith another job within the company.[71]

D. *Analysis of the Midland Brake Decisions.*

In *Midland Brake I,* the court came to a harsh conclusion by deciding that Smith was not a qualified individual with a disability, because Smith could not work in the chemical-laden light assembly department, regardless of the amount of accommodation offered.[72] Thus, the court excluded Smith, undeniably a person with a disability, from the class of "qualified person with a disability." *Midland Brake I* did not logically flow from the ADA in two ways. First, the decision did not "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"[73] as mandated by the ADA's statement of purpose. Second, the decision did not consider the statute's plain language because the decision ignored the phrase "or desires."[74]

On the other hand, *Midland Brake II* appears to be a "fair" ruling that gave a favorable outcome to a clearly disabled employee consistent with the ADA's purpose.[75] The decision logically flowed from both the textual interpretation of the ADA and from the legislative intent. Specifically, the court carefully explained the wording of both the ADA and its legislative intent to arrive at a conclusion that is difficult to fault when considering the clear language upon which the conclusion relies.

III. OTHER TENTH CIRCUIT REASONABLE ACCOMMODATION CASES[76]

This part of the survey analyzes three other "reasonable accommodation" cases considered by the Tenth Circuit, showing how the court determined whether the accommodation was reasonable.

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69. *Id.*

70. *See id.* at 1166-67 (pointing out that there is some consideration involved—the "process of consideration is necessarily a component of the act of reassignment itself").

71. *See id.* at 1167.

72. *See id.* at 1308.

73. 42 U.S.C. § 12101(b)(2) (1994).

74. *See id.* § 12111(8).

75. *See id.* § 12101(b)(1) (stating that the purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ").

76. For a complete list of published cases on "reasonable accommodation" during this survey period, as well as a brief description of each case see *supra* note 9. The author chose these three cases as especially illustrative of the Tenth Circuit's reasoning.

A. *Anderson v. Coors Brewing Co.*[77]

1. Facts:

Coors hired Anderson, who suffered from Multiple Sclerosis (MS),[78] "as a temporary production operator (TPO)."[79] Coors used TPO's in a variety of positions throughout the plant, on an "as needed" basis.[80] Anderson worked in several capacities, one being "above the ovens" on a ladder, catching cans from a conveyor belt.[81] Working in this capacity, Anderson became ill and requested accommodations upon returning to work.[82] After examining the requested accommodations, Coors determined that Anderson could not perform the requisite functions of a TPO and terminated Anderson's employment.[83] Anderson sued under the ADA, but the district court granted Coors' summary judgment motion, which argued that Anderson, even with reasonable accommodations, was not qualified for the TPO position.[84]

2. Decision:

The Tenth Circuit affirmed the district court's summary judgment order. The court declared that the TPO position had a legitimate business purpose.[85] Limiting Anderson's job to conform to the accommodations would defeat the business purpose of the TPO, essentially creating a new position for Anderson.[86] Because Anderson could not perform the TPO job requirements, with or without accommodation, Anderson "failed to establish a *prima facie* case of discrimination under the ADA."[87]

On first inspection, *Anderson* appears to conflict with *Midland Brake II*, because *Anderson* did not require the employer to find another suitable job within the company. However, in *Anderson*, Coors had a legitimate business purpose for the TPO, by definition a temporary position.[88] Granting Anderson's requested accommodations would have essentially rewritten the job description, creating a new job within Coors and de-

77. 181 F.3d 1171 (10th Cir. 1999).

78. *See Anderson*, 181 F.3d at 1174-75 (explaining that Multiple Sclerosis limited Anderson from, among other things, working in hot environments, standing for long periods of time, lifting heavy objects and (because of dizziness) working on ladders or at heights).

79. *Id.* at 1174.

80. *Id.*

81. *Id.*

82. *See id.*

83. *See id.*

84. *See Anderson*, 181 F.3d at 1175 (finding also that Anderson failed to demonstrate that the reason for termination was pretextual).

85. *See id.* at 1177.

86. *See id.*

87. *Id.* at 1177-78.

88. *See id.* at 1177.

feating the business purpose of the TPO.[89] This result was fair to the employee, whom Coors hired on a temporary basis to perform a specific business purpose.

C. *McGuinness v. University of New Mexico School of Medicine*[90]

1. Facts:

Former medical student McGuinness suffered from an anxiety disorder that manifested during math or chemistry exams.[91] Rather than accept the Medical School's offer to repeat the first year, McGuinness chose to file suit under the ADA.[92] The district court granted summary judgment to the medical school because McGuinness did not have a disability under the ADA. The court did not reach the reasonable accommodation issue.[93]

2. Decision:

The Tenth Circuit affirmed that McGuiness did not have a disability under the ADA and then considered the reasonable accommodation issue.[94] The court held that McGuinness's request for advancement to the medical school's next level was a *substantial*, rather than a *reasonable*, accommodation.[95]

Here, as in *Midland Brake II*, the court examined the ADA's plain language. While being fair, the court showed that it would not accept just any accommodation. The accommodation must be truly *reasonable*, in the plain meaning of the word, and not *substantial*.[96]

D. *EEOC v. Wal-Mart Stores, Inc.*[97]

1. Facts:

Because a hearing-impaired employee left a mandatory training session, Wal-Mart first demoted and then terminated the employee.[98] The

89. *See id.*

90. 170 F.3d. 974 (10th Cir. 1998).

91. *See McGuinness*, 170 F.3d at 976 (explaining that McGuinness had previously earned Bachelor of Science degrees in chemistry and biology; a degree in physiological psychology; and a doctorate in psychology by developing study habits to overcome the "anxiety disorder" disability).

92. *See id.* at 977 (stating that another basis of McGuinness's claim was on the "association discrimination" provision, 42 U.S.C. § 121112(B)(4) (1994) because McGuinness has a disabled son with cerebral palsy).

93. *See id.* (noting also that McGuinness had failed to distinguish between Title I and Title II of the ADA. The district court did not allow McGuinness's attempt to amend in response to the motion for summary judgment.)

94. *See id.*

95. *See id.* at 979.

96. *See id.*

97. 187 F.3d 1241 (10th Cir. 1999).

employee could not understand the videotaped session because Wal-Mart provided neither closed captioning nor an interpreter.[99]

2. Decision:

The Tenth Circuit affirmed the district court's award of punitive damages against Wal-Mart.[100] The court held that Wal-Mart's managers "engaged in recklessly indifferent intentional discrimination" against the employee because Wal-Mart had not provided an interpreter as a reasonable accommodation.[101]

This result sent the same message to the employer that the *McGuiness* court sent to the employee. Implicitly, the court showed that fairness must prevail. Just as the court denied former medical student McGuiness relief because McGuiness requested a *substantial* rather than a *reasonable* accommodation, the court affirmed the punitive damage award because Wal-Mart was "recklessly indifferent" to the disabled employee's need for accommodation.[102]

IV. OTHER CIRCUITS

The other circuits generally parallel the Tenth Circuit in interpreting reasonable accommodation under the ADA.[103] This Part of the survey examines the two circuits that differ.

A. *Fourth Circuit: Myers v. Hose*[104]

1. Facts:

When bus driver Myers developed medical problems and failed a required biannual physical exam, supervisor Hose offered Myers termination under one of three circumstances.[105] Myers declined and asked for additional time to control the medical problems.[106] When Hose refused, Myers retired and sued, alleging discrimination based on a handicap.[107] The district court granted summary judgment to Hose on all counts.[108]

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98. *See EEOC*, 187 F.3d at 1243-44.
99. *See id.* at 1243.
100. *See id.* at 1248.
101. *Id.*
102. *Id.*
103. *See Midland Brake II*, 180 F.3d at 1162-63 (discussing the status of the support of the other circuits).
104. 50 F.3d 278 (4th Cir. 1995).
105. *See Myers*, 50 F.3d at 280-81.
106. *See id.*
107. *See id.* at 281 (stating that Myers also claimed wrongful discharge and discrimination based on race.)
108. *See id.*

2. Decision:

The Fourth Circuit interpreted provisions in the ADA as containing "no reference to an individual's future ability to perform the essential functions of his position . . . . [T]hey are formulated entirely in the present tense, framing the precise issue as whether an individual 'can' (not 'will be able to') perform the job . . . ."[109] Thus, the Fourth Circuit stated, "[T]he duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his *present* position."[110]

3. Analysis

By interpreting the ADA as applying only to the disabled individual's ability to perform the demands of the *present* position, the Fourth Circuit differs from the interpretation of the Tenth Circuit by giving more credence to the present tense of the wording than to the ADA's plain language. The Fourth Circuit completely ignored the phrase "or desires."[111]

B. *Fifth Circuit: Foreman v. Babcock & Wilcox Co.*[112]

1. Facts:

Welder Foreman needed a pacemaker and could no longer work in the welding area.[113] Employer Babcock & Wilcox ("B&W") denied Foreman's request for an alternative job with equivalent seniority and pay and offered Foreman a janitorial position instead.[114] Foreman sued under the ADA for B&W's failure to reasonably accommodate a disability.[115] The district court directed a verdict for B&W because Foreman could no longer work at the present welding job, either with or without an accommodation.[116]

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109. *Id.* at 283.

110. *Id.* at 284 (emphasis added).

111. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(8) (1994) ("A 'qualified individual with a disability' [means] 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.").

112. 117 F.3d 800 (5th Cir.1997).

113. *See Foreman*, 117 F.3d at 803 (indicating possible hazard from electromagnetic interference with a pacemaker).

114. *See id.*

115. *See id.*

116. *See id.* at 803-04.

2. Decision:

The Fifth Circuit held that Foreman's heart condition was not a disability under the ADA.[117] Further, the court commented that even if the heart condition were a disability, Foreman would not be a qualified individual because Foreman was not medically qualified to perform his current job.[118] Going even further, the court noted that even if Foreman were both "disabled" and "qualified," Foreman's requested accommodation for a reassignment would be unreasonable as the reassignment violated a collective bargaining agreement.[119] In any event, Foreman had offered no evidence that the requested reassignment position had been available.[120]

3. Analysis

The Fifth Circuit differs in two fundamental ways from the Tenth Circuit. First, the Fifth Circuit did not clearly base *Foreman* upon the ADA's plain language. Consequently, *Foreman* does not lend itself to consistent interpretation by lower courts.

Second, the Fifth Circuit lacks fairness by requiring the disabled employee to bear the burdens of proving both that an alternate job exists within the company and that the disabled employee can perform that job, rather than following the EEOC's recommended process.[121]

CONCLUSION

Without specifically defining "reasonable accommodation," the ADA suggests broad-ranged possibilities to impart clarity.[122] EEOC regulations provide guidance as to what constitutes a reasonable accommodation, indicating methods to determine whether a reasonable accommodation exists.[123] Because "reasonable" for one employer might not mean "rea-

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117. *See id.* at 806-07.

118. *See id.* at 809.

119. *See id.*

120. *See id.* at 807-10.

121. *See* 29 C.F.R. pt 1630, app. § 1630.9 (1999) (stating the first step is for the employer to "[a]nalyze the particular job involved and determine its purpose and essential functions . . . ").

122. The term "reasonable accommodation" 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.

42 U.S.C. § 12111(9) (Supp. II 1990).

123. The EEOC provides:

sonable" for another, guidelines as to what constitutes "reasonable" might prevent an employer from being subject to review. This underscores the need for the courts to provide a clear and consistent interpretation of "reasonable."

Adding the thirty-some "reasonable accommodation" cases (thirteen published) heard by the Tenth Circuit during this survey period and considering that each of the other circuits heard a similar number of like cases indicates the importance the Tenth Circuit's position on ADA interpretation. All but two of the circuits agree with the Tenth Circuit's interpretation of "reasonable accommodation."

This shows how closely aligned the Tenth Circuit is with the other circuits on ADA interpretation. The Tenth Circuit, due to clear and consistent reasoning, has established itself as a leader in ADA interpretation.

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> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) (1999).

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