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Acommodating Misconduct Under the Americans with Disabilities Act

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Timmons: Accommodating Misconduct Under the Americans with Disabilities Act
**ACCOMMODATING MISCONDUCT UNDER THE AMERICANS
WITH DISABILITIES ACT**

*Kelly Cahill Timmons**

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I. INTRODUCTION

An employer discharges an anesthesiologist with sleep apnea for falling asleep during surgical procedures.¹ Another employer discharges a manager with post-traumatic stress disorder for an angry confrontation with a female co-worker during which he slapped her hand.² A third employer discharges a grocery store clerk with Tourette’s Syndrome for outbursts of profanity and racial slurs in the workplace.³ A fourth employer discharges a long-standing administrative employee with major depression, who left work in an emotional crisis and was admitted to a psychiatric hospital, for leaving the workplace without notifying her direct supervisor.⁴

The Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified individuals with disabilities because of their disabilities.⁵ Assuming that the conditions of these employees constitute disabilities within the meaning of the Act, do any of their

1. *Brohm v. JH Props., Inc.*, 947 F. Supp. 299, 300-01 (W.D. Ky. 1996), *aff’d*, 149 F.3d 517 (6th Cir. 1998).

2. *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1049, 1052 (5th Cir. 1998).

3. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003), *aff’d*, 90 Fed. Appx. 384 (11th Cir. 2003).

4. *Simpkins v. Specialty Envelope, Inc.*, No. 95-3370, 1996 WL 452858, at *1-2 (6th Cir. Aug. 9, 1996).

5. 42 U.S.C. § 12112(a) (2000).

discharges implicate the protections of the ADA? A few courts have held that discharge due to conduct causally connected to a disability constitutes discrimination because of disability and violates the ADA unless the plaintiff is not qualified for his or her job.⁶ Some other courts have held that employers can discharge employees for conduct causally connected to their disabilities only if the violated conduct rules are job-related and consistent with business necessity.⁷ Most courts, however, have held that disabled employees who engage in misconduct are unprotected by the ADA,⁸ asserting that “if a disabled employee engages in misconduct, an employer may terminate or discipline that employee without incurring liability.”⁹ Under the majority view, a finding that an employee engaged in misconduct, even misconduct related to his or her disability, is generally fatal to the employee’s ADA claim.¹⁰ Moreover, although the ADA requires employers to make reasonable accommodation to the limitations of disabled individuals, courts have held that the duty of reasonable accommodation never compels an employer to excuse past misconduct.¹¹

The proper analysis of disability-related misconduct is an important issue under the ADA because many disabilities, particularly mental ones, manifest themselves in the form of conduct. If employers are able to avoid ADA scrutiny when discharging a disabled employee simply by pointing to the employee’s conduct, the ADA’s promise of equal employment opportunity to individuals with disabilities will be thwarted. On the other hand, providing too much protection to disability-related misconduct would interfere greatly with the ability of employers to operate their businesses safely and efficiently. The specter of a physician falling asleep during surgery with impunity, provided that he could later claim that his behavior was caused by a disability, is a frightening one. But is the majority view the only interpretation of the ADA that would avoid this consequence? In order for the anesthesiologist to lose his claim, is it necessary for the manager, the grocery store clerk, and the administrative employee to have no recourse under the ADA as well?

In the recent case of *Raytheon Co. v. Hernandez*, the Supreme Court indicated that the proper analysis of disability-related misconduct turns on the distinct forms of disability discrimination prohibited by the ADA: disparate treatment, failure to provide reasonable accommodations, and disparate impact.¹² This Article analyzes the existing jurisprudence on

6. See *infra* Part III.B.2.

7. See *infra* Part III.B.2.

8. See *infra* Part III.B.1.

9. Maes v. Henderson, 33 F. Supp. 2d 1281, 1288 (D. Nev. 1999).

10. *Id.*

11. See *infra* Part II.B.2.

12. 540 U.S. 44, 52-53 (2003).

disability-related misconduct through the lens of these forms of discrimination, demonstrating that courts have failed to apply them properly in cases involving misconduct.

Part II outlines the forms of discrimination prohibited by the ADA, as well as the ADA's limited protected class. Part III describes the existing jurisprudence of the ADA and misconduct, discussing disabilities that may manifest themselves in the form of conduct and exploring current approaches to cases involving disability-related misconduct. Part IV critiques the current approaches first by exploring the meaning of "misconduct" and then by examining the lessons of *Raytheon*—and its emphasis on the distinct forms of discrimination—for disability-related misconduct cases. Part V applies the lessons of *Raytheon* to the cases of the anesthesiologist, the manager, the grocery store clerk, and the administrative employee, exploring the ability of these workers to challenge their discharges as disparate treatment, disparate impact, and failure to provide reasonable accommodation. As part of this analysis, this Article contends that a second chance should be a possible reasonable accommodation in cases (1) where there is little evidence of employee fault with respect to both the misconduct and the failure to request an accommodation prospectively, (2) where the misconduct is of low severity, and (3) where the employee is unlikely to repeat the misconduct. In Part VI, the Article concludes that, despite potential problems with accommodating misconduct, a finding that a discharged employee engaged in disability-related misconduct should not be fatal to the employee's ADA claim. Rather, courts should scrutinize carefully whether such employees have experienced discrimination because of their disabilities, examining all of the forms of discrimination prohibited by the ADA.

II. PROHIBITED DISCRIMINATION UNDER THE ADA

Title I of the Americans with Disabilities Act prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to" hiring, discharge, and other terms and conditions of employment.¹³ To understand the scope of the ADA's protections, it is necessary to understand the meaning of both "qualified individual with a disability" and "discriminate."

A. *Qualified Individual with a Disability*

The ADA protects only qualified individuals with disabilities from discriminatory acts by employers.¹⁴ A qualified individual with a disability

13. 42 U.S.C. § 12112(a) (2000).

14. *Id.* An exception to this rule involves the ADA's restrictions on medical examinations and

is “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.”¹⁵ The statute defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities of” the individual in question; “a record of such an impairment;” or, “being regarded as having such an impairment.”¹⁶ Although the statute does not define the term “impairment,” regulations issued by the Equal Employment Opportunity Commission (EEOC)¹⁷ provide that a physical or mental impairment includes “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more” of specified body systems,¹⁸ and “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁹

The scope of the ADA’s coverage depends largely on the meaning of two words: “major” and “substantially.”²⁰ The Supreme Court has stated that a life activity is major if it is significant and of “comparative importance,” and that the activity in question need not have a “public,

inquiries. *Id.* § 12112(d). Courts have held that persons who have been subjected to medical examinations and inquiries prohibited by the statute have standing to sue under the ADA, even if they are not disabled. *See, e.g.,* *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) (stating that “[i]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability”).

The ADA differs greatly from the seminal antidiscrimination statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17, which does not limit its protection to members of certain classes. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting) (noting that “every single individual in the work force” is protected by Title VII); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279-80 (1976) (holding that Title VII’s prohibition of race discrimination is enforceable by whites as well as blacks); *Brill v. Lante Corp.*, 119 F.3d 1266, 1270 (7th Cir. 1997) (stating that all men and women are members of a protected group in sex discrimination cases).

15. 42 U.S.C. § 12111(8).

16. *Id.* § 12102(2). The coverage of the “record of” and “regarded as” definitions of disability are outside the scope of this Article.

17. The Supreme Court has questioned the persuasive authority of the EEOC regulations interpreting the term “disability” because Congress delegated to no agency the authority to issue such regulations. *See* *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002); *Sutton*, 527 U.S. at 479.

18. 29 C.F.R. § 1630.2(h)(1) (2004). The body systems listed are “neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.” *Id.*

19. *Id.* § 1630.2(h)(2). Because the definition of impairment is so broad, few cases have turned on the issue of whether the plaintiff has an impairment.

20. According to the Supreme Court, “these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled.” *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196-97.

economic, or daily dimension.”²¹ In a later case, the Court stated that major life activities are “those activities that are of central importance to daily life.”²² Courts generally agree that the activities listed by the EEOC in its regulations—“caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”²³—are major life activities.²⁴ Other activities that many courts have found to be major include thinking, eating, and sleeping.²⁵ Moreover, some courts have found concentrating and interacting with others to be major life activities.²⁶

Regarding the meaning of the phrase “substantially limits,” the Supreme Court has stated that “substantially” means “considerable” or “to a large degree.”²⁷ Accordingly, an impairment that interferes in a

21. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). In *Bragdon*, the Court held that the plaintiff’s asymptomatic HIV infection was a disability because it substantially limited the major life activity of reproduction. *Id.* at 639-41.

22. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 197. The Court thus reasoned that in order for the performance of manual tasks—the activity at issue in *Toyota*—to be a major life activity, “the manual tasks in question must be central to daily life,” when viewed either individually or together. *Id.* Because the plaintiff’s carpal tunnel syndrome and related impairments only limited her ability to perform certain job-related manual tasks, the Court held that the plaintiff was not entitled to summary judgment on the issue of whether she had a disability. *Id.* at 200-02.

23. 29 C.F.R. § 1630.2(i) (2004).

24. *See, e.g.*, *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 801 (9th Cir. 2002) (finding that seeing is a major life activity); *Emerson v. N. States Power Co.*, 256 F.3d 506, 511 (7th Cir. 2001) (stating that learning and working are “established major life activities”); *Muller v. Costello*, 187 F.3d 298, 312 (2d Cir. 1999) (finding that breathing is a major life activity); *Benette v. Cinemark U.S., Inc.*, 295 F. Supp. 2d 243, 255 (W.D.N.Y. 2003) (finding that hearing is a major life activity).

25. *See, e.g.*, *Brown v. Cox Med. Ctrs.*, 286 F.3d 1040, 1044-45 (8th Cir. 2002) (finding that thinking—“[t]he ability to perform cognitive functions”—is a major life activity); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1134 (9th Cir. 2001) (finding that “caring for oneself” is a major life activity) (quoting 29 C.F.R. § 1630.2(i) (2000)); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (finding that eating is a major life activity); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) (finding that sleeping is a major life activity).

26. *See, e.g.*, *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 569 (3d Cir. 2002) (finding that concentrating is a major life activity); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (reasoning that “[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity’”). *But see Pack*, 166 F.3d at 1305 (finding that concentrating is not a major life activity); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (suggesting that getting along with others is not a major life activity because “[t]he concept . . . is remarkably elastic, perhaps so much so as to make it unworkable as a definition”). In its Compliance Manual, the EEOC lists “[m]ental and emotional processes such as thinking, concentrating, and interacting with others” as “other examples of major life activities.” EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL § 902.3(b) (Mar. 1995). As noted by the *Soileau* court, however, “the manual is hardly binding.” 105 F.3d at 15 n.2.

27. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2280 (3d ed. 1976)).

minor way with a major life activity is not a disability.²⁸ Rather, the impairment must prevent or severely restrict the individual from engaging in the major life activity, and the impact of the impairment must be permanent or long-term.²⁹ Courts generally agree that if an impairment lasts “at least several months,” its impact is long-term.³⁰ Moreover, an individual is substantially limited in the major life activity of working only if the individual’s impairment prevents him or her from working in a broad class of jobs.³¹ It is insufficient for the impairment to preclude the individual from performing “one type of job, a specialized job, or a particular job of choice.”³² Finally, courts must consider an individual’s impairment in its corrected state in determining whether the impairment substantially limits a major life activity.³³ If medication corrects an individual’s impairment, the impairment is not a disability, and an employer is free to discriminate against the individual based on that impairment.³⁴

B. *Discrimination Because of Disability*

To challenge an employer’s action under the ADA, a plaintiff must prove that he or she is a qualified individual with a disability, which—as

28. *Id.* at 197 (stating that “[t]he word ‘substantial’ thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities”).

29. *Id.* at 198. In *Bragdon*, however, the Court emphasized that the ADA “addresses substantial limitations on major life activities, not utter inabilities.” *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). Accordingly, the Court reasoned that even though “[c]onception and childbirth are not impossible for an HIV victim,” such an individual is nonetheless substantially limited in the reproduction because such activities “are dangerous to the public health.” *Id.*

30. *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1270 (10th Cir. 1998) (finding that a reasonable jury could find the plaintiff’s impairment substantially limiting because its anticipated duration was “at least several months”); *see also* Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d Cir. 2002) (reasoning that the plaintiffs’ impairment of alcoholism was long term because they would be discharged from a halfway house “‘between three and nine months after admission’” (quoting N.Y. COMP. CODES R. & REGS. tit. 14 § 375.8(g) [sic])). Similarly, the EEOC Compliance Manual provides that an impairment “may be long-term, or potentially long-term,” if its duration “is indefinite or unknowable or is expected to be at least several months.” EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 26, § 902.4(d) (example 2).

31. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

32. *Id.* at 492. The Court stated further that “[i]f jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.” *Id.*

33. *Id.* at 482.

34. *See id.* at 488-91 (holding that plaintiffs with severe myopia who had 20-20 vision with the aid of glasses or contacts were not disabled, such that United Air Lines was free to reject their employment applications because of their myopia).

discussed above—may not be easy to do. In addition,³⁵ the plaintiff must prove that the challenged action constituted discrimination because of disability.³⁶ The ADA prohibits discrimination because of disability and defines discrimination in three main ways: disparate treatment, failure to provide reasonable accommodations, and disparate impact.³⁷

1. Disparate Treatment

Disparate treatment, “the most easily understood type of discrimination,”³⁸ is intentional discrimination.³⁹ Disparate treatment occurs whenever an employer treats a disabled person differently from others because of a protected trait such as a disability.⁴⁰ In a disparate treatment case, the plaintiff must prove that a prohibited factor actually motivated the employer’s decision,⁴¹ or in other words, that a prohibited factor caused the employer to make the decision.⁴²

Under Title VII, unless the very narrow bona fide occupational qualification defense is satisfied, employment decisions based on a protected trait such as race or sex are prohibited.⁴³ In contrast, the ADA permits employment decisions motivated by an individual’s disability if the individual is not qualified.⁴⁴ To be qualified, and thus protected from disparate treatment on the basis of one’s disability, an individual must be

35. 42 U.S.C. § 12112(a) (2000).

36. *See id.* (providing, as the “[g]eneral rule” regarding discrimination, that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual”).

37. *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1188-89 (10th Cir. 2003). The statute also restricts certain medical examinations and inquiries of employees or applicants for employment as part of its prohibition against discrimination. 42 U.S.C. § 12112(d) (2000).

38. *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

39. *Peebles v. Potter*, 354 F.3d 761, 765 (8th Cir. 2004).

40. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003); *Peebles*, 354 F.3d at 766; *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8 (1996) (“A disabled individual who could perform the job in its present form, but whom the employer refuses to hire because of a mistaken belief that she cannot perform the requisite tasks or out of revulsion against the worker’s disability (such as a disfiguring cosmetic condition), is simply a victim of traditional discrimination.”).

41. *Raytheon Co.*, 540 U.S. at 52.

42. *See Gonzalez v. City of Minneapolis*, 267 F. Supp. 2d 1004, 1014 (D. Minn. 2003) (finding that the plaintiff’s ADA disparate treatment claim failed because of the lack of evidence indicating that “his disability in any way motivated or caused his termination or other adverse action”).

43. 42 U.S.C. § 2000e-2(a) (2000); *id.* § 2000e-2(e) (providing that employment decisions based on “religion, sex, or national origin” are permissible “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

44. *Id.* § 12112(a).

able to perform the essential functions of the employment position that he or she holds or desires, with or without reasonable accommodation.⁴⁵

Because of the difficulty in finding direct evidence of discriminatory intent, plaintiffs often attempt to demonstrate disparate treatment using the burden-shifting approach first developed in the Title VII context in *McDonnell Douglas Corp. v. Green*.⁴⁶ Under this approach, a plaintiff first must establish a prima facie case of discrimination—enough evidence that will raise an inference of discrimination.⁴⁷ The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action.⁴⁸ Finally, the plaintiff must prove that the employer's articulated reason is pretext and that its actual reason was prohibited discrimination.⁴⁹ Where the adverse employment action at issue is termination, courts generally have stated the elements of a prima facie case of discrimination under Title VII as follows: (1) plaintiff belongs to a class protected by Title VII; (2) plaintiff was qualified for the job he or she held; (3) plaintiff was discharged; and (4) the job was not eliminated after the discharge.⁵⁰

45. *Id.* § 12111(8).

46. 411 U.S. 792, 802-04 (1973).

47. *Id.* at 802.

48. *Id.*

49. *Id.* at 804. To rule in favor of the plaintiff on a disparate treatment claim, the trier of fact must find that the employer's motivation for the adverse employment action was discrimination based on a protected trait. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993). However, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

50. *See, e.g., Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994). Some courts have stated that the fourth element of a prima facie case of discriminatory discharge under Title VII is that the employer replaced the plaintiff with someone outside the plaintiff's protected group. *See, e.g., Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class."). However, most courts agree that the plaintiff need not make such a showing. *See, e.g., Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 353 (3d Cir. 1999) (holding that "a plaintiff need not prove, as part of her prima facie case, that she was replaced by someone outside of the relevant class"); *Williams*, 14 F.3d at 1308. In their treatise on employment discrimination, Harold S. Lewis Jr. and Elizabeth J. Norman state that "the termination plaintiff usually satisfies element (4) simply by producing evidence that the employer had a continuing need for someone to perform the plaintiff's work, or, even more clearly, that the employer in fact filled plaintiff's former position, but not necessarily with someone from another protected class." HAROLD S. LEWIS JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* § 3.10 (2001).

With regard to the second element of the prima facie case, the plaintiff need only prove that he or she met the minimum or absolute qualifications of the position. *See Walker v. Mortham*, 158 F.3d 1177, 1185 (11th Cir. 1998). Moreover, if the employer asserts that it terminated the plaintiff because of poor work performance or misconduct, courts typically consider such an argument as the employer's asserted legitimate nondiscriminatory reason for the plaintiff's termination, rather

As under Title VII, courts in ADA cases frequently use the burden-shifting approach to proving disparate treatment.⁵¹ They vary, however, in how they describe the elements of a prima facie case of disability discrimination. Many courts state the elements in discharge cases as (1) plaintiff has a disability; (2) plaintiff is a qualified individual,⁵² and (3) in discharging the plaintiff, the employer discriminated against him or her because of the disability.⁵³ This delineation of the elements of the prima facie case is problematic, however, because it simply reiterates the statute's prohibition of discrimination. The ADA prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual."⁵⁴ As discussed above, courts developed the burden-shifting approach to proving discrimination in order to allow those plaintiffs lacking direct evidence of discrimination to create an inference of discrimination using circumstantial evidence.⁵⁵ Thus,

than finding the plaintiff unable to satisfy the "qualified" element of a prima facie case. *See, e.g.,* *Aragom v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659-60 (9th Cir. 2002) (finding that plaintiff satisfied his "minimal prima facie burden of establishing that he was qualified for [his] position," despite employer's argument that he was laid off for inadequate job performance); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-64 (6th Cir. 2000) ("[W]hen assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff.").

51. *See, e.g.,* *Raytheon, Co. v. Hernandez*, 540 U.S. 44, 49 (2003).

52. Unlike Title VII, which does not require an individual to be "qualified" to receive protection from employment decisions motivated by a protected trait, ADA plaintiffs must be "qualified" to receive protection from disparate treatment on the basis of disability. 42 U.S.C. § 12112(a) (2000). To be "qualified" under the ADA, a plaintiff must be able to perform the essential functions of the job with or without reasonable accommodation. *Id.* § 12111(8).

53. *See, e.g.,* *Shaner v. Synthes (USA)*, 204 F.3d 494, 500 (3d Cir. 2000) ("In order to establish a prima facie case of disparate treatment under the ADA, a plaintiff must show '(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise [sic] adverse employment decision as a result of discrimination.'" (quoting *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998)); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir. 1998) (stating that to make out a prima facie case under the ADA, plaintiff "must show that (a) he has a disability; (b) he is a qualified individual for the job in question; and (c) an adverse employment decision was made because of his disability"); *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir. 1997) (stating that a plaintiff establishes a prima facie case of discriminatory discharge by proving that "he has a 'disability;'" "that he is a 'qualified individual;'" and that "in 'discharg[ing]' him, his employer 'discriminate[d] against [him] because of [his] disability'" (quoting 42 U.S.C. § 12112(a) (1994)).

54. *Id.* § 12112(a).

55. In *McDonnell Douglas Corp. v. Green*, for example, the Court listed the elements of a prima facie case of a racially discriminatory failure to hire as "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the

requiring a plaintiff to prove discrimination because of disability—the ultimate question under the ADA—as part of a *prima facie* case makes little sense.⁵⁶

Some courts, however, have described the elements of a *prima facie* case of discriminatory discharge under the ADA in a manner more consistent with the purposes of the burden-shifting approach.⁵⁷ One court stated the third element as requiring a showing that the plaintiff “suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.”⁵⁸ Another court stated that a plaintiff must show that “he or she was subject to an adverse employment action” and that “he or she was replaced by a nondisabled person or was treated less favorably than non-disabled employees.”⁵⁹ As under Title VII, once a plaintiff establishes a *prima facie* case of disability discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for terminating the plaintiff.⁶⁰ The plaintiff must

plaintiff’s] qualifications.” 411 U.S. 792, 802 (1973). The Court did not include as one of the elements “that in not hiring the plaintiff, the employer discriminated against him because of his race” or “the employer failed to hire the plaintiff because of his race.”

56. If a plaintiff must prove discrimination because of disability as part of her *prima facie* case, an employer could not prove that it was motivated by a legitimate nondiscriminatory reason rather than the plaintiff’s disability. The plaintiff would have established the ultimate question of discrimination as part of her *prima facie* case, and there would be no point in proceeding through the remaining steps of the burden-shifting approach.

57. In *Hutchinson v. United Parcel Service, Inc.*, the court expressly rejected the version of the *prima facie* case that includes the “because of disability” element. 883 F. Supp. 379, 395 (N.D. Iowa 1995). The court reasoned as follows:

This court agrees with those decisions holding that the proper *prima facie* case under the ADA is that most closely resembling the *prima facie* showing required for other forms of employment discrimination: the plaintiff need not show at the *prima facie* case phase that he or she was terminated “because of” a disability. Rather, the plaintiff need only make a showing that gives rise to an *inference* of discrimination on the basis of disability.

Id.

58. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1021-22 (8th Cir. 1998); *see also* *Butler v. City of Prairie Vill.*, 172 F.3d 736, 748 (10th Cir. 1999) (stating that “to establish the third element of a *prima facie* case of disability discrimination, the plaintiff must show that she was terminated because of her disability, or that the employer terminated the plaintiff ‘under circumstances which give rise to an inference that the termination was based on her disability’”) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

59. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir. 1997) (quoting *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995)). According to yet another court, a plaintiff must demonstrate an adverse employment action, that “the employer knew or had reason to know of his or her disability,” and that “after . . . termination the position remained open, or the disabled individual was replaced.” *Monette v. Elect. Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996).

60. *See Butler*, 172 F.3d at 750 (“Because we have concluded that Plaintiff set forth a *prima* Published by UF Law Scholarship Repository, 2005

then demonstrate that the asserted reason is a pretext for disability discrimination, and the plaintiff may do so by showing that the reason is not credible.⁶¹

The disparate treatment theory of discrimination furthers the goal of equal treatment of employees. Under the disparate treatment theory, the plaintiff contends that the employer failed to provide equal treatment and instead treated the plaintiff differently because of a protected trait. Different treatment on the basis of disability is prohibited unless the plaintiff is not a qualified individual able to perform the essential functions of his or her job with or without reasonable accommodation.⁶²

In contrast, the two other forms of discrimination prohibited by the ADA—failure to provide reasonable accommodations and disparate impact—further the goal of equal *opportunity*. Under both the accommodations theory and the disparate impact theory, the plaintiff contends that the employer's equal treatment of its employees operated to deny the plaintiff equal opportunity, such that the employer must alter that treatment because of its effect on the plaintiff or on persons in the plaintiff's protected class.

2. Failure to Provide Reasonable Accommodations

The ADA includes in its definition of discrimination “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 the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business.”⁶³ The statute provides that reasonable accommodation may include physical changes to the workplace, such as “making existing facilities used by employees readily accessible to and usable by individuals with disabilities.”⁶⁴ Reasonable accommodation also may include nonphysical changes, such as “job restructuring” or “appropriate adjustment or modifications of . . . policies.”⁶⁵

facie case of discrimination under the ADA, we must examine whether the [employer] proffered a legitimate, nondiscriminatory reason for its decision to terminate Plaintiff's employment.”)

61. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004).

62. 42 U.S.C. § 12111 (2000).

63. *Id.* § 12112(b)(5)(A). The Act also prohibits “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.” *Id.* § 12112(b)(5)(B).

64. *Id.* § 12111(9)(A).

65. *Id.* § 12111(9)(B). For example, courts have held that modifying the plaintiff's work schedule may be a reasonable accommodation. *See, e.g., Breen v. Dep't of Transp.*, 282 F.3d 839, 842-43 (D.C. Cir. 2002) (holding, under the Rehabilitation Act, that a modified work schedule—in

In order to trigger the duty to accommodate, a plaintiff generally must inform the employer of his or her disability and request an accommodation.⁶⁶ Moreover, courts have reasoned that, because an employer must accommodate only “the ‘known’ physical or mental limitations” of an otherwise qualified disabled individual, the duty of reasonable accommodation is prospective in nature.⁶⁷ Accordingly, a “second chance” is not a reasonable accommodation contemplated by the ADA.⁶⁸

Commentators frequently have emphasized the distinction between the traditional equal treatment model of discrimination represented by Title VII and the equal opportunity model represented by the ADA’s duty of reasonable accommodation. For example, Pamela S. Karlan and George Rutherglen have stated that “under the civil rights statutes that protect women, blacks, or older workers, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor; disabled individuals often can.”⁶⁹ As noted by Christine Jolls, however,

which plaintiff would work one extra hour at the end of each day without disruptions and then take one compensatory day off every other week—may be a reasonable accommodation for a plaintiff whose obsessive compulsive disorder made it difficult for her to complete her tasks with normal workplace interruptions).

66. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001) (referring to “the general rule that an employee must make an initial request” for an accommodation); *Robin v. Espo Eng’g Corp.*, 200 F.3d 1081, 1092 (7th Cir. 2000) (stating that because plaintiff “did not make a request for an accommodation under the ADA,” his employer “was not required to accommodate his disability”).

67. *See, e.g., Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996). The EEOC’s Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities takes the same position, stating that “reasonable accommodation is always prospective.” EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES 31 (Mar. 25, 1997), available at <http://www.eeoc.gov/policy/docs/psych.html>.

68. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir. 1997); *Corr v. MTA Long Island Bus*, 27 F. Supp. 2d 359, 368 (E.D.N.Y. 1998).

69. Karlan & Rutherglen, *supra* note 40, at 3. Karlan and Rutherglen further explain that the ADA contains:

[A] far different definition of “discrimination” than the definition embraced in other areas of employment discrimination law. Title VII, for instance, essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it. The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination.

Id. at 9 (footnote call number omitted). Similarly, Samuel Issacharoff and Justin Nelson describe ADA cases as differing from early discrimination case law in that the redistributive impact of those early cases “flowed directly from the prohibition on discrimination simpliciter,” while most ADA cases “concern not discrimination simpliciter, but a claimed failure to redistribute in the form of

these commentators have overlooked the fact that Title VII also incorporates an equal opportunity model of discrimination through its disparate impact theory of liability.⁷⁰ Similarly, in addition to the duty of reasonable accommodation, the ADA also prohibits employment practices that have a disparate impact on individuals with disabilities.⁷¹

3. Disparate Impact

As developed in the Title VII context, the disparate impact theory of discrimination prohibits employers from engaging in facially-neutral employment practices that have a disproportionately harsh effect on members of a protected class, unless such practices are job-related and consistent with business necessity.⁷² The Supreme Court first recognized this theory of discrimination in the case of *Griggs v. Duke Power Co.*, in which the Court found that an employer violated Title VII by requiring that employees pass two standardized tests and have a high school diploma in order to obtain a job in one of the company's more desirable departments, where such requirements had the effect of disproportionately excluding black employees and could not be shown to be related to successful job performance.⁷³ The Court held that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation," unless the challenged practice is related to job

accommodation." Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 310-11 (2001) (footnote call number omitted); see also Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200 (2003) (contrasting the "'sameness' model" of Title VII—"requiring employers to treat African Americans and women exactly the same as others"—with the "'difference' model" of the ADA—"requiring employers to treat individuals with disabilities differently and more favorably than others").

70. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001).

71. See *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1188-89 (10th Cir. 2003) (explaining that the ADA prohibits "three distinct types of discrimination"—disparate treatment, not making reasonable accommodations, and disparate impact); *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) (noting that "the disparate impact theory has been adopted entirely by the ADA").

72. 42 U.S.C. § 2000e-2(k)(1)(A) (2000); see also *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (explaining that claims of disparate impact discrimination "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").

73. 401 U.S. 424, 431-32 (1971). The Court noted that census statistics revealed that black males were much less likely to have a high school diploma than white males, and that the EEOC had found in another case that the use of a group of tests—including the two tests at issue in *Griggs*—resulted in only six percent of blacks passing the tests, compared with fifty-eight percent of whites. *Id.* at 430 n.6

performance.⁷⁴ Even though the challenged requirements may have been “neutral on their face, and even neutral in terms of intent,” the Court reasoned that they violated Title VII because “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”⁷⁵

Consistent with the disparate impact theory as recognized under Title VII, the ADA prohibits employers from “utilizing standards, criteria, or methods of administration” “that have the effect of discrimination on the basis of disability.”⁷⁶ The ADA also prohibits employers from “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by [the employer], is shown to be job-related . . . and . . . consistent with business necessity.”⁷⁷ This language is similar to that used in the Civil Rights Act of 1991, which amended Title VII to expressly codify the disparate impact theory of discrimination.⁷⁸

The method of proving a disparate impact under the ADA differs from the method under Title VII, however, making it easier for an ADA plaintiff to utilize this theory of discrimination. Under Title VII, a plaintiff must prove that an employer “uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”⁷⁹ In other words, a plaintiff must prove that an employment practice is disproportionately harmful to members of a class protected by

74. *Id.* at 431.

75. *Id.* at 430, 432.

76. 42 U.S.C. § 12112(a), (b)(3)(A).

77. *Id.* § 12112(a), (b)(6).

78. *See id.* § 2000e-2(a)(2); *id.* § 2000e-2(k)(1)(A) (stating that “[a]n unlawful employment practice based on disparate impact is established” if the “complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin” and “the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity”). Before this amendment, some commentators had argued that Title VII’s language did not support a disparate impact theory of discrimination. *See, e.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 182-204 (1992); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1344-45 (1987) (arguing that the basis of the disparate impact theory “is not to be found in any provision explicitly enacting it into law or in any passage in the legislative history”).

The ADA’s “screen out” language is consistent with courts’ descriptions of how to prove a disparate impact under Title VII. *See, e.g.*, *Grano v. Dep’t of Dev.*, 637 F.2d 1073, 1081 (6th Cir. 1980) (“In a disparate impact situation . . . the issue is whether a neutral selection device . . . screens out disproportionate numbers of [the protected class].”). Moreover, the regulations issued by the EEOC to interpret the employment provisions of the ADA specifically refer to these definitions of discrimination as based on disparate impact. *See* 29 C.F.R. § 1630.15(c) (2004) (referring to defenses to “[o]ther disparate impact charges”).

79. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

the statute. Courts generally have insisted that a plaintiff prove a disparate impact via statistical evidence showing that the employment practice disqualified or excluded a disproportionate number of persons in a protected group.⁸⁰ This is a complicated process, requiring the court to determine the appropriate comparison group—the relevant applicant or labor pool it must examine to decide whether the challenged employment practice causes a disparate impact on the basis of a protected trait.⁸¹

In contrast with Title VII's statistics-based method of establishing a disparate impact on a protected group, an ADA plaintiff may prove a disparate impact by demonstrating that an employer's policy "screen[s] out or tend[s] to screen out *an individual with a disability* or a class of individuals with disabilities."⁸² In other words, an ADA plaintiff may establish a disparate impact simply by proving that the challenged policy had an adverse effect on her because of her disabilities; the plaintiff need not demonstrate an adverse effect on a class of persons with disabilities.⁸³

80. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (stating that the evidence in disparate impact cases "usually focuses on statistical disparities"); *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 160 (2d Cir. 2001) (stating that "statistical proof almost always occupies center stage in a prima facie showing of a disparate impact claim"); *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 953 (8th Cir. 2001) (stating that a plaintiff must present "statistical evidence of a kind and degree sufficient to show that the practice in question caused the plaintiff to suffer adverse employment action because of his or her membership in a protected group").

81. See *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1312 (11th Cir. 1999) (explaining that "to determine whether an employment practice causes a 'disparate' impact [on the basis of race], the court must gain some handle on the baseline racial composition that the impact is 'disparate' from; that is, what should the racial composition of the job force look like absent the offending employment practice"). The parties are likely to disagree on what comparison group is appropriate. See *id.* ("The contest between the plaintiff and defendant is one in which both seek to answer the question of who is qualified, and thus to define the qualified applicant pool on their own terms.").

The court also must decide what magnitude of disparity is required. The Supreme Court has stated only that the challenged employment practice must disqualify members of a protected class at a substantially higher rate than persons outside the class. *Watson*, 487 U.S. at 994-95; see, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971). The EEOC's Uniform Guidelines on Employee Selection Procedures provide that a selection rate for any protected group which is less than four-fifths of the rate for the group with the highest rate generally constitutes evidence of adverse impact. 29 C.F.R. § 1607.4(D) (2004). Some lower courts have relied on this rule to determine when a disparity is sufficient. See, e.g., *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002); *Waisome v. Port Auth.*, 948 F.2d 1370, 1375-76 (2d Cir. 1991); see also *Ramona L. Paetzold & Steven L. Willborn, Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 333 n.22 (1996) ("The four-fifths rule is the dominant approach for determining whether an employer's selection criterion has systematically damaged the plaintiff's protected class status.").

82. 42 U.S.C. § 12112(b)(6) (emphasis added).

83. See *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case by demonstrating an

The EEOC explains the rationale for allowing individually focused disparate impact claims under the ADA in its Technical Assistance Manual to Title I of the ADA:

Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on “people with disabilities.” Often, there may be little or no statistical data to measure the impact of a procedure on any “class” of people with a particular disability compared to people without disabilities. As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability.⁸⁴

Perhaps because disparate impact is similar to the duty of reasonable accommodation,⁸⁵ courts frequently overlook it as a viable theory of discrimination under the ADA.⁸⁶ Two of the statute’s references to “qualification standards” do receive frequent attention, however: the direct threat provision and the provision regarding the illegal use of drugs and alcohol.⁸⁷ The ADA creates a defense for action under a qualification standard “shown to be job-related and consistent with business necessity”⁸⁸ and further provides that such a qualification standard “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,”⁸⁹ if reasonable accommodation will not enable the individual to perform the job safely.⁹⁰

adverse impact on himself rather than on an entire group.”); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § I-4.3(2) (1992), available at <http://www.jan.wvu.edu/links/ADAtam1.html> (“It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard.”).

84. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 83, § I-4.3(2).

85. See Jolls, *supra* note 70, at 645 (contending that “some aspects of antidiscrimination law—in particular its disparate impact branch—are in fact requirements of accommodation”).

86. See, e.g., *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999) (“Under the ADA, two distinct categories of disability discrimination claims exist: failure to accommodate and disparate treatment.”).

87. See, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79, 87 (2002) (concluding that an EEOC regulation authorizing the refusal to hire an individual with a disability because his performance on the job would pose a direct threat to the individual’s own health was permitted by the ADA, despite the fact that the statute’s direct threat defense is more narrow); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 319 n.14 (5th Cir. 1997); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 847-48 (6th Cir. 1995).

88. 42 U.S.C. § 12113(a) (2000).

89. *Id.* § 12113(b).

90. *Id.* § 12113(a); see also *Echazabal*, 536 U.S. at 78-79 (describing the direct threat

In addition, the ADA provides that an employer

may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.⁹¹

The statute also provides that “any employee or applicant who is currently engaging in the illegal use of drugs,” is not a qualified individual with a disability when the employer acts on the basis of such use.⁹² Individuals who formerly engaged in the illegal use of drugs but have been rehabilitated, however, may be qualified individuals with disabilities under the Act.⁹³

Alcoholism is an impairment under the ADA,⁹⁴ and courts have held that it may substantially limit a major life activity of an individual, such that the individual is disabled.⁹⁵ Similarly, courts have held that recovering drug addicts may be disabled within the meaning of the statute.⁹⁶ Individuals who are alcoholics or are addicted to drugs sometimes engage in conduct that employers find objectionable and that is causally connected

defense).

91. 42 U.S.C. § 12114(c)(4).

92. *Id.* § 12114(a).

93. *Id.* § 12114(b)(1). Individuals may also be protected if they are “participating in a supervised rehabilitation program” and are no longer engaged in the illegal use of drugs. *Id.* § 12114(b)(2).

94. *Reg’l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002).

95. *E.g., id.* at 47-48 (holding, in a case arising under Title II of the ADA, that the plaintiffs’ alcoholism was a disability because it substantially limited their ability to care for themselves, given that they could not “live independently without suffering a relapse”). Most courts agree, however, that if the plaintiff cannot show that alcoholism substantially limited one of the plaintiff’s major life activities, the plaintiff is not disabled. *E.g., Bailey v. Ga.-Pac. Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002) (finding that the plaintiff’s alcoholism was not a disability because it did not limit any of his major life activities, including the activity of working); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997) (finding that the plaintiff, despite being an alcoholic, “offered no evidence that he suffered from any substantially limiting impairment of any significant duration”). *But see Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (stating, without qualification, that “alcoholism is a protected disability under the ADA”).

96. *E.g., MX Group, Inc. v. City of Covington*, 293 F.3d 326, 328, 337-39 (6th Cir. 2002) (holding, in a case arising under Title II of the ADA, that the plaintiffs, who were recovering from drug addiction, were substantially limited in the major life activities of “working, functioning socially and parenting,” and that despite their methadone treatments, the plaintiffs remained substantially limited because of the likelihood of relapse); *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) (“Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA”).

to their disabilities.⁹⁷ As discussed above, the ADA expressly provides that employers may hold employees who are alcoholics or addicted to drugs to the same qualification standards as other employees.⁹⁸ Accordingly, if an employer would discharge a nondisabled employee for certain conduct, it may discharge an individual disabled by alcoholism or drug addiction who engages in that conduct, despite any argument that the disability caused the conduct.⁹⁹

Are there any other disabilities that might be causally connected to conduct that employers find objectionable? And if so, does the ADA impose any limitations on the ability of employers to discharge disabled employees for such conduct? Part III answers the first question and explores how courts have answered the second question.

III. THE ADA AND MISCONDUCT

A. *Disabilities That May Involve Causally Connected Misconduct*

Several impairments that may substantially limit one or more of an individual's major life activities—in other words, several disabilities—are likely to manifest themselves in the form of conduct. Such disability-related misconduct is particularly common with mental impairments, such as bipolar disorder,¹⁰⁰ major depression, post-traumatic stress disorder (PTSD), or obsessive compulsive disorder (OCD).¹⁰¹

97. For example, employees discharged for being arrested for driving under the influence have claimed that their alcoholism caused them to drive while intoxicated. *Despears v. Milwaukee County*, 63 F.3d 635, 636 (7th Cir. 1995); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995); *see also Pernice v. City of Chicago*, 237 F.3d 783, 786 (7th Cir. 2001) (plaintiff contended that “his drug addiction compelled him to possess drugs” and thus caused the possession of cocaine for which he was arrested); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 310-11 (5th Cir. 1997) (plaintiff contended that his alcoholism caused him to mouth obscene words and make a “let’s leave the room”—presumably to fight—gesture at another manager during a company social event); *Little v. FBI*, 1 F.3d 255, 257 (4th Cir. 1993) (plaintiff contended that his alcoholism caused him to be intoxicated while on duty); *Rodgers v. Fed. Express Corp.*, No. 92-3747, 1993 WL 220556, at *1 (6th Cir. June 23, 1993) (plaintiff contended that his drug addiction caused his positive drug test at work); *Teahan v. Metro-N. Commuter R.R.*, 951 F.2d 511, 514 (2d Cir. 1991) (plaintiff contended that his alcoholism caused his excessive absenteeism).

98. *See* text accompanying note 91 (quoting 42 U.S.C. § 12114(c)(4)).

99. *See Pernice*, 237 F.3d at 785 (“Although the ADA might protect a plaintiff from adverse employment action taken because of his alcoholism or drug addiction, it provides no bar to discipline for employee misconduct.”); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998) (stating that “unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA”).

100. According to Susan Stefan, “schizophrenia and bipolar disorder are the diagnoses most likely to be considered disabilities under the ADA.” SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* 55 (2002).

101. *See Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1087 (10th Cir. 1997) (“Mental illness

It is undisputed that all of the conditions listed above are impairments,¹⁰² but it is disputed whether these impairments constitute disabilities under the ADA. Whether an impairment is disabling is an individualized inquiry, focusing on the effect of the impairment on the individual plaintiff.¹⁰³ Accordingly, the fact that a court may have held that a plaintiff with major depression, for example, is disabled in one case does not mean that major depression will always constitute a disability under the ADA. Moreover, because courts must consider the mitigating effects of medication in determining whether an impairment is substantially limiting, many plaintiffs with mental impairments will be unable to prove that they are disabled within the meaning of the Act.¹⁰⁴

Despite these obstacles, some plaintiffs with mental impairments have proven that their impairments substantially limited major life activities and thus constitute disabilities.¹⁰⁵ Courts have held that plaintiffs with bipolar disorder raised a jury issue as to whether their condition substantially limited them in the major life activities of thinking, caring for oneself,

is manifested by abnormal behavior, and is in fact normally diagnosed on the basis of abnormal behavior.”); STEFAN, *supra* note 100, at 154 (“Many disabilities manifest themselves in forms of behavior or conduct, and psychiatric disability is manifested almost completely in this way.”).

102. Regulations issued by the EEOC provide that mental impairments include “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h)(2) (2004). The EEOC’s Enforcement Guidance on the ADA and Psychiatric Disabilities describes “emotional or mental illness[es]” as including “major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.” EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 67, at 2; *see also* Duda v. Bd. of Educ., 133 F.3d 1054, 1059 (7th Cir. 1998) (holding that “medically diagnosed mental conditions” are impairments under the ADA). The statute further provides that homosexuality and bisexuality are not impairments, and that compulsive gambling, kleptomania, pyromania, and sexual behavior disorders such as transvestitism and pedophilia are not disabilities. 42 U.S.C. § 12211(a)-(b).

103. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

104. *See, e.g., Mannie v. Potter*, No. 01 C 9097, 2003 U.S. Dist. LEXIS 13501, at *29-31 (N.D. Ill. Aug. 4, 2003) (holding that a plaintiff with paranoid schizophrenia, who “takes medicine daily, as prescribed by her doctor, which controls the symptoms of her illness,” does not have a disability because she “provided no evidence that any of her major life functions is impeded by her schizophrenia.”); *see also* Randal I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927, 929 (2001) (noting that after *Sutton*, many individuals with mental illnesses “who may have previously been considered disabled will now fall outside the statutory coverage because their medications effectively control their illnesses”).

105. Interestingly, since *Sutton*, no reported case has found that a plaintiff with schizophrenia was disabled under the ADA. *E.g., Mannie*, 2003 U.S. Dist. LEXIS 13501, at *30-31; Boyer v. K.R.S. Computer & Bus. Sch., 171 F. Supp. 2d 950, 964 (D. Minn. 2001) (holding that a plaintiff with drug-induced schizophrenia could not prove that he was substantially limited in any major life activity where he was able to work and engage in normal daily functions). *But see* Deily v. Waste Mgmt., No. 00-1100, 2001 U.S. Dist. LEXIS 8555, at *5 (E.D. Pa. June 25, 2001) (assuming that plaintiff with schizophrenia made out a prima facie case of disability discrimination).

sleeping, and working.¹⁰⁶ Plaintiffs with major depression have raised fact issues as to whether they were substantially limited in thinking, sleeping, working, concentrating, and interacting with others.¹⁰⁷ Plaintiffs with PTSD have demonstrated that they might be substantially limited in the major life activities of sleeping and working,¹⁰⁸ while plaintiffs with OCD

106. *See, e.g.*, *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 302 (3d Cir. 1999) (holding that a factual issue existed as to whether the plaintiff's bipolar disorder substantially limited her in the major life activity of thinking even when she was taking lithium); *EEOC v. Voss Elec. Co.*, 257 F. Supp. 2d 1354, 1357, 1360 (W.D. Okla. 2003) (holding that a plaintiff with bipolar disorder raised factual issue as to whether his condition substantially limited him in the major life activity of caring for himself); *Hansen v. Smallwood*, 119 F. Supp. 2d 1296, 1297, 1301 (M.D. Fla. 2000) (holding that factual issue existed as to whether a plaintiff's bipolar disorder substantially limited him in major life activity of working); *Stewart v. Bally Total Fitness*, No. 99-3555, 2000 U.S. Dist. LEXIS 10047, at *13 (E.D. Pa. July 20, 2000) (holding that factual issue existed as to whether plaintiff's bipolar disorder substantially limited him in major life activities of sleeping and working). As with any impairment, however, not all plaintiffs with bipolar disorder succeed in establishing that their condition is disabling, particularly when they assert "working" as the substantially limited major life activity. *See, e.g.*, *Kramer v. Hickey-Freeman, Inc.*, 142 F. Supp. 2d 555, 559 (S.D.N.Y. 2001) (holding that a plaintiff with bipolar disorder was not substantially limited in major life activity of working where medication controlled his condition and allowed him to perform all his job duties); *McConnell v. Pioneer Hi-Bred Int'l, Inc.*, CIV. 98-4060-KES 2000 DSD2, 2000 U.S. Dist. LEXIS 3335, at *19-20 (D.S.D. Jan. 25, 2000) (holding that a plaintiff with bipolar disorder who took medication was not substantially limited in major life activity of working).

107. *See, e.g.*, *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1085, 1088-1089 (9th Cir. 2001) (holding that a factual issue existed as to whether a plaintiff with depression and PTSD was substantially limited in her ability to work); *Cohen v. Ameritech Corp.*, No. 02 C 7378, 2003 U.S. Dist. LEXIS 23166, at *17 (N.D. Ill. Dec. 24, 2003) (holding, on defendant's motion for summary judgment, that a plaintiff with depression may have been substantially limited in his ability to work); *Ferrero v. Henderson*, 244 F. Supp. 2d 821, 830 (S.D. Ohio 2002) (holding that a plaintiff with anxiety disorder may have been substantially limited in sleeping, working, and thinking); *Schopmeyer v. Plainfield Juvenile Corr. Facility*, No. IP 00-1029-CH/F, 2002 U.S. Dist. LEXIS 19209, at *13-15 (S.D. Ind. Sept. 17, 2002) (holding that a plaintiff with depression may have been substantially limited in sleeping, concentrating, interacting with others, and working). *But see* *Doyal v. Okla. Heart, Inc.*, 213 F.3d 492, 495-99 (10th Cir. 2000) (holding that a plaintiff with depression and anxiety attacks could not show that she was substantially limited in learning, sleeping, thinking, or interacting with others); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1062 (7th Cir. 2000) (holding that a plaintiff with depression could not demonstrate that she was substantially limited in her major life activity of working); *Rohan v. Networks Presentation LLC*, 175 F. Supp. 2d 806, 812 (D. Md. 2001) (holding that a plaintiff's depression and PTSD did not substantially limit her ability to care for herself).

108. *See, e.g.*, *Snead*, 237 F.3d at 1085, 1089 (holding that a plaintiff's PTSD and depression may substantially limit her ability to work); *Rohan*, 175 F. Supp. 2d at 812, 813 (holding that a plaintiff's PTSD and depression may substantially limit her major life activity of sleeping); *Felix v. N.Y. City Transit Auth.*, 154 F. Supp. 2d 640, 654 (S.D.N.Y. 2001) (holding that a plaintiff's PTSD may substantially limit her major life activity of sleeping). *But see* *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001) (holding that a plaintiff's PTSD did not substantially limit his ability to work); *Rohan*, 175 F. Supp. 2d at 808, 812 (holding that plaintiff's depression and PTSD did not substantially limit her ability to care for herself).

have asserted successfully substantial limitations on caring for themselves.¹⁰⁹

The definitions of each of these impairments indicate that they are likely to manifest themselves in the form of conduct. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) defines Bipolar I Disorder as “characterized by one or more Manic or Mixed Episodes, usually accompanied by Major Depressive Episodes.”¹¹⁰ Manic episodes, “defined by a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood,” may include “[e]xpansiveness, unwarranted optimism, grandiosity, and poor judgment [which] often lead to an imprudent involvement in pleasurable activities such as buying sprees, reckless driving, foolish business investments, and sexual behavior unusual for the person, even though these activities are likely to have painful consequences.”¹¹¹ Speech during a manic episode “is typically pressured, loud, rapid, and difficult to interrupt,” and “may be marked by complaints, hostile comments, or angry tirades.”¹¹² The connection between a manic episode and conduct is highlighted by the fact that, in order to identify a manic episode, “[t]he impairment resulting from the disturbance must be severe enough to cause marked impairment in functioning or to require hospitalization to protect the individual from the negative consequences of actions that result from poor judgment.”¹¹³ Plaintiffs have alleged that conduct ranging from “loud, abusive, and insubordinate” behavior in the workplace,¹¹⁴ to providing the employer with false medical excuses and engaging in sexual behavior in the workplace,¹¹⁵ was causally connected to their bipolar disorder.

109. See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1134-35 (9th Cir. 2001) (holding that a plaintiff with OCD was substantially limited in the major life activity of caring for herself where it took her “significantly more time than the average person to accomplish the basic tasks of washing and dressing”). *But see Steele v. Thiokol Corp.*, 241 F.3d 1248, 1251, 1254-55 (10th Cir. 2001) (holding that a plaintiff with OCD was not substantially limited in either sleeping or interacting with others).

110. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 317 (4th ed. 1994). Bipolar II Disorder, in contrast, is characterized by one or more major depressive episodes and at least one hypomanic episode. *Id.* at 318.

111. *Id.* at 328-29.

112. *Id.* A hypomanic episode, necessary for a diagnosis of Bipolar II Disorder, involves similar but less severe or extreme characteristics as involved in a manic episode. *Id.* at 318, 335; *see id.* at 335 (“In contrast to a Manic Episode, a Hypomanic Episode is not severe enough to cause marked impairment in social or occupational functioning or to require hospitalization . . .”).

113. *Id.* at 329.

114. *Carrozza v. Howard County*, 847 F. Supp. 365, 367-68 (D. Md. 1994).

115. *Hogarth v. Thomburgh*, 833 F. Supp. 1077, 1080-82 (S.D.N.Y. 1993); *see also Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1179-81 (6th Cir. 1993) (involving a plaintiff physician who alleged that his stealing mail from the hospital mailboxes of other physicians was causally connected to his bipolar disorder); *Maes v. Henderson*, 33 F. Supp. 2d 1281, 1283, 1286-87 (D. Nev. 1999)

A major depressive episode, necessary for a diagnosis of bipolar disorder and both necessary and sufficient for a diagnosis of major depression, also may influence an individual's conduct. Such an episode, which is defined by a "depressed mood or the loss of interest or pleasure in nearly all activities" for a period of at least two weeks, may include increased irritability and impaired ability to think, concentrate, or make decisions.¹¹⁶ To identify a major depressive episode, "there must be either clinically significant distress or some interference in social, occupational, or other important areas of functioning."¹¹⁷ Plaintiffs have alleged that their poor work performance¹¹⁸ and absenteeism¹¹⁹ were causally connected to their depression.

Post-traumatic stress disorder involves "the development of characteristic symptoms following exposure to an extreme traumatic stressor," and characteristic symptoms include "persistent reexperiencing of the traumatic event . . . , persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness," and "persistent symptoms of increased arousal."¹²⁰ The persistent symptoms of increased arousal may include sleeping difficulties, irritability or outbursts of anger, and difficulty concentrating or completing tasks.¹²¹ Plaintiffs with PTSD have alleged that their condition caused them to fight with co-workers, both verbally and physically,¹²² and to make threatening statements.¹²³

A diagnosis of obsessive compulsive disorder requires "recurrent obsessions or compulsions . . . that are severe enough to be time consuming . . . or cause marked distress or significant impairment."¹²⁴ OCD is likely to manifest itself in the employment context through interference with "occupational functioning" due to obsessions and compulsions, which "can displace useful and satisfying behavior and can be highly disruptive to overall functioning."¹²⁵ At least one plaintiff has claimed that her OCD caused her tardiness and absenteeism.¹²⁶

(involving a plaintiff who alleged that his "inappropriate sexual joking and . . . verbal abuse of his employees" was causally connected to his bipolar disorder).

116. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 320-22.

117. *Id.* at 322.

118. *Andrews v. United Way of Southwest Ala., Inc.*, No. 98-1142-P-C, 2000 WL 210694, at *2-4, *9 (S.D. Ala. Jan. 26, 2000); *Rogers v. CH2M Hill, Inc.*, 18 F. Supp. 2d 1328, 1333 (M.D. Ala. 1998); *Adams v. Rochester Gen. Hosp.*, 977 F. Supp. 226, 230, 236 (W.D.N.Y. 1997).

119. *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 1101 (S.D. Ind. 2000).

120. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 424.

121. *Id.* at 425.

122. *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998) (involving a plaintiff with PTSD who argued that an angry encounter with a co-worker, during which the plaintiff slapped her hand down, was caused by PTSD).

123. *Jones v. American Postal Workers Union*, 192 F.3d 417, 421-22, 429 (4th Cir. 1999).

124. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 417.

125. *Id.* at 419.

126. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1130-31 (9th Cir. 2001).

Another mental impairment that manifests itself in the form of conduct is Tourette's Syndrome, a diagnosis of which requires multiple motor tics and one or more vocal tics.¹²⁷ "A *tic* is a sudden, rapid, recurrent, nonrhythmic, stereotyped motor movement or vocalization," which "is experienced as irresistible but can be suppressed for varying lengths of time."¹²⁸ For some individuals with Tourette's Syndrome, vocal tics include coprolalia, which involves "use of socially unacceptable words, frequently obscene."¹²⁹ Not surprisingly, at least one plaintiff with Tourette's Syndrome has claimed that the condition caused him to make profane outbursts in the workplace.¹³⁰

Even some physical impairments may lead to conduct that employers find objectionable. For example, during periods of low blood sugar, individuals with diabetes may experience disorientation, difficulty in concentrating, difficulty standing, irritability, and mood swings.¹³¹ Plaintiffs with diabetes have alleged that the condition caused them to be uncooperative and confrontational in the workplace,¹³² and one plaintiff—a police officer—alleged that his erratic driving of a squad car at high speed was due to a diabetic reaction.¹³³ In addition, some plaintiffs with physical impairments have claimed that medication for their impairments caused them to behave inappropriately in the workplace by falling asleep, for example,¹³⁴ or by fighting.¹³⁵

In light of the fact that some disabilities, particularly mental ones, manifest themselves in the form of conduct, how should courts analyze cases in which an employer discharges the plaintiff for conduct causally connected to his or her disability? The next section examines the majority approach and the two minority approaches to such cases.

127. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 101. Individuals with Tourette's Syndrome may be substantially limited in the major life activity of communicating with others, such that the impairment constitutes a disability under the ADA. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1226 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003).

128. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 100.

129. *Id.*

130. *Ray*, 264 F. Supp. 2d at 1224-25.

131. *See Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 665-66 (7th Cir. 1995); *Bugg-Barber v. Randstad US, L.P.*, 271 F. Supp. 2d 120, 122-23, 126 (D.D.C. 2003).

132. *United States v. Miss. Dep't of Pub. Safety*, 309 F. Supp. 2d 837, 839 (S.D. Miss. 2004); *Bugg-Barber*, 271 F. Supp. 2d at 129-30. Individuals with diabetes may be substantially limited in the major life activity of eating. *Miss. Dep't of Pub. Safety*, 309 F. Supp. 2d at 840.

133. *Siefken*, 65 F.3d at 665-66.

134. *Buie v. BFGoodrich Textile Chems., Inc.*, 60 F. Supp. 2d 522, 522 (W.D.N.C. 1999) (involving a plaintiff who claimed that medication he took for his diabetes and kidney disorder caused him to fall asleep on the job).

135. *Taylor v. Dover Elevator Sys., Inc.*, 917 F. Supp. 455, 463 (N.D. Miss. 1996) (involving a plaintiff who claimed that medication he took for epilepsy caused him to be more volatile, which caused him to fight with a co-worker).

B. Current Approaches to Cases Involving Disability-Related Misconduct

1. Majority Approach

Most courts have held that disabled employees who engage in misconduct are unprotected by the ADA because they are unable to prove the causation element of a disability discrimination claim. For example, in *Hamilton v. Southwestern Bell Telephone Co.*, the plaintiff, who suffered from PTSD, was fired after he angrily confronted a co-worker with profanity.¹³⁶ The plaintiff contended that his outburst was caused by his PTSD,¹³⁷ but the court found that contention irrelevant, reasoning that “the ADA does not insulate emotional or violent outbursts blamed on an impairment.”¹³⁸ In support of that proposition, the court cited a case involving misconduct by an employee who was an alcoholic,¹³⁹ despite the fact that the ADA has a special provision regarding qualification standards for employees who are alcoholics or addicted to drugs.¹⁴⁰ According to the court, “[t]he cause of Hamilton’s discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment.”¹⁴¹ The court further stated that “Hamilton can not hide behind the ADA and avoid accountability for his actions.”¹⁴²

Consistent with the reasoning of the *Hamilton* court, other courts have held that the discharges of a grocery store clerk with Tourette’s Syndrome

136. 136 F.3d 1047, 1052 (5th Cir. 1998). The court found that the plaintiff’s PTSD did not substantially limit a major life activity and thus was not a disability under the ADA. *Id.* at 1050-51. Nonetheless, the court also analyzed whether the plaintiff could prove that he was fired “because of his disability.” *Id.* at 1052.

137. *Id.* at 1052. Loss of temper was one of the symptoms of PTSD reported by the plaintiff. *Id.* at 1051.

138. *Id.* at 1052.

139. *Id.* at 1052 n.19 (citing *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993)).

140. See text accompanying note 91 (quoting 42 U.S.C. § 12114(c)(4) (2000)).

141. *Hamilton*, 136 F.3d at 1052.

142. *Id.* Similarly, in *Maes v. Henderson*, the court rejected the claim of a plaintiff with bipolar disorder who was demoted for sexual harassment, reasoning that “if a disabled employee engages in misconduct, an employer may terminate or discipline that employee without incurring liability under the Rehabilitation Act or the Americans with Disabilities Act.” 33 F. Supp. 2d 1281, 1288 (D. Nev. 1999). In support of this proposition, the court cited *Hamilton* and several other cases; all but *Hamilton* and one other case involved misconduct committed by employees who were alcoholics or addicted to drugs. *Id.* The court stated that “the Act serves to protect individuals from being treated differently on the basis of their disability” but that it “cannot be used as a sword to allow disabled employees to engage in behavior that would justify the discipline or discharge of any other employee.” *Id.* at 1289.

for “blurting out . . . vulgar language and racial slurs,”¹⁴³ a cartographer with frontal lobe dysfunction for bizarre behavior such as quacking at a co-worker who was carrying a duck head umbrella,¹⁴⁴ and a clerk-typist with bipolar disorder for “insubordinate behavior and outbursts directed towards her supervisors,”¹⁴⁵ failed to implicate the ADA because the employees were discharged because of their conduct, rather than because of their disabilities.¹⁴⁶ Other courts have relied upon the distinction between discharge due to disability and discharge due to conduct in upholding the terminations of a physician with sleep apnea for falling asleep during surgical procedures,¹⁴⁷ a postal worker with PTSD for threatening the life of his supervisor,¹⁴⁸ and an employee with epilepsy for fighting on company premises.¹⁴⁹ In support of this distinction, the courts relied primarily on cases involving misconduct by alcoholic or drug-addicted employees, failing to mention the ADA’s special provision regarding qualification standards for such employees.¹⁵⁰

143. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1228-29 (S.D. Ga. 2003), *aff’d*, 90 Fed. Appx. 384 (11th Cir. 2003).

144. *Gasper v. Perry*, No. 97-1542, 1998 U.S. App. LEXIS 14933, at *6, *22-33 (4th Cir. July 2, 1998).

145. *Carrozza v. Howard County*, 847 F. Supp. 365, 367-68 (D. Md. 1994).

146. *Ray*, 264 F. Supp. 2d at 1228 (finding that “Ray cannot sustain his burden of showing that he was discharged because of his disability” rather than for “his constant outbursts of vulgar language and racial slurs”); *Gasper*, 1998 U.S. App. LEXIS 14933, at *22 (relying on “the principle that an employer may terminate an employee for misconduct, even if that misconduct is allegedly related to the employee’s disability”); *Carrozza*, 847 F. Supp. at 367 (reasoning that “[w]here there is misconduct, even if the misconduct was caused by a qualifying handicap,” the Rehabilitation Act does not bar termination).

147. *Brohm v. JH Props., Inc.*, 947 F. Supp. 299, 300-01 (W.D. Ky. 1996), *aff’d*, 149 F.3d 517 (6th Cir. 1998) (“It is clear in this case that Dr. Brohm was fired for sleeping, not for having sleep apnea.”). The plaintiff in *Brohm* alleged disability discrimination under the Kentucky Civil Rights Act, but according to the court, the protections of that statute mirrored those under the ADA. *Id.* at 300.

148. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 421, 429 (4th Cir. 1999) (“The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee’s misconduct, even if the misconduct is related to a disability.”).

149. *Taylor v. Dover Elevator Sys., Inc.*, 917 F. Supp. 455, 463 (N.D. Miss. 1996) (reasoning that the “ADA is not designed to give disabled persons preferential treatment” and that “employers are not required to ignore a disabled employee’s disregard of company rules”). The plaintiff claimed that the new medication he had been taking for his epilepsy made him more volatile than usual, such that his fighting was causally connected to his epilepsy. *Id.*

150. The *Carrozza* court, for example, only cited *Little v. FBI*, 1 F.3d 255 (4th Cir. 1993), the same case involving an alcoholic employee relied upon by the *Hamilton* court. 847 F. Supp. at 367-68. Both the *Gasper* and *Taylor* courts only cited cases involving misconduct by alcoholic and drug-addicted employees. *Gasper*, 1998 U.S. App. LEXIS 14933, at *20-22; *Taylor*, 917 F. Supp. at 462. The *Jones* and *Brohm* courts each cited several cases, only two of which involved an employee with a disability other than alcoholism or drug addiction. *Jones*, 192 F. 3d at 429; *Brohm*, 947 F. Supp. at 301.

The reasoning of some of these courts suggests that disabled employees who commit misconduct, even misconduct causally connected to their disabilities, fall completely outside the protection of the ADA.¹⁵¹ The courts emphasize that a plaintiff must prove discrimination because of disability and state that a plaintiff who was discharged for misconduct cannot prove that the employer discriminated because of the plaintiff's disability.¹⁵² It is, of course, true that in order to recover under the ADA, plaintiffs must prove that they experienced discrimination because of their disabilities.¹⁵³ What courts often fail to clarify, however, is that there are three ways in which an employer's action can constitute discrimination because of disability.¹⁵⁴ Courts thus make statements such as "[the] ADA is not designed to give disabled persons preferential treatment,"¹⁵⁵ ignoring the fact that two of the three theories of prohibited disability discrimination—failure to provide reasonable accommodations and disparate impact—involve a contention by plaintiffs that mere equal treatment serves to deny them equal opportunity.¹⁵⁶ Moreover, courts often fail to identify under which theory of discrimination they are analyzing a plaintiff's ADA claim.¹⁵⁷

151. In *Carrozza*, for example, the court stated that "[w]here there is misconduct, even if the misconduct was caused by a qualifying handicap . . . , the Rehabilitation Act does not bar termination or other disciplinary proceedings." 847 F. Supp. at 367. According to the court, "[e]ven though [plaintiff's] behavior might have been caused-in-fact by plaintiff's bi-polar disorder, the employer was justified under *Little* in pursuing adverse employment action against her, to and including her termination, for her misbehavior in the work place." *Id.* at 367-68. Similarly, the *Maes* court stated that "an employer may discipline an employee for misconduct without violating the Rehabilitation Act, regardless of whether the misconduct can be directly attributed to the employee's disability." *Maes v. Henderson*, 33 F. Supp. 2d 1281, 1288 (D. Nev. 1999); see also *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998) ("An employee who is fired because of outbursts at work directed at fellow employees has no ADA claim.").

152. See, e.g., *Gasper*, 1998 U.S. App. LEXIS 14933, at *28 (distinguishing between "termina[ti]on because of . . . disability" and "discipline or termination as a result of misconduct, even if that misconduct is related to the disability"); *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1228 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003) (stating that because the plaintiff "presented no evidence that Kroger terminated him for any reason other than his constant outbursts of vulgar language and racial slurs," he "cannot sustain his burden of showing that he was discharged because of his disability"); *Brohm*, 947 F. Supp. at 302 (quoting *Siefkin v. Vill. of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995)) ("An employee may not 'bootstrap his disease into the line of causation' . . . by showing that the misconduct relied on by the employer would not have occurred 'but for' the disability.").

153. 42 U.S.C. § 12112(a) (2000). Plaintiffs also must prove that they are qualified individuals with disabilities. *Id.*

154. See *supra* Part II.B.

155. See *Taylor*, 917 F. Supp. at 463.

156. See *supra* Parts II.B.2., II.B.3.

157. See, e.g., *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (rejecting plaintiff's ADA claim without stating whether it alleged disparate treatment, disparate

Nonetheless, courts rejecting disability discrimination claims in misconduct cases due to a lack of causation appear to be proceeding under the disparate treatment theory of discrimination. In *Maes v. Henderson*, for example, the court expressly stated that the plaintiff claimed intentional discrimination.¹⁵⁸ Several courts refer to the plaintiff's inability to establish a prima facie case of discrimination,¹⁵⁹ which indicates that they are using the burden-shifting approach to proving disparate treatment first developed in the Title VII context.¹⁶⁰ In *Taylor v. Dover Elevator Systems, Inc.*, the court explained that if the plaintiff could establish a prima facie case showing "illegal motivation" by his employer, the court should apply "Title VII's shifting of evidentiary burdens."¹⁶¹ The court found that the plaintiff was unable to establish the element of a prima facie case that "he suffered adverse employment action because of his disability" as he was actually terminated because of misconduct.¹⁶²

Many of the courts rejecting misconduct-related disability discrimination claims under the disparate treatment theory do not consider whether the plaintiff could prove discrimination under either the reasonable accommodation or the disparate impact theory.¹⁶³ Moreover, those courts that have discussed the duty of reasonable accommodation

impact, or failure to accommodate).

158. 33 F. Supp. 2d 1281, 1287 (D. Nev. 1999).

159. See, e.g., *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050 (5th Cir. 1998); *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1225 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 1996).

160. See *supra* notes 46-50 and accompanying text.

161. 917 F. Supp. 455, 460 (N.D. Miss. 1996).

162. *Id.* at 462. Other courts have engaged in similar reasoning. See, e.g., *Hamilton*, 136 F.3d at 1050, 1052 (including as an element of a prima facie case that "an adverse employment decision was made because of [plaintiff's] disability" and finding plaintiff unable to satisfy that element because he "was not terminated because of his disability but rather because he violated BELL's policy on workplace violence"); *Ray*, 264 F. Supp. 2d at 1225, 1228 (including as an element of a prima facie case that plaintiff was "discriminated against based upon his disability," and finding that plaintiff "cannot sustain his burden of showing that he was discharged because of his disability" rather than because of "his constant outbursts of vulgar language and racial slurs").

The *Taylor* court reasoned, moreover, that even if the plaintiff could establish a prima facie case, his employer articulated a legitimate, nondiscriminatory reason for the plaintiff's discharge—his misconduct, specifically his fighting on company premises. 917 F. Supp. at 462-63; see also *Ray*, 264 F. Supp. 2d at 1229 (stating that "Kroger had a legitimate basis for terminating [plaintiff's] employment"). According to the court, there was no evidence that the asserted reason was pretext for discharge because of disability. *Taylor*, 917 F. Supp. at 463; see also *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 508 (7th Cir. 2004) ("The disparate treatment of similarly-situated employees who were involved in misconduct of comparable seriousness, but did not have a similar disability, could establish pretext."); *Hamilton*, 136 F.3d at 1052-53 (stating that it did not regard the employer's asserted reason as pretextual).

163. This is probably because the plaintiffs in those cases failed to assert anything other than intentional discrimination.

generally have held that discharges due to misconduct do not violate the duty. As discussed above, most courts agree that the duty of reasonable accommodation is always prospective in nature and is not triggered until an employee requests an accommodation from the employer.¹⁶⁴ In most cases in which an employee has been discharged for disability-related misconduct, however, the employee made no request for accommodation before committing the misconduct.¹⁶⁵ Accordingly, the only accommodation that would assist the employee is a second chance, which the ADA does not require.¹⁶⁶

Under the majority approach, employees who engage in disability-related misconduct are generally unsuccessful in demonstrating discriminatory discharge under the ADA. Courts typically find that these plaintiffs were discharged due to their misconduct rather than their disabilities, rejecting the plaintiffs' claims because of a lack of disparate treatment. The few courts that consider the reasonable accommodation theory of discrimination reject the claims of most plaintiffs because the plaintiffs failed to request an accommodation before engaging in the misconduct. Accordingly, under the majority approach, the ADA imposes few limitations on the ability of employers to discharge employees for disability-related misconduct. A minority of courts, however, interpret the ADA as providing considerably more protection for employees whose disabilities manifest themselves in the form of conduct.

164. See *supra* notes 66-68 and accompanying text; see also *Maes v. Henderson*, 33 F. Supp. 2d 1281, 1290 (D. Nev. 1999) (stating that "an employer has no duty to provide reasonable accommodation until it has been made aware of the disability-related limitations of an employee").

165. See, e.g., *Bugg-Barber v. Randstad US, L.P.*, 271 F. Supp. 2d 120, 130 (D.D.C. 2003) (reasoning that the plaintiff needed "to notify her employer on a timely basis—before her conduct became unruly in a business setting—that she needed an accommodation of some sort" and that there was no evidence that she "ever requested an accommodation that was denied"); *Burmistrz v. City of Chi.*, 186 F. Supp. 2d 863, 875 (N.D. Ill. 2002) (noting, in a case in which the plaintiff, who had some mental problems, was terminated for failing to call in to notify his employer that he would be absent, that "[n]othing in the record suggests Plaintiff ever requested or was given an accommodation of not being required to notify the City when he would be absent"); *Maes*, 33 F. Supp. 2d at 1291 (finding that the plaintiff "has not provided any evidence that he ever requested an accommodation").

166. See *Bugg-Barber*, 271 F. Supp. 2d at 131 (reasoning that the plaintiff "is not looking for an 'accommodation' under the ADA, but a complete pardon . . . [which] the law does not require"); *Walsh v. Andersen Consulting LLP*, No. 00 C 2743, 2000 WL 1809960, at *7 (N.D. Ill. Dec. 11, 2000) (holding that "[r]equesting an accommodation after an employer has made a legitimate decision to terminate does not entitle an employee to an accommodation" because "[a]n employer is not required to give an employee a second chance as an accommodation").

2. Minority Approach

a. *Teahan v. Metro-North Commuter Railroad*

The seminal case rejecting the majority approach to disability-related misconduct is *Teahan v. Metro-North Commuter Railroad*.¹⁶⁷ The plaintiff in *Teahan* was a substance abuser who missed a great deal of work as a telephone and telegraph maintainer for a railroad, allegedly because of his alcohol and drug abuse.¹⁶⁸ His employer decided to terminate him because of his excessive absenteeism, and on that same day—before receiving notice of his employer’s decision—the plaintiff entered a substance abuse rehabilitation program.¹⁶⁹ The plaintiff’s employer was unable to terminate him immediately because of the provisions of a collective bargaining agreement.¹⁷⁰ Several months later, after the plaintiff successfully completed the rehabilitation program and returned to work, his employer completed the disciplinary procedures required by the collective bargaining agreement and terminated the plaintiff.¹⁷¹

The plaintiff sued the employer under the Rehabilitation Act of 1973¹⁷²—the precursor to the ADA, applicable to employers receiving federal funds—contending that he was discharged “solely by reason of” his handicap of alcoholism and drug addiction, in violation of the statute.¹⁷³ The district court found that the plaintiff could not prove that he was terminated “solely by reason of” his handicap because he was discharged due to his absenteeism, which was a legitimate nondiscriminatory reason for his termination.¹⁷⁴ According to the district court, the plaintiff thus had to show that the employer’s “asserted reason was pretextual, which showing he failed to carry.”¹⁷⁵ In short, the district court rejected the plaintiff’s claim because he was unable to prove disparate treatment.

The Second Circuit reversed, holding that a plaintiff satisfies the “solely by reason of” handicap requirement of the Rehabilitation Act by showing that the employer “justifies termination based on conduct caused by the handicap.”¹⁷⁶ The district court erred, in other words, by

167. 951 F.2d 511 (2d Cir. 1991).

168. *Id.* at 513.

169. *Id.*

170. *Id.*

171. *Id.*

172. 29 U.S.C. §§ 701-796(l) (2000).

173. *Teahan*, 951 F.2d at 514.

174. *Id.*

175. *Id.*

176. *Id.* at 516. At the time of *Teahan*, the Rehabilitation Act did not contain a special provision explicitly authorizing employers to hold employees disabled by alcoholism or drug addiction to the same conduct standards as nondisabled employees, like the ADA’s 42 U.S.C.

“distinguish[ing] between a handicap and its consequences.”¹⁷⁷ The Second Circuit reasoned that accepting such a distinction would mean that an employer could base an employment decision on a consequence of a handicap, rather than on the handicap itself, and avoid any scrutiny into whether the handicap and its consequences were relevant to the qualifications for a particular job.¹⁷⁸

The court provided the example of an employee with a permanent limp, which the court assumed was a handicap under the Rehabilitation Act.¹⁷⁹ The limp caused the employee to make a loud “thump” when he walked, and his employer fired him because of the thump.¹⁸⁰ The court reasoned that distinguishing between the handicap—the limp—and one of its consequences—the thump—would mean that the employee could not prove that his employer discharged him “solely by reason of” his handicap.¹⁸¹ Because the employee could not satisfy that essential element of a Rehabilitation Act claim, it would be irrelevant whether the employee was otherwise qualified despite the handicap, a result which the court found contrary to the purposes of the Act.¹⁸²

Accordingly, the court held that if the plaintiff could prove that his substance abuse caused his absenteeism, his discharge due to absenteeism occurred “solely by reason of” his handicap and thus violated the ADA, unless the employee was not otherwise qualified for the job.¹⁸³ The court remanded the case to the district court to decide the “otherwise qualified” issue.¹⁸⁴

§ 12114(c)(4). See *Mercado v. N.Y. City Hous. Auth.*, No. 95 CIV. 10018 (LAP), 1998 WL 151039, at *12 (S.D.N.Y. Mar. 31, 1998) (noting that “*Teahan* was brought under the pre-1992 Rehabilitation Act, which did not contain an analog to 42 U.S.C. § 11214(c)(4) [sic]”); cf. 29 U.S.C. § 794(d) (2000) (“The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990.”).

177. *Teahan*, 951 F.2d at 516.

178. *Id.* at 516-17.

179. *Id.* at 516.

180. *Id.*

181. *Id.*

182. *Id.* at 516-17.

183. *Id.* at 517. The court noted that “[i]f only a small percentage of *Teahan*’s absences can be shown to have been ‘caused’ by his alcoholism, and a sufficiently great number of absences are not so caused, such would provide ground for Metro-North to terminate appellant as not prompted solely by reason of his handicap.” *Id.*

184. *Id.* at 521. On remand, the district court found that the plaintiff was not otherwise qualified for his job because of the likelihood of a relapse of his substance abuse problems, such that his discharge did not violate the Rehabilitation Act; and the Second Circuit affirmed. *Teahan v. Metro-N. Commuter R.R.*, 88 Civ. 5376, 1994 U.S. Dist. LEXIS 18448, at *29-30 (S.D.N.Y.

District courts in the Second Circuit have followed the *Teahan* approach, finding that discharge due to disability-related misconduct satisfies the causation element of a disability discrimination claim, such that the employer is liable unless the plaintiff was not qualified for his or her job.¹⁸⁵ In *Husowitz v. Runyon*, for example, the plaintiff was a postal worker with bipolar disorder who engaged in repeated disruptive and uncooperative behavior, including “episodes of loud singing, playing the radio at excessively high volumes, procrastination, disturbing co-workers, and other instances of misconduct and insubordination.”¹⁸⁶ After his

185. *E.g.*, *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1080, 1085 (S.D.N.Y. 1993) (holding that the plaintiff’s discharge for providing his employer with false medical excuses and for engaging in sexual acts at the agency’s offices was because of his disability and relying on expert testimony indicating that the plaintiff’s behavior was attributable to his bipolar disorder). The court stated that “if a handicap manifests itself in certain behavior, and an employee is discharged because of that behavior, he has been terminated ‘solely by reason of’ the handicap.” *Id.* at 1085. However, because the plaintiff’s job required access to classified information and because his disability caused him “substantial breaks from reality,” the court concluded that the plaintiff was not qualified for his position. *Id.* at 1080, 1086-87.

One district court has questioned whether *Teahan* is good law under the ADA, rather than the Rehabilitation Act, where the plaintiff’s disability is alcoholism or drug addiction, in light of the ADA provision explicitly authorizing employers to hold employees with such disabilities to the same conduct standards as nondisabled employees. *Mercado v. N.Y. City Housing Auth.*, No. 95 CIV. 10018 (LAP), 1998 WL 151039, at *12 (S.D.N.Y. Mar. 31, 1998) (noting that “*Teahan* was brought under the pre-1992 Rehabilitation Act, which did not contain an analog to 42 U.S.C. § 11214(c)(4) [sic]”).

Even a few courts outside the Second Circuit have followed *Teahan*. *See, e.g.*, *Berkey v. Henderson*, 120 F. Supp. 2d 1189, 1190, 1193 (S.D. Iowa 2000) (reasoning that the plaintiff, who was discharged for tardiness allegedly related to various mental disorders, was discharged because of his disability, but finding that plaintiff was “unqualified to perform the essential function of regular and reliable attendance”); *Ambrosino v. Metro. Life Ins. Co.*, 899 F. Supp. 438, 444 (N.D. Cal. 1995) (reasoning that “termination based on conduct caused by chemical dependency and status which results from the dependency and/or the conduct caused by the dependency is termination based on the disability of chemical dependency”); *Ham v. State*, 788 F. Supp. 455, 457-58 (D. Nev. 1992) (reasoning that an employer’s termination of an alcoholic plaintiff following an arrest for driving under the influence was “admittedly based upon [p]laintiff’s alcoholism” “[s]ince the drunk driving was a causally connected manifestation of the alleged handicap”). Moreover, in *Schmidt v. Safeway Inc.*, although the court did not cite *Teahan*, it engaged in the same reasoning that “terminating an employee because of a symptom of that disability”—in *Schmidt*, terminating an alcoholic employee because he had a trace of alcohol in his urine—“is tantamount to terminating him because of the disability.” 864 F. Supp. 991, 1001-02 (D. Or. 1994); *see also* *Humphrey v. Mem. Hosps. Ass’n*, 239 F.3d 1128, 1130-31, 1139-40 (9th Cir. 2001) (stating, in a case in which an employee with obsessive compulsive disorder was discharged for absenteeism and tardiness, that “[f]or purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination”) (footnote call number omitted).

186. 942 F. Supp. 822, 826 (E.D.N.Y. 1996). Moreover, although the plaintiff held a “lead” position, such that he was in charge of certain clerks, whenever a clerk asked him a question, he would abruptly respond, “go see a supervisor.” *Id.* at 825 n.5, 826.

supervisor reprimanded the plaintiff for using a telephone in a restricted area, the plaintiff implicitly threatened the supervisor by referring to an incident in which a postal worker in Oklahoma killed several co-workers and then himself.¹⁸⁷ Following this incident, the Postal Service suspended the plaintiff,¹⁸⁸ and the plaintiff claimed that the suspension constituted disability discrimination in violation of the Rehabilitation Act.¹⁸⁹

Although the Postal Service argued that it had suspended the plaintiff based on his conduct rather than his disability, the court noted that “[t]he Second Circuit rejects the distinction between a handicapping condition and specific conduct for determining if an employer’s decision to take action against an employee is based on the plaintiff’s disability.”¹⁹⁰ Finding that the plaintiff’s misconduct was “the direct result of his mental disability,” the court held that the plaintiff established that he was suspended because of his disability.¹⁹¹ The court then examined whether the plaintiff could perform the essential functions of his job with or without reasonable accommodation, such that he was “otherwise qualified” for his position.¹⁹² Stating that the plaintiff “was a disruptive influence by his threatening behavior,” the court concluded that the plaintiff was not able to perform the essential functions of his job without a reasonable accommodation.¹⁹³ Although the Postal Service attempted to accommodate the plaintiff by permitting either him or his co-workers to work apart from each other and by providing him opportunities to improve his conduct before he was suspended, the plaintiff’s “relationship with his co-workers continued to be marked with conflict.”¹⁹⁴ Because the plaintiff was not

187. *Id.* at 828. The plaintiff told his supervisor, “[D]o you remember Oklahoma? . . . if I go down, you are coming with me.” *Id.*

188. *Id.* On his first day back from this suspension, the plaintiff again told his supervisor, “Lou, do you remember Oklahoma? When I go down, I am bringing others with me.” *Id.* at 829.

189. *Id.* at 824.

190. *Id.* at 832.

191. *Id.* at 832-33.

192. *Id.* at 833.

193. *Id.* at 834-35. The court quoted another case in which it was stated that “[i]t is certainly a ‘job-related requirement’ that an employee, handicapped or not, be able to get along with co-workers and supervisors.” *Id.* at 834 (quoting *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994)).

Curiously, after concluding that the plaintiff could not perform the essential functions of his job, the court stated that it found that the Postal Service’s decision to suspend plaintiff “was lawful, unless the plaintiff demonstrates that the decision was a pretext for discrimination against him on the basis of his handicap.” *Id.* at 834. Given that the court had already held – based on the *Teahan* rule—that suspending plaintiff because of his disability-related conduct was an action taken because of the plaintiff’s disability, it is odd that the court then questioned whether there was pretext.

194. *Id.* at 835. The court noted that “[a]s many as seven different co-workers complained that they could not work in the same area as the plaintiff” *Id.*

qualified for his job, his suspension did not violate the Rehabilitation Act.¹⁹⁵

The *Teahan* approach to disability-related misconduct, like the majority approach, relies on the disparate treatment theory of discrimination. Disparate treatment occurs when an employment decision is caused by an individual's protected trait, such as disability. Under the majority approach, decisions based on the plaintiff's misconduct are not caused by his or her disability and thus do not constitute disparate treatment. In contrast, the *Teahan* approach equates employment decisions based on disability-related misconduct to decisions based on disability status.¹⁹⁶ Such decisions constitute disparate treatment on the basis of disability and are prohibited by the ADA unless the plaintiff is not qualified for his or her position, thereby falling outside the ADA's protection.

b. *Den Hartog v. Wasatch Academy*

Like the Second Circuit in *Teahan*, the Tenth Circuit also has rejected a bright-line distinction between discharge due to disability and discharge due to disability-related misconduct. In *Den Hartog v. Wasatch Academy*, the court noted that the ADA expressly provides that a disabled person can be held to the same conduct standards as a nondisabled person solely in the specific context of employees who are alcoholics or addicted to drugs.¹⁹⁷ The plaintiff argued that this specific provision indicates that Congress "did not intend to extend the same employer prerogative to employees with other disabilities."¹⁹⁸ The court agreed that, outside the context of alcoholism and drug addiction, employment decisions based on disability-caused misconduct violate the ADA unless the conduct standard at issue is job-related and consistent with business necessity.¹⁹⁹

In further support of its rejection of a dichotomy between disability and disability-related misconduct, the *Den Hartog* court noted that mental illness manifests itself by abnormal behavior and reasoned that "[t]o permit

195. *Id.*

196. See *Teahan v. Metro-N. Commuter R.R.*, 951 F.2d 511, 516 (2d Cir. 1991) (explaining that the district court erred in "distinguish[ing] between a handicap and its consequences"). Anyone doubting that the *Teahan* approach equates decisions based on disability-related misconduct to decisions based on disability status should note that none of the cases applying this approach examines whether the employer asserted a legitimate nondiscriminatory reason for its action. The *Teahan* approach, in other words, does not provide that a decision based on disability-related misconduct is *presumptively* caused by the employee's disability, satisfying the causation element of a prima facie case. Rather, such a decision *always* constitutes disparate treatment on the basis of disability.

197. 129 F.3d 1076, 1086 (10th Cir. 1997) (referencing 42 U.S.C. § 12114(c)(4) (1994)); see *supra* text accompanying note 91 (quoting 42 U.S.C. § 12114(c)(4)).

198. *Den Hartog*, 129 F.3d at 1086.

199. *Id.*

employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled."²⁰⁰ The court further observed that many of the cases recognizing such a dichotomy involved alcoholic or drug-addicted employees, the one category of employees upon whom the ADA expressly permits the imposition of uniform conduct standards.²⁰¹ The court concluded that an employer faced with an employee who engaged in disability-related misconduct should first consider whether a reasonable accommodation could remedy the misconduct, and if so, the employer should attempt the accommodation.²⁰² If not, the employer may discharge or discipline the employee only if an affirmative defense applies,²⁰³ like the "job-related and consistent with business necessity" defense or the "direct threat" defense.²⁰⁴ "Otherwise," according to the court, "the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability, so long as the employee can satisfactorily perform the essential functions of his job."²⁰⁵

In later cases, the Tenth Circuit reiterated its *Den Hartog* holding that the ADA protects disability-related misconduct outside the alcoholism and drug addiction context unless the employer can prove that the relevant conduct standard is job-related and consistent with business necessity, or that the employee poses a direct threat to the health and safety of others in the workplace.²⁰⁶ Moreover, at least one court outside the Tenth Circuit has followed the reasoning in *Den Hartog*.²⁰⁷

200. *Id.* at 1087.

201. *Id.* The court also provided other reasons for rejecting a dichotomy between disability and disability-related misconduct, such as the facts that an employer need not make an accommodation that would impose an undue hardship, and that an employer may discharge an employee who presents a direct threat to the health and safety of others in the workplace. *Id.* According to the court, "[t]he availability of these affirmative defenses establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers. However, the necessary corollary is that there must be certain levels of disability-caused conduct that have to be tolerated or accommodated." *Id.* The problem with the court's reasoning is that an undue hardship or a direct threat could arise in circumstances not involving conduct. For example, very expensive specialized computer equipment necessary to enable a disabled employee to perform his or her job might impose an undue hardship on an employer, and an employee could pose a direct threat because he or she has a contagious disease.

202. *Id.* at 1088.

203. *Id.*

204. See 42 U.S.C. § 12113(a), (b) (2000).

205. *Den Hartog*, 129 F.3d at 1088.

206. *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134 (10th Cir. 2003); *McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998).

207. *Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1342 (N.D. Iowa 2000) (holding that, outside the context of alcoholism and illegal drug use, "as the Tenth Circuit held in *Den Hartog*, the ADA protects both the disability and the conduct caused by the disability"); see also

Unlike the majority and the *Teahan* minority approaches to disability-related misconduct, which rely on the disparate treatment theory of discrimination, the *Den Hartog* minority approach utilizes the disparate impact theory. The disparate impact basis of the court's opinion—while never mentioned expressly by *Den Hartog* or its progeny—is apparent from the court's statement that “an employer may *not* hold a disabled employee to precisely the same standards of conduct as a nondisabled employee, unless such standards are job-related and consistent with business necessity.”²⁰⁸ The court based the “job-related and consistent with business necessity” limit²⁰⁹ on one of the ADA provisions regarding disparate impact challenges to employment decisions, which states that it is a defense to a claim of discrimination “that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability” has been demonstrated as “job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.”²¹⁰ The court appeared to view conduct rules as standards that may tend to screen out individuals with disabilities, having a disparate impact on such individuals, and reasoned that these rules violate the ADA unless they are job-related and consistent with business necessity.

A minority of courts reject the majority rule of a bright-line distinction between discharge because of disability and discharge resulting from disability-related misconduct. Some of these courts follow the approach in *Teahan*, holding that discharging employees for disability-related misconduct is disparate treatment on the basis of disability, violating the ADA unless the employees were not qualified for their jobs. Others follow the *Den Hartog* approach, holding that, due to the disparate impact of conduct rules on the disabled, employees cannot be discharged because of disability-related misconduct unless the employer can prove that the relevant conduct standard is job-related and consistent with business necessity or that the employees pose a direct threat to the health and safety of others. Do any of these approaches correctly interpret the ADA's prohibition against discrimination because of disability? To answer this question, it is first necessary to explore what courts mean by “misconduct.”

Mercado v. N.Y. City Hous. Auth., No. 95 CIV. 10018 (LAP), 1998 WL 151039, at *10 (S.D.N.Y. Mar. 31, 1998) (stating that the ADA does not shield alcoholic employees “from the consequences of their conduct,” “in stark contrast to its treatment of other disabilities”).

208. 129 F.3d at 1086.

209. *Id.* at 1086 n.8.

210. 42 U.S.C. § 12113(a) (2000).

IV. HOW SHOULD DISABILITY-RELATED MISCONDUCT BE ANALYZED UNDER THE ADA?

A. What Does “Misconduct” Mean, and Should It Even Matter?

According to a majority of courts, employees who engage in disability-related misconduct cannot demonstrate discriminatory discharge under the ADA because their employers discharged them due to their misconduct rather than their disabilities. A court’s conclusion that a disabled employee engaged in misconduct is thus often fatal to the employee’s ADA claim. How do courts determine what behavior by an employee constitutes misconduct?

The case of *Martinson v. Kinney Shoe Corp.*²¹¹ raises this issue, albeit indirectly. The plaintiff in *Martinson*, an epileptic, occasionally had seizures at work, and his employer admitted firing him because of his seizures.²¹² The plaintiff’s employer argued—and the district court found—that the plaintiff could not prove that his employer discriminated against him due to his disability because the employer discharged him based on his seizures, not because he suffered from the “general disability” of epilepsy.²¹³

The Fourth Circuit rejected that argument, stating that “[t]o fire for seizures is to fire for a disability.”²¹⁴ The court also noted, however, that “misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.”²¹⁵ The court appeared to recognize no contradiction between its rejection of the defendant’s argument that there was a difference between discharge because of seizures and discharge because of epilepsy and its recitation of the majority rule that discharge because of misconduct is always permissible.

Consistent with the Fourth Circuit’s approach in *Martinson*, outside the misconduct context, other courts have held that discharges based on symptoms or consequences of an employee’s disability constitute disparate treatment on the basis of disability.²¹⁶ Such discharges violate the ADA

211. 104 F.3d 683 (4th Cir. 1997).

212. *Id.* at 685. The plaintiff’s employee separation report stated that the plaintiff’s discharge was due to “[s]eizures in store, sales floor, and stockroom. Inability to control timing of same.” *Id.*

213. *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419, 430-31 (W.D. Va. 1996).

214. *Martinson*, 104 F.3d at 686.

215. *Id.* at 686 n.3.

216. In a case arising under the Rehabilitation Act, the Supreme Court held that an employment decision based on an employee’s contagiousness, an effect of her disability, constituted disparate treatment because of disability. *Sch. Bd. v. Arline*, 480 U.S. 273, 282 (1987) (reasoning that “[i]t would be unfair to allow an employer to seize upon the distinction between the effects of

unless the plaintiff is unqualified for his or her job.²¹⁷ In *Milton v. Scrivner, Inc.*, for example, the employer instituted faster production standards and discharged the plaintiffs because of their inability to meet the pace of the new standards.²¹⁸ The plaintiffs contended that their inability to satisfy the new standards was a consequence of their disabilities and that terminating them because of that inability constituted disparate treatment.²¹⁹ Rather than distinguishing between discharge because of disability and discharge because of a consequence of a disability,²²⁰ the court examined whether the plaintiffs were qualified for their jobs.²²¹ Concluding that speed was essential for the plaintiffs' jobs, the court found that the plaintiffs were not qualified.²²²

In short, courts' treatment of employment decisions based on manifestations of a disability often hinges upon whether the courts characterize those manifestations as misconduct. If courts do not characterize the manifestations as misconduct, they are likely to find disparate treatment on the basis of disability, which violates the ADA unless the plaintiff was unqualified for his or her job. If they consider the manifestations to be misconduct, most courts find the plaintiff unable to establish discrimination because of disability. Accordingly, under the approach taken by most courts, it is important to determine what manifestations of a disability constitute misconduct.

The *Martinson* court distinguished between discharge because of seizures and discharge because of misconduct. What if, however, the employer in *Martinson* argued that seizures on the job constituted misconduct, in violation of a neutral work rule that employees had to be alert and attentive—and upright²²³—at all times while on the job? Would

a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment"); cf. *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543-44 (7th Cir. 1995) (rejecting employer's argument that it need not accommodate the plaintiff's pressure ulcers, a consequence of her disability of paralysis, because "an intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability and hence a condition that the employer must reasonably accommodate"). The authors of a widely-used employment discrimination casebook summarize *Arline* and *Vande Zande* as holding that "a decision based on the symptoms of a disability, symptoms which may not be shared by all individuals suffering from the disability and which may be experienced by non-disabled individuals as well, are [sic] decisions based on the disability itself." MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 749 (5th ed. 2000).

217. See 42 U.S.C. § 12112(a) (2000).

218. 53 F.3d 1118, 1120 (10th Cir. 1995).

219. See *id.*

220. One of the employer's arguments in its motion for summary judgment was that "plaintiffs failed to offer evidence of intentional discrimination." *Id.* at 1123.

221. *Id.* at 1124.

222. *Id.* at 1124-25.

223. The court noted that "on one occasion, a supervisor discovered [the plaintiff] lying on the

the employer's discharge of the plaintiff then fall outside the ADA's coverage? This suggestion is not entirely fanciful. In *Ray v. Kroger Co.*, the court held that an employer's discharge of an employee with Tourette's Syndrome for profane outbursts did not implicate the ADA because a termination based on an employee's misconduct—even if that misconduct is related to a disability—does not violate the ADA.²²⁴ The *Ray* court cited *Martinson* in support of this proposition.²²⁵ Because the court characterized the behavior of the plaintiff in *Ray* as misconduct, it did not consider whether discharge because of profane outbursts equates to discharge because of Tourette's Syndrome in the same way that to fire for seizures is to fire for epilepsy.

How, then, do we determine what behavior constitutes misconduct—removing a disabled employee from the ADA's protection in the view of most courts—and what behavior is simply a manifestation of an employee's disability, like seizures are to epilepsy?²²⁶ The courts that

floor in the stockroom with a lit cigarette on his chest and on another occasion, a supervisor found him supine behind the sales counter holding a charge slip." *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 685 n.1 (4th Cir. 1997).

224. 264 F. Supp. 2d 1221, 1228-29 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003). The plaintiff worked as a clerk in the frozen food section of a Kroger grocery store. *Id.* at 1224. He was discharged after complaints about his outbursts from a co-worker, a customer, and a contractor. *Id.* The court found the plaintiff unable to satisfy his burden of showing that he was discharged due to his disability because he had "no evidence that Kroger terminated him for any reason other than his constant outbursts of vulgar language and racial slurs." *Id.* at 1228. The court also found that the plaintiff was not qualified for his job, reasoning that "interacting with customers without offending them was an essential function of [the plaintiff's] job." *Id.*

225. *Id.* at 1228-29.

226. The case of *Humphrey v. Memorial Hospitals Ass'n* provides an interesting example of a court wrestling with this problem. 239 F.3d 1128 (9th Cir. 2001). The plaintiff, who suffered from obsessive compulsive disorder (OCD), was discharged for absenteeism and tardiness. *Id.* at 1130, 1133. The plaintiff contended that her absenteeism and tardiness were due to her OCD, which caused her to "engage[] in a series of obsessive rituals that hindered her ability to arrive at work on time." *Id.* The court held that a reasonable jury could find a causal link between the plaintiff's OCD and her attendance problems and thus could conclude that her discharge constituted disparate treatment based on disability because "[f]or purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Id.* at 1139-40 (footnote call number omitted).

The "few exceptions" noted by the court focused primarily on cases involving employees who were alcoholics or addicted to drugs, pursuant to the ADA provision authorizing employers to hold such employees to the same qualification standards as nondisabled employees. *Id.* at 1139 n.18. However, the *Humphrey* court was forced to distinguish *Newland v. Dalton*. *Id.* In *Newland v. Dalton*, the court had held that "firings precipitated by misconduct rather than any handicap"—even misconduct causally connected to the handicap—did not violate the Rehabilitation Act. 81 F.3d 904, 906 (9th Cir. 1996). The *Humphrey* court reasoned that *Newland* stood for the proposition that "egregious and criminal conduct" was an exception to the general rule that there was no distinction between discharge for disability and discharge for disability-related conduct, and it concluded that "[a]ny such exception would not be applicable to *Humphrey's* absences or tardiness." 239 F.3d at

have recognized a bright-line distinction between discharge because of disability and discharge because of disability-related misconduct generally have engaged in little effort to define the term “misconduct.” One definition occasionally asserted is that “misconduct” implies behavior that the employee can control as opposed to behavior that is compelled. Judge Posner made this argument in *Despears v. Milwaukee County*, a case involving an employee who was demoted when his driver’s license was revoked after his fourth DUI conviction.²²⁷ Judge Posner accepted the plaintiff’s argument that his alcoholism caused his drunk driving and thus his demotion but reasoned that “a cause is not a compulsion (or sole cause); and we think the latter is necessary to form the bridge that Despears seeks to construct between his alcoholism and his demotion.”²²⁸

Under this theory, if the employee can control the behavior that the employer finds objectionable—rather than the disability compelling that behavior—the behavior is misconduct. Such a dividing line may support a distinction between discharging an employee with Tourette’s Syndrome for profane outbursts, on the one hand, and discharging an alcoholic employee for drunk driving, on the other. The disease of alcoholism does not compel an individual to drive while intoxicated, and an alcoholic employee has some control over his or her decision to drink and drive.²²⁹ It may be incorrect to say, however, that an individual with Tourette’s Syndrome has no ability to control his or her outbursts; according to the DSM-IV, the tics characteristic of the impairment are “experienced as irresistible but can be suppressed for varying lengths of time.”²³⁰ Does this

1140 n.18. The *Newland* court, however, did not indicate that its holding was so limited but rather stated broadly that “a termination based on misconduct rather than the disability itself [is] valid.” 81 F.3d at 906.

227. 63 F.3d 635, 635 (7th Cir. 1995).

228. *Id.* at 636. Similarly, in *EEOC v. Amego, Inc.*, the court implied that it might accept the argument that discharge for conduct caused by a disability constitutes discharge because of disability in cases involving “certain conduct which is in fact more closely compelled by the disability (e.g., profanity from Tourette’s Syndrome sufferers).” 110 F.3d 135, 149 (1st Cir. 1997). The court rejected that argument, however, as applied to a former team leader in a facility serving severely disabled people who was discharged because of her two suicide attempts involving overdose on medications. *Id.* at 137, 149. The court found no evidence that the plaintiff’s “depression compelled her to overdose on medications, as opposed to other methods of attempting suicide.” *Id.*

229. Of course, even if the disability of alcoholism compelled individuals to engage in certain behavior, the ADA expressly provides that employers are free to discharge such individuals because of that behavior if they would take the same action against nondisabled employees. See 42 U.S.C. § 12114(c)(4) (2000). Curiously, Judge Posner did not mention this provision of the statute in *Despears*. See 63 F.3d 635 (7th Cir. 1995).

230. AM. PSYCHIATRIC ASS’N, *supra* note 110, at 100; see, e.g., *Purcell v. Penn. Dep’t of Corr.*, No. 95-6720 1998, U.S. Dist. LEXIS 105, at *3 (E.D. Pa. Jan. 9, 1998) (stating that plaintiff with Tourette’s Syndrome had “difficulty suppressing his verbal and motor tics”; “he is able to do

ability to exercise some control over the timing of one's outbursts mean that a profanity-laden outburst by an individual with Tourette's Syndrome constitutes misconduct?

What about an individual with bipolar disorder who shouts at colleagues during a manic episode, given that characteristics of such an episode may include "an abnormally and persistently . . . irritable mood," "poor judgment," and "speech . . . marked by complaints, hostile comments, or angry tirades"?²³¹ Should the fact that an individual with bipolar disorder may find it considerably more difficult to control his or her temper during a manic episode be enough to exclude such shouting from the category of misconduct? Or, as *Despears* suggests, must the individual demonstrate that during a manic episode, it is *impossible* for him or her to refrain from shouting?²³²

Judge Posner's reasoning in *Despears* suggests that plaintiffs whose disabilities manifest themselves in the form of conduct should argue that their disabilities compel such conduct.²³³ Such an argument, however, may ultimately be more harmful than helpful to plaintiffs with mental disabilities, because "[t]he view that people with psychiatric disabilities have no control over their behavior, which equates the behavior with the disability, may perpetuate the very stereotypes that the ADA was intended to eliminate."²³⁴ Moreover, the ADA claim of a plaintiff making such an argument is still likely to fail. If a plaintiff with bipolar disorder, for example, has no ability to control angry tirades during a manic episode, the reasoning of *Despears* suggests that discharge due to angry tirades constitutes disparate treatment because of bipolar disorder. The ADA protects plaintiffs from such disparate treatment, however, only if they are qualified, meaning they are able to perform the essential functions of their jobs with or without reasonable accommodation. Courts are likely to find that

so for short spans of time, [but] it is uncomfortable later and he must 'explode' by releasing the built-up tics").

231. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 328-29.

232. Perhaps it is more difficult for alcoholics to refrain from drunk driving, but the *Despears* court required evidence that the plaintiff, being an alcoholic, "could not have avoided becoming a drunk driver." 63 F.3d at 636.

233. At least one plaintiff has relied on *Despears* to argue that his behavior was compelled by his disability, such that his employer's discharge of him for that behavior constituted disparate treatment on the basis of disability. *Pernice v. City of Chicago*, 237 F.3d 783, 786 (7th Cir. 2001). In *Pernice*, the plaintiff was discharged after he was arrested for possession of cocaine in violation of a work rule prohibiting possession of controlled substances. *Id.* at 784. The plaintiff contended that his disability of drug addiction compelled him to possess drugs, such that his misconduct could not be separated from his disability. *Id.* at 786. The court rejected the plaintiff's compulsion argument, reasoning that "[w]hether or not his alleged disability of drug addiction created a wholly involuntary need to possess drugs, Pernice made a conscious choice to actually possess drugs." *Id.* at 787.

234. STEFAN, *supra* note 100, at 65.

plaintiffs with no ability to control their angry tirades—or any other conduct—are not qualified for their jobs.²³⁵

Rather than compelling particular conduct regardless of the circumstances, mental disabilities may manifest themselves only at certain times and in certain environments or contexts.²³⁶ In particular, workplace stress and abuse by supervisors or co-workers are likely to trigger the manifestations of mental disabilities through related conduct.²³⁷ The context-dependent nature of such conduct suggests that individuals with mental disabilities may be qualified for their jobs despite their disabilities and that reasonable accommodation of the disabilities is possible.²³⁸ The fact that disability-related behavior depends on context, however, pulls against the idea that the disability compels the behavior. Without such compulsion, according to the *Despears* court, the behavior is misconduct²³⁹ and, in the view of most courts, prevents plaintiffs from proving discriminatory discharge under the ADA.²⁴⁰

The difficulty in determining what is misconduct suggests that the mere label “misconduct” should not play such a significant role in ADA cases. As Susan Stefan has noted:

The first step toward coherent doctrine in this area is to avoid the use of the word “misconduct.” If an employee’s conduct is framed at the outset as misconduct, the deck is stacked against a careful examination of the facts of a case. Calling behavior “misconduct” predetermines outcomes because it assumes both intentionality and choice and has connotations in our society that make it utterly opposed to “disability.” It is easy for a court to hold that an employer

235. See, e.g., *Misek-Falkoff v. IBM*, 854 F. Supp. 215, 218, 227 (S.D.N.Y. 1994) (holding that plaintiff, who had a physical disorder related to the nervous system that sometimes caused “fits of rage, emotional outbursts, crying episodes and similar behavior,” was not qualified for her job because “[i]t is certainly a ‘job-related requirement’ that an employee, handicapped or not, be able to get along with co-workers and supervisors”).

236. Susan Stefan, “*You’d Have to Be Crazy to Work Here*”: *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 811 (1998); see also STEFAN, *supra* note 100, at 58 (“Psychiatric disability can be greatly exacerbated or greatly ameliorated by the quality of interpersonal contact and the nature of the environment.”); Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerous Mentally Ill*,” 34 U.C. DAVIS L. REV. 849, 878 (2001) (explaining, in the context of misconduct taking the form of violence, that “violence [often] results from situational contexts . . . , rather than inhering in an individual”).

237. See Hubbard, *supra* note 236, at 904-05 (stating that “workplace stresses or conflicts can trigger confrontations that lead to violence”); Stefan, *supra* note 236, at 818 (“The very essence of most psychiatric disabilities . . . is that they can be triggered or exacerbated by environmental stimuli, principally stress and stressful interactions with others.”).

238. Stefan, *supra* note 236, at 818.

239. See *supra* notes 227-28 and accompanying text.

240. See *supra* Part III.B.1.

should not have to tolerate misconduct in the workplace. This is simply another way of phrasing the conclusion that the employee loses the case.²⁴¹

Interestingly, Judge Posner, who wrote the *Despairs* opinion suggesting that disability-related behavior is not misconduct if it is compelled by the disability,²⁴² has moved away from the position that the concept of “misconduct” should be significant in ADA cases. In *Matthews v. Commonwealth Edison Co.*, the Seventh Circuit, in an opinion written by Judge Posner, examined

whether an employer ever can be said to have fired a disabled worker on grounds of disability when he fired him because of a condition positively correlated with a disability; and whether it is ever proper to fire an employee because of a condition that is at once positively correlated with a disability and not probative of the employee’s current ability to do the job.²⁴³

The court answered no to the first question and yes to the second, reasoning that “[e]ven if [an] individual is qualified, if his employer fires him for any reason other than that he is disabled”—“even if the reason is the consequence of the disability”—“there is no discrimination ‘because of’ the disability.”²⁴⁴

The *Matthews* court provided the example of an employer who rejected a dyslexic applicant for a position involving considerable reading in favor of another applicant because of the other applicant’s greater speed at reading.²⁴⁵ Despite noting that “[i]t is not the dyslexic worker’s ‘fault’ that he can’t read as well as his competitor; it is due entirely to his disability,”²⁴⁶ the court concluded that it was not disparate treatment on the

241. STEFAN, *supra* note 100, at 153.

242. See *Despairs v. Milwaukee County*, 63 F.3d 635, 636-37 (7th Cir. 1995).

243. 128 F.3d 1194, 1195 (7th Cir. 1997).

244. *Id.* at 1196. In support of the proposition that there is no disparate treatment based on disability under those circumstances, the court cited *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), an age discrimination case in which the Supreme Court held that employment decisions based on factors empirically correlated with age did not constitute disparate treatment on the basis of age. *Matthews*, 128 F.3d at 1196. In light of this reasoning, one wonders whether the *Matthews* court would agree with the district court in *Martinson* that discharging an employee for seizures is not disparate treatment based on the disability of epilepsy. See *supra* notes 211-16 and accompanying text.

245. 128 F.3d at 1196. The court assumed that, despite his slow speed at reading, the dyslexic applicant was qualified for the position, such that he was protected by the ADA from disparate treatment based on his disability. *Id.*

246. *Id.* Slow reading, in other words, may be compelled by the disability of dyslexia; *cf.* Published by UF Law Scholarship Repository, 2005

basis of disability for the employer to prefer the other applicant.²⁴⁷ According to the court, an employee fired or not hired based on a condition positively correlated with a disability—like the dyslexic worker in the example—can establish disability discrimination under the ADA only by proving disparate impact, “challeng[ing] the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation.”²⁴⁸

Matthews suggests that the proper approach to cases involving discharge because of any manifestation of a disability—whether or not that manifestation is deemed to be “misconduct”—is scrutiny under the disparate impact theory of discrimination.²⁴⁹ In other words, *Matthews* supports the *Den Hartog* minority approach to disability-related misconduct.²⁵⁰ Perhaps because it never uses the term “misconduct,” courts have not cited *Matthews* in cases involving employees discharged for misconduct causally connected to a disability.²⁵¹ Nonetheless, *Matthews* accurately predicted the approach to disability-related misconduct taken by the Supreme Court in its December 2003 decision in *Raytheon Co. v. Hernandez*.²⁵²

B. *Raytheon Co. v. Hernandez: The Supreme Court Considers Disability-Related Misconduct*

The Supreme Court granted the petition for certiorari in *Raytheon Co. v. Hernandez* on the question “whether the ADA confers preferential rehire

Despays, 63 F.3d at 636 (suggesting that if alcoholism compelled drunk driving, an employment decision based on a DUI conviction would constitute disparate treatment on the basis of disability).

247. *Matthews*, 128 F.3d at 1196.

248. *Id.* The plaintiff in *Matthews* was discharged by his employer as part of a reduction in force, where the employer based its decision on whom to retain on recent performance. *Id.* at 1197. The plaintiff’s recent performance was weak compared to that of his co-workers because the plaintiff had missed a great deal of work due to his disability. *Id.* The court found the plaintiff unable to establish disparate treatment, reasoning that the plaintiff “was not discharged because of his disability” but rather “because of a consequence of the disability—his absence from work the last half of 1991 and his not working full-time the following year.” *Id.* at 1198. Because the plaintiff had waived any disparate impact claim, his ADA case failed. *Id.* at 1197-98.

249. *Id.* at 1195-96.

250. *See id.*; *supra* notes 197-210 and accompanying text.

251. The one exception is *Lottinger v. Shell Oil Co.*, 143 F. Supp. 2d 743, 758 (S.D. Tex. 2001) (stating that because “[t]he ADA does not prohibit adverse action due to a consequence of a disability,” it “does not insulate an employee from adverse action taken by an employer because of misconduct in the workplace, even if his improper behavior is arguably attributable to an impairment”). The *Lottinger* court did not apply the disparate impact theory of discrimination to the plaintiff’s claims. *See id.* at 757 (stating that “[t]o recover under the ADA, the plaintiff must prove that he was discriminated against on the basis of his disability”).

252. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003); *Matthews*, 128 F.3d at 1195-

rights on disabled employees lawfully terminated for violating workplace conduct rules.”²⁵³ Had the Court answered that question, it would have gone a long way toward answering the question posed by this Article: whether and to what extent the ADA restricts the ability of employers to discharge employees who engage in disability-related misconduct. If the ADA confers preferential rehire rights on disabled former employees terminated for misconduct, it stands to reason that disabled current employees who commit disability-related misconduct might have some protection from discharge. The Court, however, did not reach the question on which it granted certiorari.²⁵⁴ Nonetheless, the Court’s opinion provides substantial guidance on which of the lower courts’ approaches to disability-related misconduct is correct.

Joel Hernandez, the plaintiff in *Raytheon*, failed a drug test given by Raytheon, his employer, in 1991.²⁵⁵ He chose to resign in lieu of discharge, and the employee separation summary documenting his resignation indicated that he left Raytheon due to “discharge for personal conduct.”²⁵⁶ More than two years later, after receiving treatment for his drug and alcohol addictions, Hernandez applied to be rehired by Raytheon.²⁵⁷ As requested on the application, he noted that he had previously worked for the company.²⁵⁸ An employee in the company’s labor relations department reviewed his application, and noting that Hernandez had previously worked for Raytheon and was terminated for misconduct, determined that he was ineligible for rehire.²⁵⁹ The employee claimed that she reached this conclusion based on Raytheon’s unwritten policy of not rehiring former employees who were previously discharged or who resigned in lieu of discharge.²⁶⁰ She also claimed that she was unaware of the conduct underlying Hernandez’s resignation at the time she rejected his application.²⁶¹ Hernandez contested the employee’s testimony on that point.²⁶²

253. *Raytheon Co.*, 540 U.S. at 46. Raytheon acquired the defendant employer in this case, Hughes Missile Systems Company, subsequent to the employer’s decision not to rehire the plaintiff. *Id.* at 46-47 & n.1. The case was captioned *Hernandez v. Hughes Missile Systems Co.* in the Ninth Circuit. 298 F.3d 1030 (9th Cir. 2002). For the sake of clarity, this Article refers to the employer as “Raytheon” or “the company” and to the case as *Raytheon Co. v. Hernandez*, its caption before the Supreme Court.

254. *Raytheon Co.*, 540 U.S. at 46.

255. *Id.* at 47.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 49. Hernandez had attached to his application for re-employment a copy of his

Hernandez filed suit under the ADA, contending that in rejecting his application for re-employment, Raytheon discriminated against him because of a disability in violation of the ADA.²⁶³ After the district court granted Raytheon's motion for summary judgment, the Ninth Circuit reversed and remanded the case for trial.²⁶⁴

The Ninth Circuit first examined whether Hernandez could state a *prima facie* case of disability discrimination,²⁶⁵ indicating that the court was examining his claim under the disparate treatment theory of discrimination.²⁶⁶ The court stated the elements of a *prima facie* case as (1) the plaintiff has a disability; (2) he is qualified; and (3) "his employer terminated or refused to rehire him because of his disability."²⁶⁷ The court had little difficulty deciding that Hernandez established a genuine issue of material fact on the first two elements of the *prima facie* case,²⁶⁸ but its approach to the third element was more complex. First, the court explained

resume and two reference letters. *Id.* at 47. One of the letters was from a counselor who stated that Hernandez regularly attended Alcoholics Anonymous meetings and was in recovery. *Id.* According to Hernandez, his application packet thus provided the labor relations employee with actual notice that Hernandez was a recovering alcoholic. *Id.* at 49. Raytheon's statement to the EEOC in response to Hernandez's charge of disability discrimination also casts some doubt on the company's asserted reason for rejecting Hernandez's application. *See id.* at 48. Although the letter stated that "[t]he Company maintains it's [*sic*] right to deny re-employment to employees terminated for violation of Company rules and regulations," the letter explained more specifically that "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." *Id.*

263. *Id.* at 48.

264. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1033, 1037 (9th Cir. 2002).

265. *Id.* at 1033.

266. *See supra* notes 46-53 and accompanying text.

267. *Hernandez*, 298 F.3d at 1033.

268. *See id.* at 1033-35. Regarding the first element, the court noted that

it is not disputed that Hernandez was a drug *addict* and that his positive drug test formed a record of his addiction. In other words, it is not disputed that Hernandez was "disabled" within the meaning of the ADA at the time he resigned in lieu of termination, and a record of that disability existed.

Id. at 1033 n.9.

Regarding the "qualified" element, Hughes did not contest that Hernandez was qualified for the job of Product Test Specialist at the time of his resignation in 1991, when his employee separation sheet indicated that his work performance was both "good" and "fair." *Id.* at 1035. Hughes contended, however, that Hernandez was not qualified for the position in 1994 when he sought reemployment. *Id.* Hughes based this contention on the fact that in 1999, after Hernandez sued Hughes, the company offered him the position of Product Test Specialist if he passed the required examination, and Hernandez failed that test. *Id.* The court reasoned that, since Hernandez was qualified in 1991 and was not qualified in 1999, whether he was qualified in 1994—"a date considerably closer to the time during which he satisfactorily performed the job"—when he applied for rehire was a genuine issue of material fact. *Id.*

that there was a fact issue on causation because of the need for credibility determinations on whether the labor relations employee knew of Hernandez's record of drug addiction when she rejected his application.²⁶⁹ Second, the court explained that even if the employee had been unaware of his record of drug addiction, Hernandez could still prove that his disability caused the rejection of his application.²⁷⁰

The court's reasoning on this point is convoluted and interwoven with its rejection of Raytheon's asserted legitimate nondiscriminatory reason for not rehiring Hernandez—the company's policy not to rehire employees who were discharged or resigned in lieu of discharge for violating the company's conduct rules.²⁷¹ Raytheon contended that this policy did not discriminate against former employees with a record of drug addiction "because it does not single out such employees or treat them differently from employees who violated other personal conduct rules (such as fighting or stealing from the company)."²⁷² The court rejected this argument, stating that Hernandez "may not be denied re-employment simply because of his past record of drug addiction."²⁷³

This statement indicates that the court relied implicitly on the *Teahan* approach to finding disparate treatment, reasoning that Hernandez's disability caused his positive drug test, and thus failure to rehire based on the consequences of that drug test—Hernandez's resignation in lieu of discharge—constituted disparate treatment on the basis of disability.²⁷⁴ The court's implicit reliance on *Teahan* becomes more apparent when the court states that even if the labor relations employee were not aware of the circumstances behind Hernandez's resignation, her ignorance would be irrelevant because "her lack of knowledge would have been due solely to [Raytheon's] unlawful policy which shields its employees from the knowledge that an employment decision may be illegal."²⁷⁵ If the staff member who made an employment decision was unaware of the

269. *Id.* at 1034; see *supra* note 262.

270. *Hernandez*, 298 F.3d at 1036 n.18.

271. See *id.* at 1035. The court states in two footnotes that the same rationale for rejecting Raytheon's asserted legitimate nondiscriminatory reason also establishes the causation element of Hernandez's prima facie case. *Id.* at 1034 n.10, 1036 n.18.

272. *Id.* at 1035.

273. *Id.* at 1036.

274. To use the example provided by the *Teahan* court, failing to hire a former drug addict based on his drug-related resignation is analogous to failing to hire an employee with a limp because of the thump he makes when he walks. See *Teahan v. Metro-N. Commuter R.R.*, 951 F.2d 511, 516-17 (2d Cir. 1991). Employers are rejecting both applicants because of consequences of their disabilities.

275. *Hernandez*, 298 F.3d at 1036. The court stated further that "[h]aving willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge." *Id.*

applicant's disability, it would seem that the disability could not have caused her decision. Rather than such a staff member being unaware of the fact that she is committing an unlawful act, she could not have committed an unlawful—meaning intentionally discriminatory—act unless she knew of the disability and made her decision *on that basis*.²⁷⁶ The only way the court's statement makes sense is if the court was equating employment decisions based on a consequence of a disability to employment decisions based on disability status, as did the *Teahan* court.²⁷⁷ Because the plaintiff established a prima facie case and the employer's only asserted legitimate nondiscriminatory reason was unlawful, the Ninth Circuit reversed the grant of summary judgment to Raytheon.²⁷⁸

The Supreme Court,²⁷⁹ however, held that the Ninth Circuit erred in rejecting the neutral no-rehire policy as a legitimate nondiscriminatory reason for Raytheon's failure to rehire Hernandez.²⁸⁰ According to the Court, the company's no-rehire policy was a "quintessential legitimate nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."²⁸¹ Noting that disparate treatment requires evidence that "the protected trait . . . actually motivated the employer's decision,"²⁸² the Court reasoned that if Raytheon rejected Hernandez's application pursuant to a neutral and generally applicable no-rehire policy, that decision "can, in no way, be said to have been motivated by [Hernandez's] disability."²⁸³

276. The Ninth Circuit in *Raytheon* is not the only court to suggest that a decisionmaker's ignorance of a plaintiff's membership in a protected class is somehow troubling in a disparate treatment case. See *Lenoir v. Combined Ins. Co. of Am.*, No. 01C5267, 2002 WL 1949735, at *11 (N.D. Ill. Aug. 23, 2002). In *Lenoir v. Combined Insurance Co. of America*, the employer contended that the manager who decided to fire the plaintiff, based on the plaintiff's alleged theft of forty-five cents worth of scrambled eggs from the company cafeteria, had no knowledge of the plaintiff's disability, such that the plaintiff could not prove disparate treatment based on disability. *Id.* at *3, *10-11. The court rejected the employer's argument, reasoning that "[i]f employers could simply isolate termination decisions to only those members of management with no knowledge of employees' protected statuses, they could then immunize themselves from the strictures of employment discrimination statutes." *Id.* at *11. Interestingly, in *Lenoir*, unlike in *Raytheon* and the other cases discussed in this Article, the plaintiff did not argue that her disability caused her misconduct. See *id.* at *3-4 (discussing plaintiff's challenges to her termination).

277. See *supra* notes 167-78 and accompanying text.

278. *Hernandez*, 298 F.3d at 1037.

279. The opinion, written by Justice Thomas, was joined by all of the other members of the Court, except Justice Souter, who took no part in the decision of the case, and Justice Breyer, who took no part in the consideration or decision of the case. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 45 (2003).

280. *Id.* at 54-55. Raytheon did not contest on appeal that Hernandez had established a prima facie case of discrimination. *Id.* at 50.

281. *Id.* at 54-55.

282. *Id.* at 52 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

283. *Id.* at 55.

The Supreme Court implicitly rejected the *Teahan* approach to disability-related misconduct and its equating of decisions based on consequences of disabilities to decisions based on disability status.²⁸⁴ The Court stated that if the labor relations employee was unaware of Hernandez's disability, her hiring decision could not have been motivated by his disability and thus could not have constituted disparate treatment.²⁸⁵ Moreover, the Court noted that the Ninth Circuit's suggestion that Raytheon's decision not to rehire Hernandez violated the ADA because his "workplace misconduct is related to his disability" conflicted with the Court's rejection of a similar argument in a case arising under the Age Discrimination in Employment Act.²⁸⁶

Rather than expressly rejecting *Teahan*, however, the Court's precise holding in *Raytheon* focused on the Ninth Circuit's improper use of disparate impact reasoning in a disparate treatment case.²⁸⁷ Hernandez had waived any disparate impact claim by failing to assert it in a timely manner.²⁸⁸ Nonetheless, the Ninth Circuit stated that Raytheon's "blanket policy against rehire of *all* former employees who violated company policy . . . screens out persons with a record of addiction who have been successfully rehabilitated" and thus violated the ADA.²⁸⁹ As the Supreme Court noted, a policy's effect on members of a protected class is a factor under disparate impact analysis, not under disparate treatment.²⁹⁰

284. See *supra* notes 167-78 and accompanying text.

285. *Raytheon Co.*, 540 U.S. at 54 n.7.

286. *Id.* at 54 n.6 (citing *Hazen Paper Co.*, 507 U.S. at 611).

287. *Id.* at 53-55. The Court stressed that it "has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." *Id.* at 52.

288. *Id.* at 49.

289. *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1036 (9th Cir. 2002).

290. *Raytheon Co.*, 540 U.S. at 54. The Ninth Circuit apparently realized that it was proceeding under the rubric of disparate impact. In response to a Petition for Rehearing and Rehearing En Banc filed by Raytheon, the court issued an amended opinion. *Hernandez*, 298 F.3d at 1031. The "screens out" language was a new addition in the amended opinion. *Id.* at 1031. The sentence had previously provided that maintaining such a blanket policy "discriminates on account of past disability against persons with a record of addiction who have been successfully rehabilitated." 292 F.3d 1038, 1044 (9th Cir. 2002) (original opinion). Another change in the amended opinion was the addition of a footnote: "We note that Hughes has not raised a business necessity defense, and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict." 298 F.3d at 1037 n.19 (citation omitted); *cf.* 292 F.3d at 1045 (original opinion). Business necessity is not a defense to claims of disparate treatment; it is a defense only to claims of disparate impact. See *Raytheon Co.*, 540 U.S. at 52.

In short, the court appeared to want to rule in favor of Hernandez because of the disparate impact of Raytheon's policy on persons with a record of addiction, but the court had to acknowledge that Hernandez waived any disparate impact claim. The court tried to force its reasoning into the prima facie case and legitimate nondiscriminatory reason rubric of disparate treatment, which explains the convoluted nature of the opinion.

Accordingly, the Supreme Court held that the Ninth Circuit wrongly “conflat[ed] the analytical framework for disparate-impact and disparate-treatment claims” by holding that a neutral no-rehire policy could never constitute a legitimate nondiscriminatory reason “in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts.”²⁹¹ Because Raytheon articulated a legitimate nondiscriminatory reason for not rehiring him, Hernandez could establish liability only by proving that the asserted reason was pretextual and did not actually cause the company’s decision.²⁹²

C. *The Lessons of Raytheon: Disparate Treatment and Disparate Impact*

1. Disparate Treatment

a. Implicit Rejection of *Teahan* Minority Approach

Raytheon provides substantial guidance on the limitations imposed by the ADA on employers’ ability to discharge employees for disability-related misconduct.²⁹³ As discussed above, the Supreme Court implicitly rejected the *Teahan* minority approach to such misconduct.²⁹⁴ Plaintiffs cannot prove disparate treatment merely by establishing that their employers discharged them based on workplace conduct related to their disabilities.²⁹⁵

The *Raytheon* Court’s citation of the Age Discrimination in Employment Act (ADEA)²⁹⁶ decision of *Hazen Paper Co. v. Biggins*²⁹⁷ reinforces this point.²⁹⁸ In *Hazen Paper*, the Supreme Court rejected the

291. *Raytheon Co.*, 540 U.S. at 51-52.

292. *Id.* at 51-52 (stating that because the “neutral no-rehire policy [was], by definition, a legitimate, nondiscriminatory reason under the ADA . . . the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that ‘petitioner’s stated reason for respondent’s rejection was in fact pretext’”) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)) (footnote call number omitted).

293. *See supra* Part IV.B.

294. *See supra* notes 284-85 and accompanying text.

295. *See supra* note 286 and accompanying text.

296. 29 U.S.C. §§ 621-634 (2000).

297. 507 U.S. 604 (1993).

298. 540 U.S. at 54 n.6. The Seventh Circuit’s decision in *Matthews v. Commonwealth Edison Co.*, discussed *supra* notes 243-48 and accompanying text, predicted the Supreme Court’s suggestion that the disparate impact theory of discrimination is the appropriate means to analyze employment decisions based on consequences of a disability. The *Matthews* court also cited *Hazen Paper* in support of the proposition that such employment decisions do not constitute disparate treatment because of disability. *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997).

plaintiff's argument that by discharging him to prevent his pension benefits from vesting—a factor “that is empirically correlated with age”—his employer discriminated against him because of his age in violation of the ADEA.²⁹⁹ The Court noted that the ADEA's prohibition against disparate treatment was intended to prevent employers from relying on “inaccurate and stigmatizing stereotypes” about the abilities of older workers.³⁰⁰ “When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears,” the Court reasoned, “even if the motivating factor is correlated with age, as pension status typically is.”³⁰¹ The employer's reliance on an age-correlated factor will constitute disparate treatment only when the employer chooses that factor as a proxy for age, with the purpose of discriminating against older employees because of their age.³⁰²

The authors of a widely used employment discrimination casebook acknowledge *Hazen Paper's* holding that, at least in the context of age discrimination, disparate treatment occurs only when an employer makes a decision based on an employee's protected status, and it does not occur when the employer utilizes another factor, even one related to that status.³⁰³ In that regard, *Hazen Paper* is similar to *General Electric Co. v. Gilbert*, in which the Court held that, even though only women can become pregnant, discrimination on the basis of pregnancy does not constitute sex discrimination in violation of Title VII.³⁰⁴ Nonetheless, the casebook's authors suggest that disparate treatment under the ADA should be viewed more broadly than disparate treatment under the ADEA or Title VII.³⁰⁵

Similarly, one of the courts arguing in favor of the *Teahan* minority approach to disability-related misconduct asserted that a broad view of disparate treatment is necessary to fulfill Congress's intent in proscribing disability discrimination in employment. In *Hogarth v. Thornburgh*, the court noted that drawing a distinction between discharge because of

299. 507 U.S. at 608-09.

300. *Id.* at 610.

301. *Id.* at 611.

302. *See id.* at 612-13 (stating that the Court “do[es] not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination”).

303. ZIMMER ET AL., *supra* note 216, at 749.

304. 429 U.S. 125, 135-36 (1976). Congress overruled *Gilbert* by passing the Pregnancy Discrimination Act of 1978, which amended Title VII to provide that employment decisions based on pregnancy constitute decisions made on the basis of sex. *See* Pub. L. No. 95-555, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

305. *See* ZIMMER ET AL., *supra* note 216, at 749 (noting cases in which courts have held that decisions based on a disability's symptoms constitute disparate treatment on the basis of disability). Whether the authors agree with this suggestion is unclear, however. *See id.* (querying whether there is “any reason to treat disability discrimination differently from age discrimination in this respect”).

disability and discharge because of disability-related misconduct “appears to invite an inquiry into the state of mind of the employer.”³⁰⁶ Such an inquiry was inappropriate, according to the *Hogarth* court, because “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”³⁰⁷ The court reasoned that “[t]he congressional goal of eliminating such thoughtless discrimination is hardly advanced if an employer is permitted to raise a ‘pure heart, empty head’ defense, claiming that it was unaware of the relation between the handicap and its manifestations.”³⁰⁸

A broader view of disparate treatment, however, is not necessary to achieve Congress’s goal of eliminating discrimination against the disabled caused by thoughtlessness and indifference. Rather, the ADA’s objective of equal opportunity, as opposed to equal treatment, is served through the statute’s prohibition of disparate impact discrimination³⁰⁹ and its requirement of reasonable accommodation. Accordingly, there is no need to expand the meaning of disparate treatment based on disability—in a way that differs from the meaning of disparate treatment based on other prohibited factors—in order to serve the purposes of the ADA. Disabled employees who want to challenge the effect of employment policies that are not based on disability status must utilize the disparate impact theory of discrimination or the duty of reasonable accommodation.

b. Assessment of the Majority Approach: Proper Disparate Treatment Analysis of Disability-Related Misconduct

The fact that the *Teahan* minority approach to disability-related misconduct is incorrect does not mean, however, that all cases applying the majority approach are correct. Some of the cases applying the majority approach suggest that disabled employees who commit misconduct fall completely outside the protection of the ADA.³¹⁰ Neither the text of nor the policy behind the ADA supports such a blanket exclusion. Congress drafted the ADA to cover mental as well as physical disabilities,³¹¹ and

306. 833 F. Supp. 1077, 1085 (S.D.N.Y. 1993) (arising under the Rehabilitation Act).

307. *Id.* (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)).

308. *Id.*

309. The *Hogarth* court quotes from the Supreme Court decision of *Alexander v. Choate* to support its argument that the state of mind of the employer should be irrelevant in determining whether disparate treatment occurred. *Id.* (quoting 469 U.S. at 295). Notably, however, the quoted passage from *Alexander* occurs in the context of the Court’s discussion that the Rehabilitation Act must prohibit disparate impact discrimination in some circumstances. 469 U.S. at 295-97.

310. *See supra* note 151.

311. *See* 42 U.S.C. § 12102(2)(A) (2000) (defining “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”).

mental disabilities generally manifest themselves in the form of behavior.³¹² Given the ease with which any behavior could be deemed “misconduct,”³¹³ holding that disabled employees who commit misconduct fall outside the protection of the ADA would diminish substantially the ADA’s protection of the mentally disabled.³¹⁴

In addition, the incorrectness of the *Teahan* minority approach to disability-related misconduct does not mean that employees purportedly discharged due to such misconduct never will be able to prove disparate treatment.³¹⁵ In *Raytheon*, although the employer asserted that it refused to rehire Hernandez pursuant to its neutral no-rehire rule, Hernandez had the opportunity on remand to demonstrate that the asserted reason was pretext

(emphasis added).

312. See STEFAN, *supra* note 100, at 154 (“Many disabilities manifest themselves in forms of behavior or conduct, and psychiatric disability is manifested almost completely in this way.”); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1087 (10th Cir. 1997) (“Mental illness is manifested by abnormal behavior, and is in fact normally diagnosed on the basis of abnormal behavior.”).

313. See *supra* Part IV.A.

314. See *Den Hartog*, 129 F.3d at 1087 (“To permit employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA’s protection of the mentally disabled.”).

Moreover, the ADA provision authorizing employers to hold alcoholic and drug addicted employees to the same qualification standards as other employees indicates that employees disabled by alcoholism and drug addiction cannot use either the disparate impact theory or the duty of reasonable accommodation to challenge neutral, uniformly-applied conduct rules. See *id.* at 1086 (stating that 42 U.S.C. § 12114(c)(4) means that “employers need not make any reasonable accommodations for employees who are illegal drug users and alcoholics”). The fact that this authorization of neutral rules is limited to employees disabled by alcoholism and drug addiction suggests that employees with other disabilities can challenge those rules under the disparate impact theory or the duty of reasonable accommodation. See *id.* (accepting plaintiff’s argument that “because Congress only expressly permitted employers to hold illegal drug users and alcoholics to the same objective standards of conduct as other employees even though their disability causes misconduct or poor performance, Congress implicitly did not intend to extend the same employer prerogative to employees with *other* disabilities”).

At some points in its opinion, the *Den Hartog* court suggests that outside the context of drug addiction and alcoholism, employment decisions based on disability-related misconduct constitute disparate treatment on the basis of disability in violation of the ADA. See, e.g., *id.* (stating that “the disability v. disability-caused conduct dichotomy seems to be unique to alcoholism and drugs”). This, of course, is the *Teahan* minority approach to disability-related misconduct, which the Supreme Court rejected in *Raytheon*. Throughout most of *Den Hartog*, however, the court indicates that employees must use the duty of reasonable accommodation or the disparate impact theory of discrimination to challenge discharge due to disability-related misconduct. See, e.g., *id.* at 1088 (stating that when disability-related misconduct occurs, “an employer should normally consider whether a mentally disabled employee’s purported misconduct could be remedied through a reasonable accommodation,” and if not, the employer may discipline the employee if the conduct rule is job-related and consistent with business necessity or the employee poses a direct threat).

315. In other words, while it is incorrect to say, as *Teahan* did, that discharge due to disability-related misconduct is per se disparate treatment, it is also incorrect to say that discharge purportedly based on such misconduct is per se *not* disparate treatment.

for disability discrimination.³¹⁶ A plaintiff purportedly discharged for disability-related misconduct could prove pretext by demonstrating that his or her employer did not terminate all employees who engaged in such misconduct, which would raise an inference that the employer treated the plaintiff differently because of his or her disability. Such a plaintiff also could prove pretext by demonstrating that—even though the conduct rule in question may appear neutral—the employer actually adopted it because of its effect on employees with disabilities or with a particular disability.³¹⁷ Some of the courts applying the majority rule to disability-related conduct have stated that plaintiffs could establish disparate treatment if they had this kind of evidence of pretext.³¹⁸

Under the burden-shifting approach to demonstrating disparate treatment, however, courts do not reach the pretext stage of the analysis unless the plaintiff has established a *prima facie* case of discrimination.³¹⁹ As discussed in Part III.B.1 *supra*, many courts applying the majority approach to disability-related misconduct conclude that the plaintiff cannot establish a *prima facie* case because he or she cannot prove that the employer discharged the plaintiff due to the plaintiff's disability.³²⁰

316. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (stating that “the only remaining question [is] whether respondent could produce sufficient evidence from which a jury could conclude that ‘petitioner’s stated reason for respondent’s rejection was in fact pretext’”) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

317. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993) (stating that the Court “do[es] not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination”).

318. *See, e.g., Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 508 (7th Cir. 2004) (“The disparate treatment of similarly-situated employees who were involved in misconduct of comparable seriousness, but did not have a similar disability, could establish pretext.”). In *Taylor v. Dover Elevator Systems, Inc.*, the court discussed several ways that the plaintiff could attempt to show pretext: by introducing evidence that the employer “failed to rely on the reason in past decision making”; that the employer “failed to articulate the reason at the time of discharge and advanced conflicting reasons as the litigation progressed”; or that “a similarly situated employee . . . did not suffer the adverse employment action as well.” 917 F. Supp. 455, 463 (N.D. Miss. 1996). None of these methods for demonstrating pretext helped the *Taylor* plaintiff, however, who was discharged for fighting on company premises. *Id.* at 458, 463. The court noted that the employer “invoked a rule which had been in place prior to the altercation,” “consistently maintained through all the many meetings that the altercation was the cause for termination,” and also fired the other employee who was involved in the altercation. *Id.* at 463.

319. *See supra* notes 46-49 and accompanying text.

320. *See, e.g., Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050, 1052 (5th Cir. 1998) (reasoning that plaintiff could not show that “an adverse employment decision was made because of his disability” because he “was fired for his misconduct in the workplace”); *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1225, 1228 (S.D. Ga. 2003), *aff’d*, 90 Fed. Appx. 384 (11th Cir. 2003) (reasoning that plaintiff could not show that “he was discriminated against based upon his disability” because he was discharged for “his constant outbursts of vulgar language and racial

Including causation as an element of the prima facie case is problematic in light of the fact that plaintiffs use the burden-shifting approach because they lack direct evidence of causation. It would be more consistent with the purposes of the burden-shifting approach to provide that the plaintiff must prove merely that he or she “suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.”³²¹

Moreover, a plaintiff who is a qualified individual with a disability should be able to create such an inference—thus establishing a prima facie case of disability discrimination—by demonstrating that he or she was discharged because of conduct causally connected to the disability. Such an approach would provide more protection to plaintiffs, many of whom will have disabilities that manifest themselves through conduct. In arguing in favor of its approach to disability-related misconduct, the *Teahan* court contended that, unless discharge because of a consequence of a disability was equated to discharge because of disability, employers could violate the ADA surreptitiously.³²² An employer could claim, for example, that it is firing a disabled employee with a limp because of the thumping sound the employee makes when he walks, not because of the employee’s disability.³²³ To avoid this result, however, it is not necessary to adopt the broad approach to disparate treatment applied in *Teahan*. Rather, because the employer’s stated reason—the thump—is causally connected to the employee’s disability, the plaintiff can establish a prima facie case of disability discrimination. The employer will assert the plaintiff’s misconduct—in this example, the thump—as its legitimate, nondiscriminatory reason for the discharge. The plaintiff then has the opportunity to demonstrate that this reason is a pretext for disability discrimination, by showing, for example, that the employer did not discharge other noisy employees. This evidence could lead a reasonable

slurs”).

321. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1021-22 (8th Cir. 1998); *see also* *Butler v. City of Prairie Vill.*, 172 F.3d 736, 748 (10th Cir. 1999) (stating that “to establish the third element of a prima facie case of disability discrimination, the plaintiff must show that she was terminated because of her disability, or that the employer terminated the plaintiff ‘under circumstances which give rise to an inference that the termination was based on her disability’”) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (9th Cir. 1997)); *Hutchinson v. UPS, Inc.*, 883 F. Supp. 379, 395 (N.D. Iowa 1995) (holding that “the plaintiff need not show at the *prima facie* case phase that he or she was terminated ‘because of’ a disability,” but rather “need only make a showing that gives rise to an *inference* of discrimination on the basis of disability”); *supra* notes 57-59 and accompanying text.

322. *Teahan v. Metro-N. Commuter R.R.*, 951 F.2d 511, 516-17 (2d Cir. 1991).

323. *See id.* Or, under the *Raytheon* facts, an employer could claim that it is not rehiring a former employee who is a recovered alcoholic because the employee resigned in lieu of discharge, not because of the employee’s record of disability.

jury to conclude that the employer's true reason for discharging the plaintiff was the plaintiff's disability.

Allowing a qualified plaintiff with a disability to establish a prima facie case by showing discharge due to conduct causally related to disability would not mean that employers never could obtain summary judgment. In the Title VII context, although it is easy for plaintiffs to establish a prima facie case, employers frequently obtain summary judgment because the plaintiff cannot create a jury issue on pretext.³²⁴ Similarly, even if an ADA plaintiff establishes a prima facie case by showing discharge due to disability-related conduct, the employer likely will obtain summary judgment on the plaintiff's disparate treatment claim if it discharged the plaintiff pursuant to a long-standing and uniformly applied conduct rule.³²⁵

A remaining question regarding disparate treatment is whether the plaintiff must prove as an element of his or her prima facie case that the employer knew of the plaintiff's disability at the time of the discharge decision. Employer knowledge of the plaintiff's membership in a protected class is not an issue in most discrimination cases because that membership is often obvious; employers typically do not assert, for example, that they were unaware of the plaintiff's race or gender.³²⁶ Where the plaintiff's protected status is not apparent, however, as in cases alleging disparate treatment because of pregnancy or religion, courts often have required evidence of employer knowledge of that status as part of the prima facie case.³²⁷

324. See generally Jeffrey A. Van Detta, "Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a "Mixed-Motives" Case, 52 DRAKE L. REV. 71, 105-08 (2003) (discussing summary judgment under Title VII).

325. See, e.g., *Taylor v. Dover Elevator Sys., Inc.*, 917 F. Supp. 455, 463 (N.D. Miss. 1996) (holding that, even if the plaintiff could establish a prima facie case, the employer was entitled to summary judgment because the plaintiff could not prove that the employer's stated reason for firing the plaintiff—the plaintiff's fighting on company premises—was pretextual).

326. See *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) ("The traditional *McDonnell Douglas-Burdine* presumption quite properly makes no reference to the employer's knowledge of membership in a protected class because, in the vast majority of discrimination cases, the plaintiff's membership is either patent (race or gender), or is documented on the employee's personnel record (age)."); *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir. 1995) ("In race or sex discrimination, the protected characteristic of the employee is immediately obvious to the employer . . .").

327. See, e.g., *Geraci*, 82 F.3d at 581 ("If the pregnancy is not apparent and the employee has not disclosed it to her employer, she must allege knowledge and present, as part of her prima facie case, evidence from which a rational jury could infer that the employer knew that she was pregnant."); *Galloway v. Alltel Communications, Inc.*, No. C99-2097, 2001 WL 34149071, at *4 (N.D. Iowa Jan. 19, 2001) (noting employer's argument that the plaintiff could not establish a prima facie case of religious discrimination because the decisionmakers did not know that the plaintiff was Mormon when they decided to discharge her). The *Geraci* court reasoned that "it is counter-intuitive to infer that the employer discriminated on the basis of a condition of which it was wholly

Similarly, courts have held that an employer must have knowledge of an employee's disability for its discharge of the employee to constitute disparate treatment on the basis of disability.³²⁸ In *Hedberg v. Indiana Bell Telephone Co.*, the court reasoned as follows:

At the most basic level, it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee "because of" a disability unless it knows of the disability. If it does not know of the disability, the employer is firing the employee "because of" some other reason.³²⁹

The *Raytheon* Court's rejection of the *Teahan* approach to disability-related misconduct makes clear that what matters for disparate treatment purposes is discrimination based on disability status; discrimination based on the consequences of a disability does not suffice. Accordingly, it stands to reason that an employer must be aware of a plaintiff's disability status in order to discriminate on that basis.

Employer knowledge of the plaintiff's disability must play some role in cases alleging disparate treatment on the basis of disability, but the nature of that role is uncertain. One possibility is requiring the plaintiff to prove employer knowledge as an element of the prima facie case, distinct from the requirement that the plaintiff demonstrate an adverse employment action under circumstances creating an inference of unlawful discrimination, which the plaintiff can satisfy by proving discharge due to disability-related misconduct.³³⁰ The *Hedberg* court, despite emphasizing the importance of employer knowledge, did not make such a holding, however.³³¹ A better possibility may be for evidence that the employer did

ignorant." 82 F.3d at 581.

328. *E.g.*, *Hedberg*, 47 F.3d at 932 (holding that "an employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability"); *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1181-82 (6th Cir. 1993) (finding the plaintiff unable to prove that his disability caused his discharge under the Rehabilitation Act because "[e]ven if plaintiff's behavior was caused by his mental illness, [his employer] had no knowledge of this").

329. 47 F.3d at 932.

330. In *Landefeld*, the court reasoned that the plaintiff's inability to show that his employer knew of his disability at the time of his discharge prevented the plaintiff from satisfying the causation element of a prima facie case of disability discrimination. 994 F.2d at 1180-82. Under the approach advocated by this Article, however, the fact that the plaintiff was terminated for conduct—stealing mail from the hospital mailboxes of his fellow physicians—that was causally connected to his disability of bipolar disorder would create an inference of causation.

331. The court stated that it "need not decide the precise elements of a prima facie case of discrimination under the ADA." *Hedberg*, 47 F.3d at 933 n.5. Although the court acknowledged that one possibility would be to include employer knowledge of the disability as an element of a plaintiff's prima facie case, the court stated that its holding was merely that "where there is no

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not know of the plaintiff's disability to come into play at the pretext stage of the analysis, making it more difficult for the plaintiff to demonstrate that the employer's asserted reason is a pretext for disability discrimination.

Cases discussing what evidence indicates employer knowledge of a plaintiff's disability generally arise in the context of a claim that the employer failed to accommodate the plaintiff's disability, not in the context of a claim that the employer intentionally treated the plaintiff differently because of his or her disability.³³² Those cases have tended to interpret narrowly what evidence suffices,³³³ but it is arguable that courts should require less of an evidentiary showing of knowledge when the plaintiff is arguing for mere equal treatment rather than equal opportunity.

For example, in *Miller v. National Casualty Co.*, the plaintiff missed work for an extended period without providing medical documentation to her employer, causing her discharge.³³⁴ The plaintiff claimed that she failed to report to work and to notify her employer because of her disability of manic depression, and argued that her employer should have accommodated her by allowing her extra time to obtain a medical excuse before termination.³³⁵ The court held that, because the ADA requires employers to accommodate limitations of disabilities, not disabilities themselves, the plaintiff's sister's statement to the employer that the plaintiff "was mentally falling apart and the family was trying to get her into the hospital" was insufficient to trigger the duty to accommodate.³³⁶

genuine issue that an employer did not know of an employee's disability when it decided to fire him, the employee cannot make out a case of discriminatory discharge." *Id.* But see *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) (stating that plaintiff must prove as part of a prima facie case that "the employer knew or had reason to know of the plaintiff's disability"); *Dikcis v. Nalco Chem. Co.*, 974 F. Supp. 669, 674 (N.D. Ill. 1997) (holding that plaintiff "cannot establish a prima facie case of disability discrimination because there is no evidence that [his employer] knew of his disability").

332. See, e.g., *Taylor v. Principal Fin. Group*, 93 F.3d 155, 163-64 (5th Cir. 1996) (holding that plaintiff's statement to his supervisor that he was suffering from bipolar disorder failed to give rise to a duty to accommodate because the employer was unaware of "any limitations experienced by the [plaintiff] as a result of that disability"); *Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (holding that plaintiff's sister's statement that plaintiff "was mentally falling apart and the family was trying to get her into the hospital" failed to give rise to a duty to accommodate because it was insufficient to "alert[] the company to the fact that [plaintiff] suffered from a mental disability that the ADA would require the company to accommodate").

333. See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 290 (2000) (citing *Taylor* and *Miller* in support of the proposition that "courts have been extraordinarily restrictive in interpreting the requirement that the employer must be aware of the employee's disability").

334. 61 F.3d at 629.

335. *Id.*

336. *Id.* at 629-30.

Regardless of the correctness of that holding in the reasonable accommodation context, it should be clear that if the plaintiff were claiming disparate treatment—that her employer treated her differently because of her disability and would not have discharged employees who missed work without documentation for reasons other than “mentally falling apart”—she would have presented sufficient evidence of employer knowledge of her disability. Because of the tendency to incorrectly import into the disparate treatment context the stricter standard for employer knowledge under reasonable accommodation,³³⁷ it may be best for courts to consider evidence of employer knowledge or lack thereof at the pretext stage of disparate treatment analysis, rather than at the stage of the prima facie case. Under this approach, fact-finders can assess all of the evidence indicating that a plaintiff’s disability may have caused her discharge, rather than focusing too stringently on any single element.

2. Disparate Impact

The outcome in *Raytheon* suggests that the disparate impact theory of discrimination, rather than disparate treatment, is the proper means to challenge discharge for disability-related misconduct.³³⁸ Where a plaintiff is challenging the effect of a rule adopted by his or her employer—rather than the employer’s motivation in adopting or applying that rule—the plaintiff is making a disparate impact argument (or asking for reasonable accommodation).³³⁹ *Raytheon* thus indicates that the *Den Hartog* minority approach to disability-related misconduct is a viable means for challenging discharge based on such misconduct.³⁴⁰ More analysis is necessary,

337. See, e.g., Stefan, *supra* note 333, at 290-91 (citing the *Taylor and Miller* reasonable accommodations cases in support of the proposition that, in the disparate treatment context, “courts have been extraordinarily restrictive in interpreting the requirement that the employer must be aware of the employee’s disability”).

338. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 47, 53-55 (2003). In *Matthews v. Commonwealth Edison Co.*, the Seventh Circuit anticipated this conclusion with respect to challenging discharge based on any consequence of a disability, rather than on disability status. 128 F.3d 1194, 1196-97 (7th Cir. 1997).

339. See *Raytheon Co.*, 540 U.S. at 54 (noting that the Ninth Circuit’s observation that the employer’s policy “screens out persons with a record of addiction” raised a factor relevant to disparate impact claims) (quoting *Hernandez v. Hughes Missile Sys. Co.*, 298 F.3d 1030, 1036-37 (9th Cir. 2002)); *Matthews*, 128 F.3d at 1196 (stating that a dyslexic worker not promoted because of slowness in reading could try to prove pretext and thus disparate treatment—“that he lost the promotion because his employer dislikes people with disabilities, not because his inability to read quickly made him the worse choice for the job”—or “he has to switch to the disparate-impact approach and challenge the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation”).

340. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997) (stating that “an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity”).

however, before deciding that plaintiffs discharged for disability-related misconduct can utilize the disparate impact theory of discrimination to challenge their discharge. In addition, *Den Hartog* might not represent a correct application of the disparate impact theory to disability-related misconduct.

a. The Meaning of “Qualification Standards, Employment Tests, or Other Selection Criteria”

As discussed in Part II.B.3. *supra*, the ADA contains two provisions prohibiting disparate impact discrimination. One provision prohibits employers from “utilizing standards, criteria, or methods of administration” “that have the effect of discrimination on the basis of disability.”³⁴¹ The other provision, which is more specific, prohibits employers from “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by [the employer], is shown to be job-related . . . and . . . consistent with business necessity.”³⁴²

Can a plaintiff challenge a policy directly targeting workplace misconduct under the disparate impact theory? Arguably, the statute’s reference to “qualification standards, employment tests, or other selection criteria” indicates that plaintiffs can use the ADA’s disparate impact provisions to challenge only employer policies that pose barriers to hiring or promoting disabled employees.³⁴³ In fact, outside the ADA context, most disparate impact cases—and all of the disparate impact cases decided by the Supreme Court—have involved challenges to an employer’s qualification standards or selection practices for hiring or promoting employees.³⁴⁴ Workplace conduct rules are likely to pose barriers to disabled employees’ retaining their jobs, rather than to such employees obtaining those jobs in the first place. *Raytheon* does not provide an answer to this question because the policy at issue in *Raytheon*, although misconduct-related, imposed a barrier to hiring certain individuals: those whom the employer had discharged previously for misconduct.

341. 42 U.S.C. § 12112(b)(3) (2000).

342. *Id.* § 12112(b)(6).

343. *See id.*

344. *See, e.g.,* Connecticut v. Teal, 457 U.S. 440, 442-43 (1982) (discussing requirement that employees pass a written test to be considered for promotion); Dothard v. Rawlinson, 433 U.S. 321, 327-29 (1977) (discussing requirement that applicants for employment be of a certain minimum height and weight); Griggs v. Duke Power Co., 401 U.S. 424, 425-28 (1971) (discussing requirement that employees have a high school diploma and pass two standardized tests in order to be assigned initially or transferred into certain departments).

Courts should construe the disparate impact provisions of the ADA as encompassing challenges to policies prohibiting workplace misconduct. The statute's reference to "qualification standards . . . [and] selection criteria" can be interpreted as including an employer's standards for existing employees to *remain* qualified as opposed to being selected for discharge.³⁴⁵ The fact that the statute's other reference to the disparate impact theory mentions "standards, criteria, or methods of administration," without using the modifiers of "qualification" and "selection," further supports this view.³⁴⁶ Policies prohibiting workplace misconduct certainly constitute standards and criteria.³⁴⁷

In addition, the ADA provision regarding employees who are alcoholics or engaged in illegal drug use supports an understanding of "qualification standards" as including workplace conduct rules.³⁴⁸ The provision states that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same *qualification standards for employment or job performance and behavior* that such entity holds other employees."³⁴⁹ While this provision indicates that employees disabled by alcoholism or drug addiction cannot use the disparate impact theory to challenge neutral, uniformly applied conduct rules, it suggests that employees with other disabilities can contend that such rules constitute qualification standards that screen them out. Finally, the EEOC's Enforcement Guidance on the ADA and Psychiatric Disabilities directly contemplates the availability of the disparate impact theory to challenge policies prohibiting workplace misconduct. In response to the question "[m]ay an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability," the EEOC states, "Yes, provided that the workplace conduct standard is

345. See 42 U.S.C. § 12112(b)(6).

346. See *id.* § 12112(b)(3)(A).

347. In *Taylor v. Dover Elevator Systems, Inc.*, for example, the employer discharged the plaintiff for violating "company rule three which prohibits 'fighting, brawling, or attempting injury to another person while on company premises,'" and which "additionally provides that a violation thereof could result in discharge." 917 F. Supp. 455, 459 (N.D. Miss. 1996). Company rule three established a "standard" of conduct for employees.

348. See 42 U.S.C. § 12114(c)(4). Moreover, the ADA provision regarding the direct threat defense also suggests that current employees can utilize the disparate impact theory. The provision states that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). This provision must apply to existing employees as well as applicants for hire or promotion; it would not make sense to prohibit an employer from terminating an existing employee who—perhaps due to acquiring a contagious disease—became a direct threat to the health of others in the workplace.

349. *Id.* § 12114(c)(4) (emphasis added).

job-related for the position in question and is consistent with business necessity.”³⁵⁰

Aside from the express language of the statute, the purposes of the ADA also support the availability of the disparate impact theory to challenge policies on workplace misconduct. The ADA was intended to ensure more than just equal treatment of individuals with disabilities in the workplace. As the duty of reasonable accommodation makes clear, another goal of the statute was to ensure equal access to employment opportunities.³⁵¹ Just as workplaces that are not physically equipped to allow wheelchair access present obstacles to the employment opportunities of some disabled individuals,³⁵² so too can workplace conduct policies that deem as disqualifying misconduct behavior that an individual with a disability may find impossible or nearly impossible to control. The social model of disability,³⁵³ which underlies the ADA, views disability not as the product of limitations inherent in an individual’s body or mind, but rather

350. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 67, at 31 (Question 30). As support for this answer, the EEOC cites the “qualification standards . . . that screen out” component of the ADA’s definition of disability discrimination. *Id.* (citing 42 U.S.C. § 12112(b)(6) (1994)).

351. See Anita Silvers, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13, 120 (1998) (noting that the ADA “promotes . . . the view that not special benefits but, instead, access similar to other people’s is a basic requirement for acknowledging that the lives of people with disabilities are as worth living as others’ lives are”); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 958 (2000) (“While the ADA’s duty of reasonable accommodation is obviously inconsistent with a sameness model, it is nevertheless entirely consistent with the ADA’s goal of equal opportunity for individuals with actual disabilities.”).

352. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 429 (2000) (providing the example of a person with paralysis who will be unable to work if workplace entrances are too narrow to accommodate a wheelchair or accessible only by stairs).

353. Martha Minow explains this model, which she calls the “social-relations model,” as follows:

As a method of legal analysis, the social-relations approach demands analysis of difference in terms of the relationships that construct it. The approach solicits challenges from the perspective of those labeled different, and it treats existing institutional arrangements as a conceivable source of the problem of difference rather than an unproblematic background.

MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW* 112 (1990). Wendy Hensel describes the social model of disability as viewing “the limitations experienced by the disabled . . . as the result of discrimination, explicit or implicit, from self-titled ‘normal’ people rather than from the actual impairments.” Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1145, 1170. In contrast to the earlier medical model of disability, which focused on curing the disabled individual, the social model “focuses on changing attitudes and eradicating barriers” to the full participation of individuals with disabilities in society. *Id.* at 1144-45.

as “the interaction between societal barriers (both physical and otherwise) and the impairment.”³⁵⁴ This approach envisions the physical structures of a work environment as contingent rather than natural, and thus as subject to change if necessary to open the workplace to individuals with disabilities.³⁵⁵ Similarly, courts should view workplace policies as contingent rather than natural, and thus as subject to change or exception if they tend to harm disproportionately an individual with a disability or a class of such individuals, and if the employer cannot prove that the policies are job-related and consistent with business necessity. It would be a cramped understanding of equal opportunity to allow disabled individuals to enter the workplace but to then force them to comply with workplace policies—developed based on the norm of a worker with no disabilities—that they will find extremely difficult to follow due to their disabilities, where the employer cannot show a need for such policies.³⁵⁶

354. Bagenstos, *supra* note 352, at 426, 428. Bagenstos explains that much of the ADA “can be seen as implementing disability rights activists’ attempt to eliminate ‘disability’ as a disadvantaged group status by eliminating the physical, social, and attitudinal structures that make particular physical or mental conditions generally disadvantageous.” *Id.* at 433.

355. Bagenstos provides the example of a person with paralysis who will be unable to work if workplace entrances are too narrow to accommodate a wheelchair or are accessible only by stairs. *Id.* at 429. He notes that, although the person’s paralysis is real, “it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes.” *Id.* at 429; *see also* Hensel, *supra* note 353, at 1145 (describing an individual confined to a wheelchair as disabled only “as a result of the design and construction of the facility rather than any inherent biological problem”).

356. Although most Title VII disparate impact cases involve challenges to employers’ qualification standards or selection practices for hiring or promoting employees, one line of cases involves a challenge to an employer’s conduct policy as having a disparate impact on members of a protected class. This line of cases—which supports allowing disparate impact challenges to conduct policies under the ADA—involves English-only policies, in which an employer adopts a rule that only English can be spoken on the job. *See, e.g.,* Gutierrez v. Mun. Court, 838 F.2d 1031, 1036, 1053 (9th Cir. 1988), *vacated as moot*, 409 U.S. 1016 (1989); Garcia v. Gloor, 618 F.2d 264, 266, 270 (5th Cir. 1980) (finding that employer’s rule did not discriminate on the basis of national origin); EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 912-14 (N.D. Ill. 1999); Long v. First Union Corp., 894 F. Supp. 933, 937, 940-41 (E.D. Va. 1995) (granting employer’s motion for summary judgment).

In the most well-known case, *Garcia v. Spun Steak Co.*, Spanish-speaking employees sued their employer for adopting a policy whereby only English could be spoken in connection with work. 998 F.2d 1480, 1183 (9th Cir. 1993). Although the *Garcia* court ultimately ruled against the plaintiffs, the court reasoned that Title VII permitted disparate impact challenges to employer policies outside the hiring and promotion context. *Id.* at 1485. The court explained that

Regardless whether a company’s decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered “discriminatory.”

b. Assessment of the *Den Hartog* Minority Approach: Proving that Conduct Rules Have a Disparate Impact

Assuming that plaintiffs can use the disparate impact theory of discrimination to challenge conduct rules, how might a plaintiff establish disparate impact under the ADA? Although the *Den Hartog* minority approach to disability-related misconduct is based on the disparate impact theory of discrimination, that court failed to explain how a plaintiff proves that a conduct rule has a disparate impact. In fact, by stating that “an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity,”³⁵⁷ the court implies that a plaintiff need prove nothing in order to shift onto the employer the burden to establish the validity of its conduct rules.

Contrary to the implication of the *Den Hartog* court, the text of the ADA makes clear that an employer bears the burden of justifying its conduct rules only after the plaintiff demonstrates that the rules “screen out or tend to screen out an individual with a disability or a class of individuals with disabilities.”³⁵⁸ Moreover, assuming that individuals with mental disabilities—the category of disability at issue in *Den Hartog*—cannot comply with conduct rules also conflicts with the policy underlying the ADA. Such an assumption would reinforce the stereotype that persons with mental disabilities are crazy, dangerous, and completely out of control—a stereotype that suggests that such persons simply do not belong in the workplace.³⁵⁹ Although the disparate impact theory of discrimination focuses on the differences between persons in furtherance of the equal opportunity goal of the ADA, it cannot be forgotten that the ADA also embraces the goal of equal treatment.³⁶⁰ Encouraging employers to assume

Id.

Similarly, regardless of whether an employer’s hiring or promotion decisions discriminate on the basis of disability, employer policies prohibiting conduct causally connected to disabilities may impose significantly harsher burdens on employees with those disabilities, operating as a barrier to equality in the workplace. If such policies are not job-related and consistent with business necessity, courts could find them discriminatory in violation of the ADA.

357. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997).

358. 42 U.S.C. § 12112(b)(6) (2000); *see also id.* § 12113(a).

359. *See Jean Campbell & Caroline L. Kaufmann, Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in *MENTAL DISORDER, WORK DISABILITY, AND THE LAW* 221, 228 (Richard J. Bonnie & John Monahan eds., 1997) (noting that “many studies demonstrate that employers have strong negative perceptions of persons known or thought to have a mental illness”); Hubbard, *supra* note 236, at 850-51 (“Surveys consistently show that the public harbors widespread fear of ‘the mentally ill.’”).

360. In fact, when considering the duty of reasonable accommodation—the more well-known

that disabled employees cannot comply with conduct rules would conflict with that goal.³⁶¹

Accordingly, to rely on the disparate impact theory of discrimination, a plaintiff must prove that a conduct rule has a disparate impact. However, as discussed *supra* in Part II.B.3, it is easier for a plaintiff to prove disparate impact under the ADA than it is under Title VII because the ADA allows individually focused disparate impact claims. Rather than needing to produce statistical evidence showing that the challenged policy disqualified or excluded a disproportionate number of persons in a protected group, an ADA plaintiff need prove only that the policy had an adverse effect on the plaintiff because of his or her disabilities.³⁶² More precisely, the ADA plaintiff must prove that the policy had an “exclusionary effect” on the plaintiff due to the “particular limitations caused by [his or her] disability.”³⁶³ This showing is very similar to what

embodiment of the ADA’s goal of equal opportunity—it appears that equal treatment is the default goal of the statute in the employment context. Employers are required to treat employees the same, regardless of disability, unless and until the employee asks for different treatment in the form of a request for reasonable accommodation. *See* 29 C.F.R. app. § 1630.9 (2004) (stating that generally “it is the responsibility of the individual with a disability to inform the employer that accommodation is needed”).

361. *See* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 955 (2004) (stating that “this model of equality requires that the disabilities in question be deemed irrelevant to the ability of the disabled employees to perform their jobs, in the same way that their race and sex are deemed irrelevant”); Karlan & Rutherglen, *supra* note 40, at 10 (stating that the model “would condemn decisions made on the basis of ‘myths, fears, and stereotypes associated with disabilities’ that assume that individuals with physical or mental impairments are not equally capable of doing a particular job”) (quoting 29 C.F.R. app. § 1630.2(1) (1995)).

362. *See* 42 U.S.C. § 12112(b)(6) (2000) (referring to qualification standards “that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities”) (emphasis added); *see also* Keith R. Fentonmiller & Herbert Semmel, *Where Age and Disability Discrimination Intersect: An Overview of the ADA for the ADEA Practitioner*, 10 GEO. MASON U. CIV. RTS. L.J. 227, 275-76 (2000) (contending that allowing individually-focused disparate impact claims under the ADA “appears to make practical sense because ‘whether a person has a disability under the ADA is an individualized inquiry,’ a determination that ‘is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual’”; in contrast, individualized inquiries are rarely required to identify a person’s race or gender, “thereby making race or sex discrimination claims far more amenable to a statistical analysis”) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999)) (footnote call numbers omitted).

363. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 83, § I-4.3(2). The ability of ADA plaintiffs to establish disparate impact discrimination on an individual rather than a class-wide basis serves a valuable policy role in avoiding some of the stigmatization that otherwise may arise through use of the disparate impact theory. The disparate impact model of discrimination is based on the differences between groups of people, and focusing on such differences can reinforce the paternalistic idea that one group is inferior and thus in need of special treatment. Martha Minow has called this the “dilemma of difference,” explaining that “[t]he stigma of difference may be

is required to assert a claim of failure to accommodate, that the employer failed to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”³⁶⁴

recreated both by ignoring and by focusing on it. . . . The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.” MINOW, *supra* note 353, at 20.

Even under the individually-focused version of disparate impact, ADA plaintiffs must highlight the differences between themselves and other persons in the workplace. Without such differences, of course, a plaintiff could not prove that a policy had a disparate impact on him or her because of the plaintiff’s disability. Under the individually-focused version, however, a plaintiff need not argue that the policy would have a disparate impact on all persons with disabilities, or even on a narrower group such as all persons with mental disabilities or all persons with major depression. The plaintiff need not try to argue that workplace conduct standards disproportionately harm persons with major depression, which would send the message that all or most persons with major depression are unable to behave in an appropriate manner.

364. 42 U.S.C. § 12112(b)(5)(A). Christine Jolls has noted the similarities between the concepts of disparate impact discrimination and accommodation. *See* Jolls, *supra* note 70, at 645 (stating that the disparate impact branch of antidiscrimination law contains requirements of accommodation, such that “antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories”). Jolls defines accommodation as

a legal rule that requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership (or “discriminating against” the group in the canonical sense).

Id. at 648. Similarly, according to Jolls,

[e]mployers are often required by disparate impact law to incur special costs in response to the distinctive needs or circumstances (measured against existing market structures) of particular groups, and these requirements may arise in situations in which the employer had no intention of treating the group differently on the basis of group membership.

Id. at 652.

Jolls argues that in several categories of cases, those courts finding employers liable under Title VII’s disparate impact theory are actually requiring such employers to accommodate employees. For example, courts have held that no-beard policies may violate Title VII because of their disparate impact on black men, many of whom have a skin condition that makes it difficult or impossible for them to shave. *Id.* at 653-56 (discussing *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795 (8th Cir. 1993)). Jolls also discusses cases involving disparate-impact challenges to English-only policies in the workplace. *Id.* at 658-60; *see also supra* note 356 (analogizing the English-only cases to discharges of employees for engaging in disability-related misconduct, where the conduct rule is not job-related and consistent with business necessity).

Jolls notes that the typical remedy in Title VII disparate impact cases is to strike down entirely the offending policy, rather than just permitting the impacted employees to refrain from following

In the context of disability-related misconduct, a plaintiff would establish that a particular conduct rule had a disparate impact on her by showing that the “particular limitations caused by [her] disability” interfered with her ability to comply with the rule.³⁶⁵ This approach raises the question, however, of what limitations the court must consider. Assume that the plaintiff’s impairment is PTSD and that the court found the impairment to be a disability because it substantially limited the plaintiff’s major life activity of sleeping.³⁶⁶ Assume also that the impairment causes the plaintiff to be irritable and abrupt with her co-workers,³⁶⁷ in violation of a workplace conduct rule requiring employees to be courteous to each other.³⁶⁸

Can the plaintiff challenge the conduct rule as having a disparate impact on her due to limitations caused by her disability of PTSD, which include irritability? Or can the plaintiff challenge only rules that impact the limitation that made her impairment of PTSD a disability, her sleeping problems?³⁶⁹ Reinforcing the similarities between disparate impact and the duty of reasonable accommodation, the same issue arises in the reasonable accommodation context: is a plaintiff entitled only to accommodations that

the policy, as is the norm under the duty of reasonable accommodation. Jolls, *supra* note 70, at 655. In the no-beard cases, however, courts generally have required employers to exempt employees with the skin condition from the policy, highlighting that those cases involve accommodation requirements. *Id.* Moreover, the fact that the ADA, unlike Title VII, allows plaintiffs to prove disparate impact discrimination on an individual rather than class-wide basis reinforces the similarities between disparate impact and the duty to accommodate in the ADA context.

365. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 83, § I-4.3(2). Such a showing may have a stigmatizing effect on the particular plaintiff—by highlighting that her disability made it difficult or impossible for her to comply with a workplace conduct rule—but it will not stigmatize wrongfully all persons with disabilities, most of whom will have no difficulty complying with workplace conduct standards. *See* Stefan, *supra* note 236, at 799-800 (noting that most ADA cases brought by plaintiffs with psychiatric disabilities do not involve plaintiffs disciplined for misconduct who then claimed that their disability caused the misconduct). Moreover, to the extent that a plaintiff’s disability actually interferes with her ability to comply with a conduct rule, it is more harmful to her for the law to ignore the limitations caused by her disability, holding her to a standard that she cannot meet, than it is to recognize those limitations and require the employer to prove a need for the rule.

366. *See, e.g.,* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 653-54 (S.D.N.Y. 2001), *aff’d*, 324 F.3d 102, 103 (2d Cir. 2003).

367. *See* AM. PSYCHIATRIC ASS’N, *supra* note 110, at 425 (stating that the persistent symptoms of increased arousal characteristic of PTSD may include irritability).

368. The EEOC Guidance on the ADA and Psychiatric Disabilities gives this as an example of a conduct rule that might not be job-related and consistent with business necessity if the employee’s job is such that he or she does not come into regular contact with other employees. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 67, at 30 (Question 30, Example C).

369. For example, a rule requiring employees to begin work at 7 a.m. would impact the sleeping problems caused by the plaintiff’s PTSD.

are causally connected to the major life activity substantially limited by the plaintiff's impairment?

Courts are divided on this issue,³⁷⁰ but the better view is that an employer must accommodate any limitation caused by the plaintiff's impairment, not just limitations causally connected to the substantially limited major life activity that renders the impairment a disability.³⁷¹ While the ADA's definition of disability requires that the plaintiff's impairment substantially limit one or more of her major life activities,³⁷² the statute's requirement of reasonable accommodation applies to the plaintiff's

370. The first case to address this issue directly was *Felix v. New York City Transit Authority*, 324 F.3d 102, 104 (2d Cir. 2003). The plaintiff in *Felix*, a railroad clerk, developed PTSD after the firebombing of a token booth. *Id.* at 103. At the time of the bombing, the plaintiff was on her way to relieve the clerk in that token booth, and that clerk was killed in the incident. *Id.* The plaintiff's condition "included feelings of apprehension and anxiety, recurrent problems with insomnia, and an inability to work in the subways." *Id.* at 104. As a reasonable accommodation, the plaintiff requested reassignment to a position that would not require work in the subways, but her employer did not grant her request. *Id.* The court held that the employer's refusal did not violate the ADA because "there must be a causal link between the specific condition which limits a major life activity and the accommodation required." *Id.* at 104, 107; *see also* Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 687 (8th Cir. 2003) (relying on *Felix* in holding that "there must be a causal connection between the major life activity that is limited and the accommodation sought").

It was undisputed that the *Felix* plaintiff had a disability because "her insomnia limits the major life activity of sleeping." 324 F.3d at 104. The court reasoned, however, that "an employer discriminates against an employee with a disability only by failing to provide a reasonable accommodation for the 'disability' which is the impairment of the major life activity." *Id.* at 105. Accordingly, the court concluded that the plaintiff was only entitled to accommodations that "flow[ed] directly from her disability—the mental condition of insomnia that prevents her from sleeping." *Id.* at 106. Because her inability to work in the subway did not flow from her insomnia, she was not entitled to her requested accommodation. *Id.* at 106-07.

The reasoning of the *Felix* court is incorrect. The *Felix* plaintiff's disability was not insomnia, it was PTSD. *See* Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Rehearing En Banc at 1, *Felix*, 324 F.3d 102 (No. 01-7967), 2003 WL 23197906 (noting that the court's decision "distorts the statutory language in a subtle, but significant way by defining the term 'disability' to mean the limiting of a major life activity, as opposed to the underlying physical or mental disorder that causes a substantial limitation of a major life activity"). PTSD, not insomnia, was the plaintiff's mental impairment, which constituted a disability because it substantially limited the major life activity of sleeping. Because the plaintiff's inability to work in the subway flowed directly from her disability of PTSD, the court should have considered whether her requested accommodation was reasonable.

371. *See* *McAlindin v. County of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 1999) (stating that the plaintiff's "sleep disorder and sexual dysfunction merely help to establish that the impairment (panic disorder after treatment) affects a major life activity; they are not relevant to the reasonable accommodation discussion, however, which focuses on the post-treatment panic disorder's manifestations in the workplace and the employer's response to them"); *Arnold v. County of Cook*, 220 F. Supp. 2d 893, 896 (N.D. Ill. 2002) ("The only nexus required between the limitation that qualifies an individual as disabled and the limitation for which the accommodation is requested is that both be caused by a common physical or mental condition.").

³⁷² 42 U.S.C. § 12102(2)(A) (2000).

“known physical or mental limitations,” without any qualification that those limitations be substantial or impact a major life activity.³⁷³ The requirement that the plaintiff’s impairment substantially limit a major life activity is a threshold issue limiting the class protected by the ADA, but once the plaintiff falls in that protected class, she is entitled to reasonable accommodation for all of the limitations flowing from her impairment.³⁷⁴ Similarly, a plaintiff should be able to challenge under the disparate impact theory a conduct rule that tends to screen her out due to any of the limitations flowing from her impairment, not just the limitations connected to her substantially limited major life activity.³⁷⁵

If a court holds that a plaintiff can challenge (via the disparate impact theory or the duty of reasonable accommodation) only conduct rules related

373. *Id.* § 12112(b)(5)(A). The *Arnold* court made this point in rejecting the *Felix* holding, noting that “[t]he reasonable accommodation provision includes nothing to suggest that it applies only to ‘substantial’ limitations or limitations that impact ‘major life activities.’” 220 F. Supp. 2d at 896.

374. The *Arnold* court provided the example of an employee with severe allergies to numerous substances, which render her substantially limited in the major life activity of caring for herself. 220 F. Supp. 2d at 896. Another limitation caused by the employee’s allergies is that she is unable to touch rubber bands, but her employer refuses to allow her to substitute binder clips. *Id.* Under the reasoning of the *Felix* court, such a substitution would not constitute a potential reasonable accommodation because the employee’s inability to use rubber bands is not caused by her limitations in caring for herself. The *Felix* court’s reasoning indicates that the employee would be able to require the binder clip substitution as a reasonable accommodation only if using rubber bands was itself a major life activity. *See Felix*, 324 F.3d at 105 (“Felix’s inability to work in the subway did not substantially limit any major life activity.”). As noted by the court in *Arnold*, however, “it is partly because the rubber band limitation is minor that not accommodating it is unreasonable.” 220 F. Supp. 2d at 896.

In its amicus brief in support of rehearing en banc in *Felix*, the EEOC asserted that the policy considerations underlying the ADA support requiring employers to accommodate all limitations flowing from a disability. Brief of the EEOC as Amicus Curiae in Support of Rehearing En Banc at 6, *Felix*, 324 F.3d 102 (No. 01-7967), 2003 WL 23197906. Because the threshold showing for “disability” is so high, few plaintiffs succeed in making such a showing. *Id.* at 13. Moreover, “[a] medical condition that is serious enough to substantially limit a major life activity will likely also limit the individual in other ways, some or all of which affect the workplace.” *Id.* at 14. The EEOC provides the example of an individual receiving dialysis treatments for a kidney disorder who is substantially limited in the major life activity of caring for himself, but who also may need some assistance with lifting heavy items in the workplace. *Id.* According to the EEOC, “[b]y requiring accommodation of all such limitations (short of undue hardship), Congress ensured that barriers relating to the disability will not unnecessarily restrict otherwise qualified individuals with disabilities from achieving their full potential in the workplace.” *Id.*

375. To use the example discussed by the *Arnold* court in the reasonable accommodation context, *supra* note 374, the plaintiff would challenge the rule requiring usage of rubber bands rather than binder clips as tending to screen her out due to limitations imposed by her disability—her allergies—even though rubber band usage is not related to the major life activity of caring for herself. The employer then could justify the rubber band rule only by proving that it is job-related and consistent with business necessity.

to the major life activity substantially limited by the plaintiff's impairment, that holding will influence the plaintiff's litigation strategy. For example, although it might be easiest for a plaintiff to prove that her impairment of PTSD is disabling with reference to the major life activity of sleeping, she should not utilize that major life activity if she intends to challenge a conduct rule unrelated to sleeping. If the plaintiff wants to challenge a conduct rule relating to employee interactions with others because of the irritability caused by her PTSD, she should assert as her substantially limited major life activity "interacting with others."³⁷⁶ The problem with this approach, however, is that plaintiffs have had great difficulty proving that they were substantially limited in interacting with others yet nonetheless qualified for their jobs. Some courts have expressed doubt that interacting with others is a major life activity,³⁷⁷ while others have interpreted the "substantially limited" requirement in such a rigorous manner that only plaintiffs demonstrating total inability to interact with others could be deemed disabled.³⁷⁸ If a plaintiff is completely unable to interact with

376. In the alternative, the plaintiff could argue that she is substantially limited in the major life activity of working, which presumably would allow her to make a disparate impact or reasonable accommodation challenge to any workplace conduct rule. Such an argument is unlikely to succeed, however, because an individual is substantially limited in working only if her impairment prevents her from working in a broad class of jobs. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999). Moreover, if a plaintiff asserts that she is substantially limited in working because of difficulty in getting along with co-workers, a court is likely to find that she is unqualified for most jobs. *See infra* note 444 and accompanying text.

377. *E.g.*, *Davis v. Univ. of N.C.*, 263 F.3d 95, 101 n.4 (4th Cir. 2001) (noting "some doubt" as to whether the "ability to get along with others is a major life activity"); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (noting that "[t]he concept of 'ability to get along with others' is remarkably elastic, perhaps so much so as to make it unworkable as a definition" and that interacting with others "is different in kind from breathing or walking, two exemplars which are used in the regulations"). *But see McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that interacting with others is a major life activity because it "is an essential, regular function, like walking and breathing").

378. *See, e.g., Rohan v. Networks Presentations LLC*, 375 F.3d 266, 275 (4th Cir. 2004) (holding that plaintiff with PTSD was not substantially limited in interacting with others even though she avoided making friends, could only make a minimal effort at having a social life, and suffered intermittent episodes in which she was completely unable to interact with others); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1131 (10th Cir. 2003) (holding that plaintiff was not substantially limited in interacting with others because although she "had difficulty interacting with a number of her co-workers, there is no evidence tending to show she had problems interacting with people in general"); *Heisler v. Metro. Council*, 339 F.3d 622, 629 (8th Cir. 2003) (holding that plaintiff, who alleged that her depression caused her to isolate herself from others, was not substantially limited in interacting with others because "she also testified that she was still able to perform her job duties, which required her to supervise other employees"). Wendy Hensel has summarized the "substantial limitation" cases as "requir[ing] the plaintiff to produce evidence reflecting a virtual complete inability to interact with other people, both at work and in private life." Hensel, *supra* note 353, at 1181.

others, however, courts are likely to find that she is not qualified for almost all jobs.³⁷⁹

In contrast, under the proper view, a disabled plaintiff can establish that a conduct rule has a disparate impact on her by demonstrating that any of the limitations caused by her disability—even limitations unrelated to her substantially limited major life activity—interfered with her ability to comply with the rule.³⁸⁰ This approach raises another question, however: how much interference is required? Must the plaintiff prove that it was impossible for her to comply with the conduct rule due to the particular limitations imposed by her disability, or is it enough for her to show that her disability made it more difficult for her to comply with the rule? This is a question of causation and is the same question faced by courts attempting to determine what is misconduct: must the plaintiff prove that her disability compelled her misconduct?

Viewing the necessary level of interference or causation so strictly—insisting on evidence that the plaintiff’s disability compelled her to violate the rule—is inconsistent with the reality of most mental disabilities, the type of disability most likely to result in misconduct. Mental disabilities and their resulting conduct depend greatly on the individual’s environment; such disabilities “can be greatly exacerbated or greatly ameliorated by the quality of interpersonal contact and the nature of the environment.”³⁸¹ Moreover, the disparate impact theory of discrimination recognizes that “policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered ‘discriminatory.’”³⁸² If it is substantially more difficult—although not

379. *See, e.g.*, *Gilday v. Mecosta County*, 124 F.3d 760, 765 (6th Cir. 1997) (“The ability to get along with co-workers and customers is necessary for all but the most solitary of occupations”); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994) (“It is certainly a ‘job-related requirement’ that an employee, handicapped or not, be able to get along with co-workers and supervisors.”); *see also* *Hensel, supra* note 353, at 1188 (stating that plaintiffs asserting substantial limitation in interacting with others “are thus placed in an unenviable Catch-22: if they are disabled, they are not qualified, and if they are qualified, they are not disabled”).

380. Just as the plaintiff needs medical testimony to establish that she has a mental or physical impairment that substantially limits a major life activity, she would need to present medical testimony regarding the other limitations caused by her disability. To use the PTSD example discussed earlier, she would need to provide medical evidence that she had been diagnosed as having PTSD, that her PTSD caused her severe insomnia, and that the condition also caused her to be irritable.

381. *Stefan, supra* note 100, at 58. According to Stefan, “The complex, interactive dynamic between psychiatric disability and an individual’s environment means that courts must focus more on context and interaction to understand psychiatric disability.” *Id.*

382. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993). As discussed in footnote 356, *supra*, *Garcia* involved a challenge to an employer’s English-only policy as having a disparate impact. Published by UF Law Scholarship Repository, 2005

impossible—for a plaintiff to comply with a conduct rule due to limitations caused by the plaintiff’s disability, insisting upon compliance with the rule imposes significantly harsher burdens on the plaintiff than on the employee population in general. Unless the conduct rule is job-related and consistent with business necessity, its application to the plaintiff is discriminatory.

However, taking too broad a view of the sufficient level of interference or causation—allowing evidence that the plaintiff’s disability interfered only slightly with her ability to comply with the rule—also has negative implications. Holding that a disabled individual need not comply with a conduct rule where her disability limits only slightly her capacity for compliance could send the message that individuals with disabilities are less accountable for their behavior than those without disabilities. Even though that message might be helpful for an individual plaintiff with a disability challenging her misconduct-related discharge, it is likely to harm individuals with disabilities in general. Being viewed as accountable for one’s own actions is an important part of being human,³⁸³ and emphasizing the lack of accountability of individuals with disabilities is likely to entrench exclusionary and paternalistic stereotypes. As asserted by one proponent of disability rights, “[a]s important as it is to protect those who cannot protect themselves, it is equally important to promote the right of all persons to make their own choices, and, as a corollary, to be accountable for those choices.”³⁸⁴

In addition, such a broad view of the sufficient level of interference or causation is more likely to cause resentment in the workplace. If a disability causes an employee to have only slightly more difficulty complying with a conduct rule than individuals without disabilities, it may seem unfair that only the individual with a disability can challenge the rule under the disparate impact theory. Finally, allowing disabled individuals to challenge conduct rules with which they could comply with reasonable effort reduces the incentive for them to attempt compliance, likely reducing workplace productivity.³⁸⁵

impact on employees of Hispanic origin. *Id.*

383. See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 12 (1994) (discussing the fact that, in the criminal law context, the “power to exercise rational choice is seen as an essential faculty of the, so-called, normal human being”). The most human capacity is the power to choose, and, because behavior is itself a matter of choice, “it is both moral and respectful to the actor to hold the actor responsible.” *Id.* at 18 (citing Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1252-54, 1268 (1976)).

384. Donald N. Bersoff, *Some Contrarian Concerns About Law, Psychology, and Public Policy*, 26 LAW & HUM. BEHAV. 565, 568 (2002). Bersoff made this statement in the context of criticizing a constitutional rule prohibiting the execution of people with mental retardation, contending that “a constitutional ban for these defendants, on the ground that they deserve special protection and dispensation, is antagonistic to their long range rights and entitlements.” *Id.*

385. See J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 919 (2003) (noting that

The solution may be to find the causation component of disparate impact discrimination satisfied if the plaintiff's disability substantially affected her ability to comply with a workplace conduct rule. The modifier "substantially" is a familiar one in ADA jurisprudence; in the context of determining when an impairment constitutes a disability, the Supreme Court has held that "substantially" means "considerable" or "to a large degree."³⁸⁶ Under this view, an employee discharged for yelling at a co-worker would not be screened out because of her disability by a rule mandating courtesy to co-workers if she could present evidence only that the disability caused a slight increase in anger. If, on the other hand, she could show that her disability made it substantially harder for her to control her temper, the rule would have a disparate impact on her because of her disability. The employer could apply the rule to the plaintiff only if it could prove that the rule was job-related and consistent with business necessity.

V. ACCOMMODATING MISCONDUCT: APPLYING THE LESSONS OF *RAYTHEON* TO DISABILITY-RELATED MISCONDUCT

The cases described at the beginning of this Article all involve employees discharged due to conduct causally connected to their disabilities. *Brohm v. JH Properties, Inc.* involved an anesthesiologist with sleep apnea fired by a hospital for sleeping during surgical procedures.³⁸⁷ *Hamilton v. Southwestern Bell Telephone Co.* involved a manager with PTSD who was fired after an angry confrontation with a co-worker during which he slapped her hand down.³⁸⁸ *Ray v. Kroger Co.* involved a grocery store clerk with Tourette's Syndrome who was fired because of outbursts of profanity and racial slurs in the workplace.³⁸⁹ *Simpkins v. Specialty Envelope, Inc.* involved an administrative employee who was fired for leaving the workplace without notifying her direct supervisor when she left work in hysterics and was admitted to a psychiatric hospital.³⁹⁰ In each case, the court held that the plaintiff could not establish a prima facie case

employers generally agree that the possibility of "workplace discipline enhances productivity").

386. *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 196 (2002). Just as a plaintiff's impairment may be substantially limiting without completely preventing the plaintiff from engaging in a major life activity, a plaintiff's disability could substantially limit her ability to comply with a workplace conduct rule without compelling her to violate the rule; see *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (emphasizing that the ADA "addresses substantial limitations on major life activities, not utter inabilities").

387. 947 F. Supp. 299, 299-300 (W.D. Ky. 1996), *aff'd*, 149 F.3d 517 (6th Cir. 1998).

388. 136 F.3d 1047, 1049, 1052 (5th Cir. 1998).

389. 264 F. Supp. 2d 1221, 1223-24 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003).

390. No. 95-3370, 1996 WL 452858, at *1-2 (6th Cir. Aug. 9, 1996).

of disability discrimination because he or she was terminated due to misconduct rather than disability.³⁹¹

Raytheon suggests that courts should focus on the distinct forms of disability discrimination prohibited by the ADA, including disparate impact, in determining whether discharge due to disability-related misconduct violates the Act.³⁹² Could the plaintiffs in *Brohm*, *Hamilton*, *Ray*, or *Simpkins* prove disparate treatment, disparate impact, or failure to provide reasonable accommodations?

A. Disparate Treatment

1. Proving Disparate Treatment

Lacking direct evidence of discrimination, each plaintiff would attempt to demonstrate disparate treatment using the burden-shifting approach.³⁹³ Assume that each plaintiff could establish a jury issue on whether he or she had a disability and was a qualified individual, the first elements of a prima facie case.³⁹⁴ Because they were discharged, the plaintiffs can demonstrate that they suffered adverse employment actions. However, the courts in each case followed the approach to a prima facie case of disparate treatment taken by most courts, requiring the plaintiffs to prove that they were discriminated against because of their disabilities. According to the courts, the plaintiffs could not establish this element because they were discharged due to their misconduct.³⁹⁵

391. *Hamilton*, 136 F.3d at 1052; *Simpkins*, 1996 WL 452858, at *5; *Ray*, 264 F. Supp. 2d at 1228; *Brohm*, 947 F. Supp. at 301-02.

392. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003).

393. *See id.* at 50.

394. *See Hamilton*, 136 F.3d at 1050 (describing elements of a prima facie case). In the actual cases, the courts concluded that the manager in *Hamilton* with PTSD and the administrative employee in *Simpkins* with major depression were not disabled. In *Hamilton*, the court found that the limitations the plaintiff suffered due to his PTSD—overeating to the point of nausea, thoughts of suicide, difficulty concentrating, and episodes of fatigue—no longer existed. *Id.* at 1050-51. Moreover, because the plaintiff admitted that his performance level at work remained above that of his peers, despite his PTSD-caused loss of temper and difficulty handling stress, the plaintiff was not substantially limited in the major life activity of working. *Id.* at 1051. Similarly, the *Simpkins* court found that the plaintiff's major depression was not disabling because it was "only a temporary, non-chronic impairment." 1996 WL 452858, at *6.

In addition, the *Ray* court held that the plaintiff was not qualified for his job. 264 F. Supp. 2d at 1228. Although the district court in *Brohm* did not address the qualified issue, the appellate court stated that the plaintiff's sleeping on the job "rendered him unqualified to perform his duties as an anesthesiologist." 149 F.3d 517, 521 (6th Cir. 1998); *see infra* notes 466-88 and accompanying text.

395. *Hamilton*, 136 F.3d at 1052; *Simpkins*, 1996 WL 452858, at *5; *Ray*, 264 F. Supp. 2d at 1228; *Brohm*, 947 F. Supp. at 301-02.

In contrast to the majority approach, courts should find that the plaintiffs satisfied the final element of a prima facie case because their discharges for conduct causally connected to their disabilities raise an inference of discrimination. To receive the benefit of this inference, of course, each plaintiff must prove that his or her conduct was causally connected to the disability. Moreover, courts may want to impose a requirement of proximate causation as well as actual causation, such that plaintiffs discharged for conduct very loosely connected to their disabilities cannot rely on the inference.³⁹⁶

Once the plaintiffs establish a prima facie case, their employers have the opportunity to assert the plaintiffs' misconduct as the legitimate nondiscriminatory reason for discharging them. Jewish Hospital, the employer in *Brohm*, asserted that it fired Dr. Brohm for falling asleep during surgical procedures.³⁹⁷ Southwestern Bell, the employer in *Hamilton*, argued that it fired Hamilton for violating its policy on workplace violence.³⁹⁸ Kroger, the employer in *Ray*, claimed that it fired Ray because of his "constant outbursts of vulgar language and racial slurs."³⁹⁹ Specialty Envelope, the employer in *Simpkins*, contended that it fired Simpkins because of her violation of its policy against leaving the

396. For example, the plaintiff in *Alpert v. DeKalb Office Environments, Inc.* wore short dresses with visible bike shorts underneath them in violation of her employer's dress code. 206 F. Supp. 2d 1280, 1283-84 (N.D. Ga. 2001). After repeated warnings about her workplace attire, plaintiff's employer fired her. *Id.* at 1284. The plaintiff argued that she wore the bike shorts because of a need to avoid exposing herself when elevating her leg after knee surgery, such that her misconduct was causally connected to her disabling knee injury. *Id.* The court rejected plaintiff's argument, reasoning that even if her knee injury were a disability, "there exists a plethora of other clothing choices that would have met Defendant's dress requirements and would have served Plaintiff's needs," such as longer dresses or loose-fitting pants. *Id.* at 1287. The plaintiff may have been able to prove actual causation, that but for her knee injury, she would not have violated the dress code. She could not prove proximate causation, however, because a superceding cause was her decision—when faced with a variety of other choices—to wear short dresses with bike shorts. *See id.* at 1287. Accordingly, a court might find that she did not present evidence that her misconduct was sufficiently causally connected to her knee injury to raise an inference of disability discrimination.

Similarly, the plaintiff in *Padilla v. Tingstol Co.* was fired pursuant to her employer's policy of automatically discharging any employee who fails to call or report to work for three consecutive days. No. 96 C 3510, 1997 WL 779110, at *1-2 (N.D. Ill. Dec. 10, 1997). The plaintiff missed work because of back problems and argued that, accordingly, her misconduct of being absent from work was causally connected to a disability. *Id.* at *3-4. Assuming that the plaintiff's back problems were a but-for cause of her violation of the no-call, no-show policy, they were not a proximate cause because those problems did not interfere significantly with her ability to call her employer about her absence. *See id.* at *6.

397. 149 F.3d at 519-20.

398. 136 F.3d at 1052.

399. 264 F. Supp. 2d at 1228.

workplace without the permission of her direct supervisor.⁴⁰⁰ *Raytheon* makes clear that all of these arguments, despite their arguable adverse effect on persons with disabilities, constitute legitimate nondiscriminatory reasons for adverse employment actions.⁴⁰¹ Could any of the plaintiffs create a jury issue as to whether these asserted reasons are pretext for intentional discrimination because of disability?

Perhaps the easiest way to demonstrate pretext is by showing that the employer did not discharge nondisabled employees who engaged in similar misconduct, a showing that would raise an inference that the employer treated the plaintiff differently because of his or her disability. Not surprisingly, Dr. Brohm had no such evidence; it seems unlikely that Jewish Hospital retained physicians without sleep apnea who repeatedly fell asleep during surgical procedures. In *Simpkins*, the court notes the existence of “undisputed evidence in the record that Specialty had terminated three other workers for this same infraction of the company’s rules”—leaving the workplace without permission of one’s direct supervisor.⁴⁰² Such evidence certainly suggests a lack of pretext, but the court also should consider whether Specialty had ever *not* fired a worker who committed this infraction with management knowledge. Evidence that the employer did not always apply this rule might suggest that it chose to apply the rule to *Simpkins* because of her disability.⁴⁰³

In response to this argument for pretext, Specialty is likely to contend that any evidence that it treated other employees differently is irrelevant because it had no knowledge of *Simpkins*’s depression. Without such knowledge, Specialty could not have intentionally discriminated against *Simpkins* because of her disability.⁴⁰⁴ The court found this contention persuasive, holding that “an employer who discharges an employee without knowledge of the employee’s disability is not liable under the ADA.”⁴⁰⁵ Noting that *Simpkins* did not even know that she had a mental disability

400. 1996 WL 452858, at *7.

401. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

402. 1996 WL 452858, at *2.

403. If Specialty ever granted exceptions to this rule, *Simpkins*’s case would appear to be a strong candidate for such an exception. *Simpkins* left work following a meeting with her direct supervisors, during which they put her on “final” warning, despite the fact that no problems with her performance had been raised previously in her twenty years with the company. After the meeting, *Simpkins* was “shaking, hysterical, and repeatedly striking herself with clenched fists,” and the production manager gave her permission to go home. *Id.* at *1-2. This manager confirmed *Simpkins*’s assertions that her direct supervisors were unavailable at the time she left the workplace. *Id.* at *2.

404. Specialty is likely to argue that employer knowledge of the plaintiff’s disability status should be an element of the prima facie case or, in the alternative, lack of such knowledge should be conclusive evidence of lack of pretext. See *supra* notes 326-31 and accompanying text.

405. *Simpkins*, 1996 WL 452858, at *5.

until after her breakdown at work, the court reasoned that Specialty could not have known of her major depression until after it decided to fire her.⁴⁰⁶ If, however, Specialty's decisionmaker knew that Simpkins was "shaking, hysterical, and repeatedly striking herself with [her] fists" when she left the workplace,⁴⁰⁷ and there was evidence that Specialty had not discharged all employees who left work without their direct supervisor's permission, a reasonable jury may be able to conclude that Specialty's knowledge of Simpkins's mental instability influenced its decision to discharge her. In other words, Specialty might not have discharged Simpkins for leaving work if she had not been acting like she was "crazy."⁴⁰⁸ Courts should not require plaintiffs to prove their employer's knowledge of plaintiffs' particular diagnosis in order to demonstrate disparate treatment.

Because of the stigma and stereotypes attached to many disabilities, particularly mental disabilities,⁴⁰⁹ employers may be more likely to discharge individuals with disabilities for conduct which they would view less seriously if committed by a nondisabled employee.⁴¹⁰ As additional evidence of pretext, courts should look for evidence that an employer demonstrated more concern about an employee's conduct once it learned

406. *Id.*

407. *Id.* at *1.

408. Along this line, a document advising employers on how to avoid liability for disability discrimination when addressing disability-related misconduct provides that managers should "document an employee's conduct problem by specifically describing the behavior at issue, without attributing the behavior to an underlying emotional problem" and should not state "that the employee's temper outbursts . . . are symptomatic of 'a nervous breakdown.'" LINDA M. EDWARDS, DISCIPLINE OR ACCOMMODATION? EMPLOYER RESPONSES TO MISCONDUCT AND POOR PERFORMANCE OF DISABLED EMPLOYEES (1999), available at http://www.bna.com/bnabooks/aba_bna/mr/99/mr99-7-05.pdf.

In contrast to Simpkins's behavior, which might have led her employer to believe that she had a mental disability, consider the case of *Zihala v. Illinois Department of Public Health*, No. 95 C 2129, 1999 WL 116221 (N.D. Ill. Feb. 26, 1999). During her first week of employment with a new employer, Zihala repeatedly failed to follow directions, complained about the work, and contended that she should be promoted immediately. *Id.* at *5. It seems unlikely that Zihala's employer would have surmised that she had a disability based on this behavior, particularly given that they had no differing behavior by Zihala with which to compare.

409. See Hubbard, *supra* note 236, at 850-51 ("Surveys consistently show that the public harbors widespread fear of 'the mentally ill.'").

410. Interestingly, the court in the *Ray* case may have magnified the seriousness of Ray's misconduct due to stereotypes about his disability of Tourette's Syndrome. The opinion mentions only three instances in which Kroger received complaints about Ray's conduct during the year that he was employed by Kroger: when he directed a racial slur at a Kroger employee, when he made an outburst in front of a Kroger customer, and when he blurted out the "N word" in front of an African-American independent contractor with Kroger. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003). If Ray had outbursts of profanity and racial slurs that offended others in the workplace during every shift, it seems likely that Kroger would have received more than three complaints. Nonetheless, the court twice refers to Ray's "constant outbursts of vulgar language and racial slurs." *Id.* at 1228-29 (emphasis added).

of his or her disability. In *Doebele v. Sprint/United Management Co.*, for example, although plaintiff's supervisors purportedly discharged her due to "attendance problems and lack of personal effectiveness," evidence suggested that they came to view the plaintiff as a physical threat to other workers and unable to relate to them after she was diagnosed with and took disability leave for bipolar disorder.⁴¹¹

Hamilton may be another case in which the employer demonstrated more concern about an employee's behavior because of that employee's disability. Four months before he was fired, Hamilton rescued a drowning woman, after which he experienced various mental disturbances and extreme fatigue.⁴¹² He told his supervisor that his pastor believed these problems were symptoms of PTSD.⁴¹³ Shortly thereafter, the plaintiff had a confrontation with a co-worker, which the court described as follows:

Several weeks after the rescue, Hamilton, slamming an office door, angrily confronted a physically smaller female manager in front of witnesses after she returned to work from a shopping trip. In response to her appeal to not speak to her in such a tone, he slapped her hand down, yelling that she "get that f_ing finger out of my face." Additional profanity

411. 342 F.3d 1117, 1127, 1133-34 (10th Cir. 2003). The *Doebele* court held that, while the plaintiff was not actually disabled, she created a jury issue on whether her discharge was motivated by the fact that her supervisors regarded her as substantially limited in the major life activity of working. *Id.* at 1132-33. The court found that, following the plaintiff's disability leave, "[t]he supervisors' disregard of the assessment and recommendations of Ms. Doebele's treating physician support the inference that their actions were improperly based on myth, fear, and stereotype, rather than an individualized evaluation of Ms. Doebele's abilities." *Id.* at 1134. The court noted, moreover, that another employee sent a memorandum to one of the plaintiff's supervisors, warning that the supervisor could be viewed as having "lost all objectivity" with respect to the plaintiff. *Id.* at 1133; *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 304-05, 320 (3d Cir. 1999) (noting, in the context of denying summary judgment for the defendant on the plaintiff's reasonable accommodation claim, that after the plaintiff's supervisors witnessed her becoming manic at work and requiring hospitalization for bipolar disorder, they decided to increase the plaintiff's job responsibilities and document every error she made upon her return); Norman v. S. Guar. Ins. Co., 191 F. Supp. 2d 1321, 1327 n.4, 1333-34 (M.D. Ala. 2002) (finding sufficient evidence of pretext where, after members of upper management learned about plaintiff's disability of major depression, they presented her with a new, stricter attendance policy that effectively revoked accommodations given to her by her immediate supervisor and shortly thereafter fired the plaintiff for excessive absenteeism); *cf.* Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1188-89, 1196 (9th Cir. 2003) (holding that school district employees' reporting the plaintiff—an unsuccessful applicant for a teaching position who was of Lebanese descent and Muslim faith and who told them that she was very angry and did not want to "blow up"—for making a bomb threat may have been "influenced by stereotypes about her religion or nationality," in violation of Title VII).

412. *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1049 (5th Cir. 1998).

413. *Id.*

followed. He stormed from the office but then returned to continue his abusive harangue, yelling “You f_ing bitch!”⁴¹⁴

The court accepted the employer’s argument that it discharged Hamilton not because of his PTSD, but because he violated its policy on workplace violence.⁴¹⁵ Finding no evidence of pretext, the court noted that the employer “had instituted its policy against workplace violence, with provisions for suspension and dismissal for ‘extremely severe’ offenses, before Hamilton’s misconduct.”⁴¹⁶ It is curious, however, that the employer’s policy was not zero tolerance for workplace violence, but rather provided for dismissal only for “extremely severe” offenses.⁴¹⁷ If evidence showed that conduct similar to yelling at a co-worker and slapping down that person’s hand had not previously been deemed an “extremely severe” instance of workplace violence, Hamilton could argue that a reasonable jury could find pretext for disability discrimination.⁴¹⁸

An additional means of demonstrating pretext is to show that the employer did not articulate the reason at the time of the discharge, or that it changed its reasons over the course of the litigation.⁴¹⁹ In *Hamilton*, the employer did not characterize the misconduct as workplace violence until the hearing before the Texas Employment Commission.⁴²⁰ This failure arguably suggests that the employer’s primary concern with Hamilton’s conduct was not that his slapping down of his co-worker’s hand constituted “violence” but rather that the conduct was committed by an individual with a mental illness.⁴²¹ Following Hamilton’s discharge, the employer may have realized that it had not discharged all employees who had profane confrontations with their co-workers, so it chose to characterize the hand slap as workplace violence.

414. *Id.* at 1052.

415. *Id.*

416. *Id.*

417. *See id.*

418. Important to such an argument is the fact that Hamilton’s employer knew that he had (or might have) PTSD. *See id.* at 1049, 1052. If Hamilton had not informed his employer of the possibility that he had PTSD, then he could not establish that the application of the workplace violence policy was pretext for disability discrimination, unless he had evidence indicating that his employer suspected that the confrontation reflected mental illness rather than a mere outburst of temper. For example, perhaps his supervisor opined, following the outburst, that Hamilton had seemed mentally unstable since his rescue of the drowning woman.

419. *Taylor v. Dover Elevator Sys., Inc.*, 917 F. Supp. 455, 463 (N.D. Miss. 1996).

420. 136 F.3d at 1052.

421. Ann Hubbard has noted that, “in light of popular stereotypes of the dangerous mentally ill,” employers may “magnify the seriousness of the misconduct and conclude that seemingly minor misconduct warrants severe sanctions.” *See Hubbard, supra* note 236, at 920. Thus the employer in *Hamilton* may have viewed the plaintiff’s hand slap as workplace violence only because it was committed by a person with a mental disability.

Yet another possible means of showing pretext is to demonstrate that, although the conduct rule in question may appear neutral, the employer actually adopted the rule because of its effect on persons with a particular disability.⁴²² The plaintiff in *Ray* may try to make this argument, contending that Kroger did not prohibit profanity by its clerks until it learned that one of them had Tourette's Syndrome. This argument is unlikely to succeed, however. It seems improbable that Kroger tolerated its clerks using profanity and racial slurs around co-workers and, especially, customers⁴²³ until it learned of Ray's condition, and then it adopted a rule prohibiting such conduct to target him surreptitiously.⁴²⁴ If prior to its hire of Ray, Kroger clerks had never used profanity and racial slurs around co-workers and customers, Kroger might not have needed a rule prohibiting such conduct at that time. Under those circumstances, Kroger's adoption of an express policy prohibiting such conduct in response to Ray's behavior would not suggest disparate treatment, unless there was evidence that Kroger's problem was more with Ray's disability of Tourette's Syndrome than with his conduct. In contrast, an employer's adoption of a rule prohibiting bizarre behavior after hiring a brain-damaged employee might indicate disparate treatment based on disability, particularly if the employer had previously tolerated wacky pranks or antics by nondisabled employees.⁴²⁵

2. Defending Against Disparate Treatment Claims: Was the Plaintiff Qualified?

The key means for an employer to avoid liability for disparate treatment of an employee who committed disability-related misconduct is to treat

422. Cf. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993) (stating that the Court "do[es] not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination").

423. The opinion mentions three instances in which Kroger received complaints about Ray's conduct: when he directed a racial slur at a Kroger employee, when he made an outburst in front of a Kroger customer, and when he blurted out the "N word" in front of an African-American independent contractor with Kroger. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1224 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003).

424. Similarly, it seems unlikely that in the *Brohm* case, the hospital's reason for taking action against physicians who fell asleep on the job was to target surreptitiously individuals with sleep-related disabilities.

425. For example, in *Gasper v. Perry*, one of the plaintiff's co-workers complained that the plaintiff—who suffered frontal lobe dysfunction after a motorcycle accident, which caused him to be impulsive, disinhibited, and to have trouble reading social cues—grabbed her duck head umbrella, pointed the beak of the umbrella within two inches of her eyes, and said "quack, quack, quack." No. 97-1542, 1998 U.S. App. LEXIS 14933, *1, *6 (4th Cir. July 2, 1998) (arising under the Rehabilitation Act).

such employees the same as nondisabled employees who commit the same misconduct.⁴²⁶ Employers may argue, however, that it is rational for them to view misconduct by an individual with a disability more seriously than such conduct by a nondisabled employee, leading them to discharge the disabled employee. They may reason that a nondisabled employee may engage in misconduct—for example, yelling at a co-worker, as in *Hamilton*—because that employee is having an unusually bad day, such that the employee is unlikely to engage in misconduct in the future. In contrast, if an employer learns that an employee engaged in misconduct because of a disability, the employer may reason that the misconduct is due more to a problem with the employee than to changeable circumstances, such that the misconduct is more likely to continue.⁴²⁷ Employers may argue, in short, that anyone can have a bad day, but that employees who are “crazy” or “sick” are likely to have lots of bad days, so the employer is justified in treating them differently.

One option for such employers may be reliance on the direct threat defense. The ADA provides that “[t]he term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,”⁴²⁸ meaning “a significant risk . . . that cannot be eliminated by reasonable accommodation.”⁴²⁹ It is important to note, however, that this is not a defense to disparate treatment discrimination, but rather to disparate impact discrimination.⁴³⁰ An employer may adopt a requirement that employees not pose a direct threat to others in the workplace, even if that requirement has a disparate impact on individuals with disabilities, but the employer must apply the requirement to all employees.⁴³¹ In addition, to rely on the

426. See EDWARDS, *supra* note 408, at 26 (advising employers that “[c]onsistent application of employer standards is critical”).

427. This type of reasoning is consistent with the medical model of disability, which views disability as inherent in the individual. Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1038 n.261 (2004). In contrast, the social model of disability recognizes that the limitations of persons with disabilities vary depending on the environment. See STEFAN, *supra* note 100, at 58. Employers may not realize that the reactions of an individual with a disability, like the reactions of nondisabled persons, depend greatly on his or her environment. See *id.* (“Psychiatric disability can be greatly exacerbated or greatly ameliorated by the quality of interpersonal contact and the nature of the environment.”).

428. 42 U.S.C. § 12113(b) (2000).

429. *Id.* § 12111(3). Relevant factors in determining whether the risk is significant include the duration of the risk, the nature and severity of the potential harm, the likelihood that the harm will occur, and the imminence of the harm. 29 C.F.R. § 1630.2(r) (2004).

430. See 29 C.F.R. § 1630.15(b)(2) (referring to “[d]irect threat as a qualification standard” as a defense to disparate impact charges related to “selection criteria” and distinguished from disparate treatment charges).

431. *Id.* at app. § 1630.2(r) (“Like any other qualification standard, [a standard requiring individuals not to pose a direct threat to others] must apply to all applicants or employees and not

direct threat defense, an employer may not assume that all persons with mental disabilities in general or even a particular mental disability pose a risk of violence or other danger in the workplace.⁴³² Rather, the employer must make an individualized assessment of the risk posed by the particular individual in the particular job, based on current medical knowledge or other objective evidence.⁴³³ Accordingly, if the misconduct of a disabled employee consists of violence or threats of violence to other workers, the employer may be justified in discharging him or her if an individualized assessment based on current medical knowledge indicates that the employee poses a significant risk of harm to co-workers.⁴³⁴

If the employee's misconduct does not involve violence or threats of violence, however, the direct threat defense is unlikely to apply. Under those circumstances, an employer can treat an employee differently because of his or her disability only if the employee is not qualified for the position.⁴³⁵ Assume that the employer in *Hamilton* admitted that it discharged Hamilton because of his disability of PTSD, coupled with his confrontation with the co-worker.⁴³⁶ The employer may argue that because Hamilton slapped his co-worker's hand, it concluded that he posed a direct threat, but this argument is unlikely to succeed given the minor nature of the contact.⁴³⁷ Accordingly, the employer could justify its intentional

just to individuals with disabilities.”).

432. See Hubbard, *supra* note 236, at 853 (“Under the ADA, an employer may not act based on generalized fears about the risk of violence by persons with mental disorders.”).

433. See 29 C.F.R. § 1630.2(r) (providing that the direct threat determination “shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job” and that the assessment “shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence”); see also *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (stating that “risk assessment must be based on medical or other objective evidence”).

434. While arguing vigorously that “employer[s] may not act based on generalized fears about the risk of violence by persons with mental disorders,” Ann Hubbard notes that a potentially effective method “for screening out employees prone to violence is a careful background check for recent workplace violence or convictions for violent crimes” and that “previous use of aggression has been documented as a personal characteristic of aggressive employees.” Hubbard, *supra* note 236, at 853, 901-02. This evidence suggests that disabled employees whose misconduct consists of workplace violence may pose a direct threat of future violence. It also suggests, however, that employees *without* disabilities whose misconduct consists of workplace violence may pose a direct threat of future violence. See *id.* at 902-03 (stating that in general, “an employer likely has more to fear from the person who was fired from his last job for assaulting his supervisor than from the person who is being treated for depression”).

435. See 42 U.S.C. § 12112(a) (2000) (prohibiting “discriminat[ion] against a qualified individual with a disability because of the disability of such individual”).

436. See *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1049, 1052 (5th Cir. 1998).

437. See *id.* at 1052. Hamilton’s employer did not argue that Hamilton posed a direct threat. See generally *id.* After the confrontation with his co-worker, Hamilton saw a social worker who concluded that he was suffering from agitated depression and some post-traumatic symptoms. *Id.*

discrimination against Hamilton because of his PTSD only if Hamilton were not qualified for his job.⁴³⁸ An individual is qualified for a position if he or she “satisfies the requisite skill, experience, education and other job-related requirements of the employment position” and can perform the essential functions of the position with or without reasonable accommodation.⁴³⁹ In *Hamilton*, as in other cases involving discharge for disability-related misconduct, the employer would contend that the plaintiff could not perform the job’s essential functions.⁴⁴⁰

Like the direct threat defense, the “qualified” inquiry does not focus on punishing the plaintiff for his or her past misconduct. Rather, it considers the plaintiff’s probable future conduct, examining whether the plaintiff is likely to engage in future misconduct, and if so, whether that misconduct would render the plaintiff unable to perform the essential functions of his or her job. The fact that the “qualified” inquiry focuses on the future is evident in the cases following the now-rejected *Teahan* minority approach to disability-related misconduct. In *Teahan* itself, the court remanded the case for consideration of whether “the likelihood of relapse and future absenteeism by Teahan” indicated that he was not qualified for his position.⁴⁴¹ In *Husowitz v. Runyon*, the court noted that soon after the Postal Service permitted the plaintiff to return to work after his suspension for threatening his supervisor with physical violence—and after the plaintiff had a year of therapy and a psychiatric re-evaluation—the plaintiff made further threats.⁴⁴² Reasoning that it is a job-related requirement that an employee be able to get along with co-workers and supervisors, the court concluded that the plaintiff was not qualified for his job.⁴⁴³

Like *Husowitz*, several courts have held that it is an essential function of every employee’s job to refrain from disruptive, contentious, or insubordinate behavior.⁴⁴⁴ Courts do not reach a determination on whether

at 1049. Hamilton also saw a psychiatrist who diagnosed him with PTSD. *Id.* The opinion does not indicate that either the social worker or the psychiatrist viewed Hamilton as posing a physical threat to others. *See id.*

438. *See* 42 U.S.C. § 12112(a).

439. 29 C.F.R. § 1630.2(m) (2004).

440. In such cases, unlike cases alleging a discriminatory failure to hire or promote, the employer generally would not contend that the plaintiff’s education or experience rendered him or her unqualified.

441. *Teahan v. Metro-N. Commuter R.R.*, 951 F.2d 511, 520 (2d Cir. 1991); *see also* *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1087 (S.D.N.Y. 1993) (concluding that “the course of Mr. Hogarth’s illness after his termination from the FBI leaves no doubt that the possibility of further recurrence renders him unqualified to return to his former position”).

442. 942 F. Supp. 822, 834-35 (E.D.N.Y. 1996).

443. *Id.* at 835.

444. *See, e.g., Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 131 (D.N.H. 1995) (stating that “essential to the adequate performance of any job is the ability of an employee

the plaintiff is qualified simply by examining whether the plaintiff engaged in such conduct in the past, however. Rather, a plaintiff is not qualified for the position only if he or she is likely to engage in such conduct in the future.⁴⁴⁵ The fact that courts must examine whether any possible reasonable accommodation would enable the plaintiff to refrain from future inappropriate behavior reinforces the forward-looking nature of the “qualified” inquiry.⁴⁴⁶

Assume that following Hamilton’s confrontation with his co-worker, his supervisor met with Hamilton to reprimand him, which was the employer’s typical response to such misconduct. If during the meeting, Hamilton explained that his PTSD causes him to experience outbursts of anger, the supervisor could not impose a harsher penalty, like discharge, merely based on speculation about Hamilton’s future conduct. However, the supervisor could ask Hamilton if he will be able to avoid future confrontations with co-workers. If Hamilton were to respond negatively, stating that his PTSD-caused angry outbursts are unpredictable and uncontrollable, the supervisor might be entitled to discharge him on the ground that he is unqualified because he cannot perform the essential job function of refraining from contentious behavior.⁴⁴⁷ If Hamilton is

with supervisors, co-employees or customers”); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994) (“It is certainly a ‘job-related requirement’ that an employee, handicapped or not, be able to get along with co-workers and supervisors.”); *Mancini v. Gen. Elec. Co.*, 820 F. Supp. 141, 147 (D. Vt. 1993) (stating that “the ability to follow the orders of superiors is an essential function of any position”).

445. See, e.g., *Hardy v. Sears, Roebuck & Co.*, Civ. A. No. 4:95-CV-0215-HLM, 1996 WL 735565, at *7 (N.D. Ga. Aug. 28, 1996) (finding that plaintiff was not qualified for his job because, due to his “unreliable history of taking his medication, and his inability to suppress entirely the potential manifestation of further manic episodes, Plaintiff poses an ongoing risk of combative exchanges with his co-workers, and even potential physical harm to others”).

446. See, e.g., *Boldini*, 928 F. Supp. at 132 (finding that, because the plaintiff’s own counselor noted that a change in her supervisors’ management style would not eliminate plaintiff’s emotional outbursts, “it approaches the lines of certainty that no reasonable accommodation would render [plaintiff] able or qualified to accomplish the fundamental functions of her job”); *Misek-Falkoff*, 854 F. Supp. at 228 (finding under the Rehabilitation Act that plaintiff’s requested reasonable accommodation of being permitted to work at home would not enable her to perform the essential functions of her job because “[w]ork at home does not create total insulation from supervisors or coworkers,” such that “[p]ersonal contact would still be required at critical junctures, triggering chances of recurrent outbursts”). *But see* *Palmer v. Circuit Court*, 117 F.3d 351, 352-53 (7th Cir. 1997) (holding that threatening other employees renders a disabled individual unqualified, and the duty of reasonable accommodation does not apply to those who commit or threaten to commit acts of violence). For a discussion of what reasonable accommodations might enable an employee to avoid disruptive, contentious, or insubordinate conduct, see *infra* Part V.C.2.

447. In determining whether Hamilton is unqualified, however, the court also should consider the likelihood that nondisabled employees will have angry outbursts in the workplace and the consequences of angry outbursts by any employee. As noted by the court in *Hogarth v. Thornburgh*, “[a]ll employees, handicapped or not, will fail to perform their job functions properly

unqualified, he is not in the class the ADA protects, and his employer is free to treat him differently based on his disability.⁴⁴⁸ Note, however, that if evidence were to show that Hamilton's employer did not discharge nondisabled employees who indicated that they could not refrain from contentious conduct in the workplace—in other words, if there were evidence of disparate treatment—this evidence would cast doubt on the employer's argument that refraining from such conduct was an essential function of all of its jobs.⁴⁴⁹ Moreover, even if there were no evidence of disparate treatment, Hamilton could attempt to argue that the conduct rule prohibiting contentious behavior in the workplace had a disparate impact on him because of his PTSD.

In contrast, assume that during the meeting Hamilton stated that he could avoid future contentious conduct if his supervisor permitted him to leave his work area and take a brief walk to "cool off" when he becomes angry. The supervisor may still want to discharge Hamilton, reasoning that nondisabled employees can avoid confrontations with their co-workers simply by controlling themselves, without any need for special treatment by the employer. Provided that allowing such a cooling off period is a reasonable accommodation, however, Hamilton is qualified for his job, and the ADA expressly prohibits employers from denying job opportunities to qualified individuals with disabilities because of the need to accommodate those employees.⁴⁵⁰

Accordingly, the concepts of disparate treatment, qualified, and reasonable accommodation under the ADA are intertwined. An employer can treat a disabled individual differently from other employees if the individual is not qualified, but if the employer does not discharge nondisabled employees who cannot perform a purported essential function, this suggests that the function is not essential. Moreover, in determining whether an individual is qualified, courts must consider whether a reasonable accommodation would enable the individual to perform essential job functions.⁴⁵¹

at some times." 833 F. Supp. 1077, 1086 (S.D.N.Y. 1993). Accordingly, to determine if a disabled individual is qualified to perform his or her job, courts must analyze two factors: "the consequences of a failure to perform and the likelihood of such a failure being caused by the handicapping condition." *Id.*

448. See 42 U.S.C. § 12112(a) (2000) (prohibiting disability discrimination only against "a qualified individual with a disability").

449. Similarly, if an employer did not discharge nondisabled employees who indicated a propensity for workplace violence, this would cast doubt on the employer's arguments that a disabled employee showing such a propensity posed a direct threat and that its direct threat policy constituted a neutral qualification standard.

450. 42 U.S.C. § 12112(a), (b)(5)(B).

451. See *Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 132 (D.N.H. 1995) (finding that no reasonable accommodation would qualify plaintiff to complete her basic job
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The forward-looking nature of the “qualified” inquiry is beneficial for plaintiffs like Hamilton, Simpkins, and Dr. Brohm because it is not inevitable that they will continue their misconduct.⁴⁵² Both Hamilton’s and Simpkins’s misconduct were one-time events; there was no evidence that Hamilton had other confrontations with co-workers nor that Simpkins left a workplace without her direct supervisor’s permission either before or after the incident that caused her discharge.⁴⁵³ Although Dr. Brohm had fallen asleep during surgical procedures on numerous occasions, he contended that if his employer granted him leave to receive treatment for his sleep apnea, such misconduct would cease.⁴⁵⁴ The fact that the plaintiffs in these cases may have been qualified for their positions did not enable them to win their lawsuits, however, because the court found that they had not been subject to disparate treatment.⁴⁵⁵

This scenario is what concerned the court in *Teahan*—that even though disabled individuals may be qualified for their jobs, they nonetheless could be discharged because of conduct caused by their disabilities as long as their employer discharged all employees who engaged in such conduct.⁴⁵⁶

functions).

452. In contrast, Ray did not argue that he could cease his outbursts of vulgar language and racial slurs in the future. See generally *Ray v. Kroger Co.*, 264 F. Supp. 2d 1224 (S.D. Ga. 2003), *aff’d*, 90 Fed. Appx. 384 (11th Cir. 2003).

453. Unfortunately for plaintiffs, the one-time nature of a plaintiff’s misconduct may lead a court to conclude that the plaintiff’s impairment did not substantially limit any major life activities. See *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050-51 (5th Cir. 1998) (finding that the limitations Hamilton suffered due to his PTSD—overeating to the point of nausea, thoughts of suicide, difficulty concentrating, and episodes of fatigue—no longer existed, and that he was not substantially limited in working because he admitted that his performance level at work remained above that of his peers); *Simpkins v. Specialty Envelopes, Inc.*, No. 95-3370, 1996 WL 452858, at *6 (6th Cir. Aug. 9, 1996) (finding that the plaintiff was not substantially limited in working because her major depression was “only a temporary, non-chronic impairment” and she was able to return to work one week after the incident).

454. *Brohm v. JH Props., Inc.*, 947 F. Supp. 299, 302 (W.D. Ky. 1996), *aff’d*, 149 F.3d 517 (6th Cir. 1998). The appellate court in *Brohm* stated in dicta, however, that “the hospital had direct evidence that Brohm had been sleeping on the job, conduct which rendered him unqualified to perform his duties as an anesthesiologist.” *Brohm v. JH Props., Inc.*, 149 F.3d 517, 521 (6th Cir. 1998). Given the forward-looking nature of the “qualified” inquiry, arguably the court should have considered whether Dr. Brohm could have performed the essential functions of his job in the future if he had received reasonable accommodation. Cf. *Rascon v. U S W. Communications, Inc.*, 143 F.3d 1324, 1337 (10th Cir. 1998) (holding that a leave of absence may be a reasonable accommodation); *Mazzarella v. U.S. Postal Serv.*, 849 F. Supp. 89, 95 (D. Mass. 1994) (finding the plaintiff who engaged in violent and destructive behavior in the workplace unqualified because no reasonable accommodation would avoid “the undeniable possibility that such a violent episode could recur whenever the plaintiff has feelings of stress while he is at work”).

455. See *Brohm*, 149 F.3d at 522-23; *Hamilton*, 136 F.3d at 1052; *Simpkins*, 1996 WL 452858, at *7.

456. See *Teahan v. Metro-N. Commuter R.R.* 951 F.2d 511, 517 (2d Cir. 1991). But see Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The* <https://scholarship.law.ufl.edu/flr/vol57/iss2/2> 86

Moreover, the absence of disparate treatment would mean that there is no need to scrutinize whether the conduct was relevant to the employee's job.⁴⁵⁷ *Raytheon* makes clear that the answer to this concern is not to expand the concept of disparate treatment in disability cases.⁴⁵⁸ Rather, the answer to this concern is the disparate impact theory of discrimination.

B. Disparate Impact

Just as disparate treatment is intertwined with the concepts of reasonable accommodation and qualified, so too is disparate impact. An analysis of *Ray v. Kroger Co.*⁴⁵⁹ is instructive on this point. Despite finding that Ray had not been subject to disparate treatment, the court nonetheless examined whether he was qualified for his job as a night-shift grocery clerk in the frozen food section.⁴⁶⁰ The court found that Ray's job at Kroger placed him into contact with customers, co-workers, and independent contractors.⁴⁶¹ Reasoning that the job "involved regular interaction with customers," the court concluded that "interacting with customers without offending them was an essential function of Ray's job."⁴⁶² Given that his Tourette's Syndrome caused Ray to blurt out offensive words in front of customers, the court held that Ray was not qualified for his job.⁴⁶³

How might Ray contend that his discharge violated the disparate impact theory of discrimination? First, he must prove that Kroger applied a conduct rule that had a disparate impact on him because of his disability. Ray likely would assert that Kroger's rule against using profanity or racial slurs in front of customers, co-workers, and independent contractors tended to screen him out because of limitations imposed by his disability. He could make this showing by testimony from a physician that Ray had Tourette's Syndrome, that one symptom of his condition was the blurting out of profanity and racial slurs, and that the condition made it substantially more difficult for Ray than for most individuals to refrain from using such language.

Limitations of Rehabilitation Act Precedent, 14 BERKELEY J. EMP. & LAB. L. 201, 230 (1993) (stating that "employee misconduct does not exempt the employer from determining whether accommodation is reasonable before deciding to discharge or otherwise discipline the worker").

457. *Teahan*, 951 F.2d at 517 (2d Cir. 1991) (contending that the problem with a bright-line distinction between discharge because of disability and discharge because of disability-related misconduct "is that it would allow an employer to 'rely' on any conduct or circumstance that is a manifestation or symptomatic of a handicap and, in so doing, avoid the burden of proving that the handicap is relevant to the job qualifications").

458. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003).

459. 264 F. Supp. 2d 1221 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003).

460. *Id.* at 1227, 1229.

461. *Id.* at 1227.

462. *Id.* at 1228.

463. *Id.*

Once Ray demonstrated that the rule prohibiting profanity and racial slurs in front of others had a disparate impact on him, Kroger's application of the rule to him, which resulted in his discharge, would violate the ADA, unless Kroger could prove that the rule was job-related and consistent with business necessity.⁴⁶⁴ When is a workplace conduct rule job-related and consistent with business necessity?⁴⁶⁵

The answer highlights the overlap between the "qualified" inquiry and the disparate impact theory of discrimination: according to the EEOC, a qualification standard is job-related and consistent with business necessity if it concerns an essential function of the individual's job.⁴⁶⁶ No case has applied this standard to a workplace conduct rule.⁴⁶⁷ However, courts

464. 42 U.S.C. §§ 12112(b)(6), 12113(a) (2000).

465. Susan Stefan has used the disparate impact theory in a different way in cases involving employees with mental disabilities. She contends that abusive and unreasonably stressful work environments have a disparate impact on such individuals:

Just as an employer's failure to have an elevator or accessible bathroom hinders a person in a wheelchair from performing a job, an employer's antagonistic, hostile, or extremely stressful work environment prevents a person with a psychiatric disability from performing a job that the person is qualified to perform and is completely capable of performing.

Stefan, *supra* note 236, at 836-37. Rather than challenging a workplace conduct rule violated by a disabled individual as not job-related nor consistent with business necessity, Stefan challenges abusive and stressful workplace environments as making it more likely that disabled individuals will violate conduct rules or otherwise fail to perform well. *See id.* at 843 (noting that prior to the ADA "an employee's vulnerability to stress or highly unpleasant workplace conditions simply established that the employee could not work, and he or she was fired or quit," but that the ADA "requires a reexamination of who should take responsibility for readjustment of the workplace"). Stefan's argument is particularly relevant to the *Simpkins* case, where the plaintiff's misconduct of leaving the workplace without notifying her direct supervisors occurred when she became hysterical after her supervisors put her on "'final' warning" despite never informing her previously of problems with her performance. *Simpkins v. Specialty Envelope, Inc.*, No. 95-3370, 1996 WL452858, at *1-2 (6th Cir. Aug. 9, 1996). Moreover, *Simpkins* claimed that, prior to being placed on final warning, her employer "was heaping more work on her and bestowing rewards upon others, in an attempt to force her out of the company." *Id.* at *1.

466. 29 C.F.R. app. § 1630.10 (2004) (providing that "selection criteria that are related to an essential function of the job may be consistent with business necessity"); EQUAL OPPORTUNITY EMPLOYMENT COMM'N, *supra* note 83, § IV-4.3(1) (providing that a "selection criterion [that] operates to screen out an individual with a disability . . . must be a legitimate measure or qualification for the specific job it is being used for"); *id.* § IV-4.3(2) ("A standard may be job-related but not justified by business necessity, because it does not concern an essential function of a job.").

467. Although *Den Hartog* articulates a disparate impact challenge to conduct rules, it does so only in dicta. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1086 (10th Cir. 1997). In its Enforcement Guidance on Psychiatric Disabilities and the ADA, however, the EEOC provides the example that an employer must not rigidly apply its dress code and co-worker courtesy rules to a mentally disabled employee whose job involves no customer contact and only irregular interaction

frequently have applied the flip side of this definition: in determining whether the plaintiff is qualified for a job, where he or she is unable to perform a particular job function that the employer claims is essential, courts have considered whether requiring the function is job-related and consistent with business necessity.⁴⁶⁸ Both the “qualified” inquiry and the affirmative defense to disparate impact discrimination ask the same question: despite his or her disability, can the plaintiff do the job? This overlap between concepts makes the analysis somewhat circular. To be protected by the ADA from any type of discrimination based on disability, the plaintiff must be a qualified individual with a disability, meaning that he or she can perform the essential functions of the job with or without reasonable accommodation. The plaintiff has the burden of proving membership in the protected class. However, an employer commits disparate impact discrimination if it applies a standard to a qualified individual with a disability that tends to screen out the individual, unless the employer can prove that its standard is job-related and consistent with business necessity. A standard is job-related and consistent with business necessity if it concerns an essential function of the individual’s job. Who bears the burden of proof regarding whether a conduct rule involves an essential function—the plaintiff, proving that he or she is qualified despite violating the rule; or the employer, proving that the rule is job-related and consistent with business necessity despite its disparate impact?

The answer appears to be that, where the parties dispute whether a particular conduct rule that the plaintiff violated involves an essential function of the job, and thus whether the plaintiff is qualified, the employer bears the burden of proving that the rule is job-related and consistent with business necessity.⁴⁶⁹ Accordingly, Kroger must prove that its rule prohibiting profanity and racial slurs in front of others was job-related and

with other employees. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 67, at 30 (Question 30, example C). The EEOC explains that for such a position, the rules are not job-related and consistent with business necessity. *Id.* In other words, interacting positively with customers and co-workers is not an essential function of the employee’s job. *Den Hartog* cites this EEOC example in support of its argument for a disparate impact approach to misconduct cases. 129 F.3d at 1086.

468. See, e.g., *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191-92 (10th Cir. 2003) (holding, in the context of determining whether plaintiff, who was deaf, was qualified for a non-voicephone position with the employer, despite the employer’s requirement of voicephone experience for placement in a non-voicephone position, that a jury must determine whether the requirement was “job-related or a business necessity”).

469. *Hamlin v. Charter Township*, 165 F.3d 426, 430 (6th Cir. 1999) (holding that “once the disabled individual contends that a particular job requirement is unessential, the burden shifts to the employer to prove that the challenged requirement is necessary”); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (holding that “if a disabled individual is challenging a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary,” by showing that it is “job-related” and “consistent with business necessity”) (quoting 42 U.S.C. § 12112(b)(6) (1994)).

consistent with business necessity, meaning that it concerned an essential function of Ray's job as a night-shift clerk in the frozen food section of a grocery store. It may seem that, for any job, prohibiting the use of profanity and racial slurs is job-related and consistent with business necessity, and that an essential function of any job is to refrain from language that is offensive to co-workers and customers. This may seem to be a common-sense notion, much like the proposition stated by many courts that refraining from disruptive, contentious, or insubordinate conduct is an essential function of every job.⁴⁷⁰

Before upholding a workplace conduct rule that tends to screen out a disabled individual because of limitations caused by his or her disabilities, however, courts should examine carefully the specific functions of the plaintiff's job. Susan Stefan has noted, for example, that the ability "to refrain from contentious arguments and insubordinate conduct with supervisors, coworkers, or customers" was regarded as an essential function of the job of a mail carrier who delivered mail by herself in a rural area.⁴⁷¹ The *Ray* court found that Ray's job "placed him into nightly contact with customers, co-workers and independent contractors" and that "interacting with customers without offending them was an essential function of Ray's job."⁴⁷² Yet Ray's job did not center on customer service; he was not a cashier, a grocery bagger, or a greeter.⁴⁷³ The essential functions of Ray's job focused on "removing frozen food items from storage freezers in the rear of the store, placing those items on a cart, pushing the cart to the frozen food freezers on the sales floor and stocking the frozen food display cases."⁴⁷⁴ Although Ray encountered some customers when he was on the sales floor, he worked the night shift, 11:00 p.m. to 7 a.m., so that there would be fewer people in the store while he was working.⁴⁷⁵ Given that Ray's job required working in the presence

470. See, e.g., *Mazzarella v. U.S. Postal Serv.*, 849 F. Supp. 89, 94 (D. Mass. 1994) ("These fundamental requirements that an employee not engage in violent or destructive behavior are a matter of common sense."). But see Karen Dill Danforth, Note, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Illness Following Palmer*, 85 VA. L. REV. 661, 668 (1999) (arguing that "the discussion of the term 'essential functions' in the statute and the accompanying regulations suggests that Congress intended this term to pertain to actual fundamental job duties, not to broad policy goals" and that "[t]ermining subjective qualities that are not job-specific"—like "getting along well with others"—to be essential functions "gives too much license to employers to discriminate against employees with disabilities").

471. STEFAN, *supra* note 100, at 123 (citing *Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 131 (D.N.H. 1995)).

472. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221, 1227-28 (S.D. Ga. 2003), *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003).

473. See 29 C.F.R. § 1630.2(n) (2004) (providing that a job function "may be essential because the reason the position exists is to perform that function").

474. *Ray*, 264 F. Supp. 2d at 1224.

475. *Id.*

of—but not necessarily interacting with—a relatively small number of customers, co-workers, and independent contractors,⁴⁷⁶ is it correct to conclude that an essential function of his job was refraining from language that is offensive to these persons? The small number of complaints Kroger received about Ray's language⁴⁷⁷ arguably suggests otherwise.

The ADA attempts to balance the goal of opening workplaces to individuals with disabilities with the interest of employers in operating their businesses efficiently. It may be that, to strike such a balance, refraining from offending customers may be job-related and consistent with business necessity for any job performed in the presence of customers.⁴⁷⁸ Given the considerable burdens the ADA imposes on employers in furtherance of the goal of equal opportunity for disabled individuals, however, perhaps the Act also should be viewed as imposing a burden on customers to tolerate some behavior that they might find offensive. When Ray had an outburst at work, he showed any customers in the vicinity a card with information about Tourette's Syndrome.⁴⁷⁹ This educating of customers may help explain the few complaints Kroger received about Ray's outbursts. Nonetheless, the court dismissed the idea that the ADA might require Kroger and its customers to attempt to understand Ray's condition, stating that "the ADA does not require an employer to maintain indefinitely an employee who subjects the employer's customers repeatedly to curse words and racial slurs."⁴⁸⁰

What if Ray had a job that involved no customer contact, but his co-workers were offended by his outbursts? Is refraining from offending one's co-workers an essential function of every job that is not completely solitary?⁴⁸¹ What if Ray's disability caused him to engage in conduct that did not necessarily offend customers or co-workers, but disturbed them or made them uncomfortable? Is a workplace conduct rule prohibiting behavior that disturbs customers or co-workers job-related and consistent

476. The court stated that about one hundred customers, on average, were in the store during the night shift, and Ray had contact with five to seven co-workers and some contractors hired by Kroger to clean the floors. *Id.*

477. After his transfer to the night shift, Kroger received two complaints about Ray's outbursts during a period of more than six months, one complaint from a customer and one from a pressure-washer who contracted with Kroger. *Id.*

478. This would mean, of course, that individuals like Ray, with coprolalia as part of their Tourette's Syndrome, could be barred from a very broad range of jobs, not just jobs like kindergarten teacher where it seems most apparent that refraining from profane language is an essential function of the position.

479. *Ray*, 264 F. Supp. 2d at 1224.

480. *Id.* at 1229 n.4.

481. By focusing on the fact that the plaintiff's job required him to encounter *customers*, even though one of the complaints about his outbursts was by a Kroger contractor, the *Ray* court suggests that the answer is no. *See id.* at 1224.

with business necessity for every position involving some interpersonal contact?⁴⁸²

These are tough questions. It is well-accepted that employment discrimination based on race is prohibited even if customers or co-workers have a strong preference for employees of a particular race. Similarly, courts would not accept an employer's argument that its requirement that all of its employees be physically attractive was job-related and consistent with business necessity, despite its disparate impact on an applicant with a facial deformity, even if the employer could show that the deformity disturbed customers or other employees.⁴⁸³ Rather, the law expects customers and co-workers to deal with their discomfort.

Courts are not willing to uphold all job requirements intended to protect the peace of mind of customers and co-workers but that have a disparate impact on individuals with disabilities. Accordingly, perhaps courts should refuse to uphold some such job requirements related to employee conduct, rather than always assuming that "getting along" with co-workers and customers is an essential function of every job.⁴⁸⁴ For example, an employee who occasionally cries at the office due to her disability of depression and whose tears make her co-workers uncomfortable may nonetheless be qualified for her job,⁴⁸⁵ and discharging her based on her

482. See, e.g., *Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 946 (N.D. Ga. 1995) (noting employer's argument that "maintaining an effective and noncombative atmosphere in the workplace is fundamental to the performance of Plaintiff's position"). The EEOC provides that identifying essential job functions "should focus on the purpose of the job and the importance of actual job functions in achieving this purpose" and that an evaluation of the importance of functions "may include consideration of the frequency with which a function is performed, the amount of time spent on the function, and the consequences if the function is not performed." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 83, § 1-2.3(b). Where the interaction with others required by a job is brief and infrequent, refraining from disturbing them arguably is not an essential job function.

483. Cf. *Miller v. Ill. Dep't of Corr.*, 107 F.3d 483, 484 (7th Cir. 1997) ("Employment decisions motivated by the distaste or even distress that severe physical or mental disabilities arouse in some people violate the ADA.").

484. See *Bugg-Barber v. Randstad US, L.P.*, 271 F. Supp. 2d 120, 128-29 (D.D.C. 2003) (holding that plaintiff's confrontational and disruptive conduct—"although wholly inappropriate in her workplace—was not so repetitious or egregious as to deprive her of being qualified for her job as a matter of law"); *Hardy v. Sears, Roebuck & Co.*, Civ. A. No. 4:95-CV-0215-HLM, 1996 WL 735565, at *6 (N.D. Ga. Aug. 28, 1996) (holding that while "abusive and threatening behavior directed by an employee towards co-workers and customers may dictate that an employee cannot perform the essential functions of a given job . . . , the disruption caused by such behavior must be 'substantial'"); *Danforth*, *supra* note 470, at 668 (contending that "vague notions of . . . 'getting along well with others'" should not be deemed essential functions of a job). *But see* *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994) ("It is certainly a 'job-related requirement' that an employee, handicapped or not, be able to get along with co-workers and supervisors.").

485. Susan Stefan provides this example in asking about "the extent to which workplace norms should be altered to accommodate people who are 'different' but can do the job":

crying—even if it is not disparate treatment—may constitute disparate impact discrimination. A bagger at a grocery store, whose autism impairs his social interaction skills and causes him to speak too loudly and to ask personal questions of strangers, may be qualified for his job even if some customers are uncomfortable around him.⁴⁸⁶ Discharging him based on the fact that his conduct makes some customers uncomfortable may constitute disparate impact discrimination.

In contrast to Ray, Dr. Brohm cannot argue that his employer's conduct rule, which led to his discharge, was not job-related and consistent with business necessity.⁴⁸⁷ It is beyond dispute that remaining awake and alert during surgical procedures where one is the anesthesiologist of record is an essential function of the job of an anesthesiologist.⁴⁸⁸ Dr. Brohm's

Almost everyone agrees that someone who stutters painfully should not be fired and that fellow employees should deal with their discomfort related to the stuttering. Most people feel similarly about someone who weeps at the office or someone who speaks too loudly because of a disability.

STEFAN, *supra* note 100, at 157.

486. In finding that an essential function of Ray's job was refraining from language that offended others, the *Ray* court relied on *Taylor v. Food World, Inc.*, a case in which the Eleventh Circuit held that an essential function of the job of a grocery store utility clerk—which involved bagging groceries and assisting customers in taking groceries to their cars—was “the ability to carry out the tasks of the job without offending customers.” 133 F.3d 1419, 1424 (11th Cir. 1998). The grocery store fired the plaintiff after a customer complained about his behavior and two customers commented that he appeared to be drunk or on drugs. *Id.* The district court found that the plaintiff's conduct rendered him unqualified for his job as a matter of law, but the appellate court reversed, noting that some managers and many employees testified that they had received no complaints about plaintiff's behavior and that they did not consider the questions plaintiff asked customers to be inappropriate. *Id.* at 1424-25. Apparently the appellate court did not believe that the ability to carry out his tasks without offending or disturbing *any* customers was an essential function of the plaintiff's job. Rather, the plaintiff's conduct would disqualify him only if he offended a significant number of customers.

It is interesting to note the differences between the reasoning in *Ray* and that in *Taylor*. In *Ray*, even though only one customer complained about an outburst by Ray after he transferred to the night shift, the court found it “beyond dispute that Ray could not perform his work without offending customers.” 264 F. Supp. 2d at 1228. Unfortunately for Ray, this finding was due to the very definition of the coprolalia manifestation of Tourette's Syndrome, which causes sufferers to “blurt out offensive words and phrases.” *Id.*

487. Dr. Brohm can argue, however, that the rule had a disparate impact on him because of the limitations caused by his disability of sleep apnea—that his sleep apnea made it substantially more difficult for him to comply with the rule.

488. See *Brohm v. JH Props., Inc.*, 149 F.3d 517, 521 (6th Cir. 1998) (stating that Dr. Brohm's conduct of sleeping on the job “rendered him unqualified to perform his duties as an anesthesiologist”); *Brohm v. JH Props., Inc.*, 947 F. Supp. 299, 301 (W.D. Ky. 1996), *aff'd*, 149 F.3d 517 (6th Cir. 1998) (“Dr. Brohm's sleeping during surgical procedures placed his patients and the Hospital in grave danger.”)

objection is not to the substance of the no-sleeping rule but rather to the fact that the hospital did not allow him another chance to comply with the rule, after he received treatment for his sleep apnea.⁴⁸⁹

Is this a permissible disparate impact argument: that an otherwise reasonable conduct rule is not job-related and consistent with business necessity if it fails to provide an additional opportunity for compliance after treatment? The implications are disturbing. A plaintiff who violated a valid conduct rule could always argue that business necessity – and the ADA goal of opening workplaces to individuals with disabilities – indicates that the employer should not use the rule to screen him or her out, where the plaintiff could comply with the rule in the future. Under this interpretation of the ADA's disparate impact theory, a disabled employee whose disability made it substantially more difficult for him or her to comply with a conduct rule would have no incentive to seek treatment as soon as possible. Instead, when the employee finally faced discharge for violating the rule, he or she could argue that it would be consistent with business necessity to provide him or her another chance for compliance.

Dr. Brohm apparently felt no urgency to seek treatment for his sleep apnea, despite his notice that he was having difficulty complying with the workplace conduct rule prohibiting sleeping during surgical procedures. Even if he was unaware of his sleeping episodes at the time they occurred, the hospital CEO first informed Dr. Brohm of reports that he was sleeping during surgical procedures in late June and did not discharge him until early September.⁴⁹⁰ Rather than being alarmed by the danger his behavior posed to patients, Dr. Brohm offered the weak excuse that “he had a sinus problem and that clearing his sinuses could be interpreted as snoring.”⁴⁹¹ Dr. Brohm did not see a physician about his condition until the week after he was discharged, when he was finally diagnosed with sleep apnea.⁴⁹² Allowing him to use the disparate impact theory to demand another chance to comply with the no sleeping rule would reward his irresponsible and dangerous behavior and is inconsistent with the ADA.

Hamilton could attempt to make a similar disparate impact argument to that made by Ray, but it is unlikely that he would be successful. Hamilton could assert that he was fired for violating a workplace conduct rule requiring cordial relationships among co-workers, and that such a rule was not job-related and consistent with business necessity for his position. Because Hamilton was a managerial employee, however, interactions with other employees probably were a frequent and important part of his job.⁴⁹³

489. See *Brohm*, 947 F. Supp. at 302.

490. *Brohm*, 149 F.3d at 519.

491. *Brohm*, 947 F. Supp. at 300.

492. *Brohm*, 149 F.3d at 520.

493. See *supra* note 482.

Moreover, Hamilton's employer would likely assert that, by slapping his co-worker's hand down, Hamilton violated the company's conduct rule prohibiting workplace violence, and that rule seems job-related and consistent with business necessity for every job.

Hamilton's real problem with either conduct rule is similar to the problem Dr. Brohm had with the no sleeping rule. Hamilton would not contend that the rules are unnecessary or that he will never be able to comply with them. Instead, he likely would be able to refrain from workplace violence and maintain cordial relationships with his co-workers in the future, particularly if his employer allowed him to take a break to "cool off" when he became angry at work. Hamilton's problem with the rule would be with its zero tolerance nature.

He would argue that, while refraining from workplace violence and maintaining cordial relationships with his co-workers may be essential functions of his job, those conduct rules tend to screen him out due to limitations imposed by his disability—the difficulty controlling his anger caused by his PTSD—and the zero tolerance nature of the rules is not job-related and consistent with business necessity. Regarding the maintaining-cordial-relationships rule, Hamilton would argue that giving him another opportunity to comply with the rule would not present a risk of harm nearly as serious as that presented by Dr. Brohm and the no-sleeping-during-surgery rule.⁴⁹⁴ In addition, Hamilton would argue that allowing him a second chance to comply with the conduct rules would not reward irresponsible behavior as it would in the *Brohm* case. Unlike Dr. Brohm, Hamilton did not violate the conduct rules numerous times before facing discharge and seeking to change his behavior.⁴⁹⁵ While Hamilton suspected that he had PTSD before his confrontation with his co-worker, he may not have known that the symptoms of his PTSD would limit his ability to comply with the conduct rules until he lost his temper during the confrontation.⁴⁹⁶

Finally, Simpkins has an even better argument than Hamilton that the zero tolerance nature of a workplace conduct rule had a disparate impact upon her and is not job-related nor justified by business necessity. Simpkins violated her employer's rule requiring employees to obtain the permission of their direct supervisor before leaving the workplace during

494. This argument would be less strong regarding the no workplace violence rule, which would present a risk of physical injury although arguably less so than the risk presented in the *Brohm* case.

495. *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1049 (5th Cir. 1998).

496. It would weaken Hamilton's argument if he had angry outbursts outside the workplace prior to his confrontation with his co-worker. In that situation, arguably he should have known that his PTSD would interfere with his ability to comply with conduct rules in the workplace and should have taken steps to avoid the workplace confrontation before it occurred.

work hours when she had an emotional breakdown and was hospitalized for depression.⁴⁹⁷ Simpkins might challenge the substance of the rule, contending that the fact that the rule provides for no exceptions even in emergency situations and even when the employee obtains the permission of another manager had a disparate impact on her due to her hysterical state connected to her depression.⁴⁹⁸ Under those circumstances, she would argue, the rule is not job-related and consistent with business necessity.⁴⁹⁹

Like Hamilton, however, Simpkins's main objection to this rule would be its zero tolerance nature, given that it seems unlikely that she would violate the rule in the future once she received treatment for her depression. Simpkins would contend that the rule's mandate of discharge for one violation was not job-related and consistent with business necessity. Providing Simpkins another opportunity to comply with the rule would not present a risk of serious harm; unlike the grave risk of serious physical harm presented by Dr. Brohm's conduct, Simpkins's violation of the rule may have temporarily interrupted the performance of her customer service and personnel responsibilities.⁵⁰⁰ Moreover, allowing Simpkins a second chance to comply with the rule would not reward irresponsible behavior. Not only had Simpkins not engaged in such conduct prior to the incident in question, she did not know that she suffered from depression before the incident.

Dr. Brohm, Hamilton, and Simpkins would argue in the above scenarios under the rubric of disparate impact for something that courts have repeatedly rejected under the rubric of reasonable accommodation: a second chance. Disparate impact analysis suggests that Simpkins would have the strongest argument for a second chance and that Dr. Brohm's argument would be the weakest. Given the similarities between the disparate impact theory of discrimination and the duty of reasonable accommodation, does the above analysis indicate that courts have construed the scope of potential reasonable accommodations too narrowly? Under some circumstances, should a second chance constitute a reasonable accommodation for a disabled person otherwise facing discharge due to disability-related misconduct?

497. *Simpkins v. Specialty Envelope, Inc.*, No. 95-3370, 1996 WL 452858, at *2 (6th Cir. Aug. 9, 1996).

498. See generally *id.* (noting effect of disability on treatment received).

499. Simpkins's argument would be weakened in this regard if her job involved health or safety issues such that some serious harm could occur if she left her work station without her direct supervisor's knowledge. However, Simpkins's job was administrative and involved customer service and personnel issues. *Id.* at *1. Her employer did not argue that it suffered any harm through Simpkins's actions.

500. But see *supra* note 499.

C. Reasonable Accommodation

1. The Timing of Reasonable Accommodation

The general rule is that reasonable accommodation is always prospective in nature.⁵⁰¹ An employer need not excuse past misconduct as a reasonable accommodation for an employee with a disability, but if the employee requests a reasonable accommodation that will help him or her comply with a workplace conduct rule in the future, the employer must provide that accommodation, absent undue hardship.⁵⁰² The reasons for the timing limitation of this rule are obvious, particularly in light of the *Brohm* case: encouraging employees to seek diagnosis and treatment of their disabilities as soon as possible and to discuss with their employers likely difficulties in following workplace conduct rules before they arise.⁵⁰³ In addition, the fact that reasonable accommodation is always prospective in nature reduces the incentive of nondisabled individuals to claim only after their discharge that they had a disability that their employer should have accommodated.⁵⁰⁴

One consequence of the rule that reasonable accommodation is always prospective in nature is that it might encourage employers to institute a policy of no tolerance for violation of any of its workplace conduct rules. Although an employer must provide a reasonable accommodation to an employee who requests one before engaging in misconduct, as a practical matter many employees will not request a reasonable accommodation until after their disability affects their workplace conduct, attracting their employer's attention. This is particularly true of employees with mental disabilities, who—due to the stigma accompanying mental illness—may be reluctant to disclose their disability and who may not understand or be able to explain what kind of accommodation they need and why they need

501. *Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996); see also EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 67, at 21 n.51.

502. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 319 n.14 (5th Cir. 1997); *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 1007 (S.D. Ind. 2000); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 67, at 19-23.

503. The policy behind this rule—placing an incentive on plaintiffs to avoid avoidable harm—is reflected in many areas of law. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 804-06 (1998) (recognizing an affirmative defense to vicarious liability for a sexually hostile work environment created by a supervisor in order to encourage both employers and aggrieved employees to take action to prevent or quickly remedy instances of harassment).

504. See STEFAN, *supra* note 100, at 158 (noting that “the people who misuse the law’s protections against disability discrimination . . . frequently ‘discover’ their diagnosis in the wake of disciplinary action”). Of course, the difficulty of satisfying the definition of “disability” should bar these claims before courts ever reach the reasonable accommodation issue.

it.⁵⁰⁵ If the employer's policy is to place a lesser sanction than discharge upon an employee who violated a conduct rule, and the employee requests a reasonable accommodation in the course of receiving that sanction, the employer must provide the reasonable accommodation, absent undue hardship.⁵⁰⁶ If, in contrast, the employer's policy is to discharge immediately any employee who violates a conduct rule, the reasonable accommodation issue will not arise.⁵⁰⁷ Assuming that the employer applies the immediate discharge rule uniformly, it will face ADA liability only if the conduct rule has a disparate impact and is not job-related or consistent with business necessity,⁵⁰⁸ or if the plaintiff can make a disparate impact challenge to the no-tolerance aspect of the employer's policy.

Another consequence of the timing limitation on the duty of reasonable accommodation—and of the fact that employees often request an accommodation only after facing discharge—is that plaintiffs frequently contend that their employers should have known that they needed an accommodation prior to the misconduct that led to their discharge. Courts have held that where a disability interferes with an individual's ability to ask for a reasonable accommodation, and where the employer knows about both the disability and the need for accommodation, the employer must not wait for the individual to ask specifically for a "reasonable accommodation."⁵⁰⁹ The parties must engage in an interactive process to

505. Hubbard, *supra* note 236, at 906; Danforth, *supra* note 470, at 678-79; *see also* Andrews v. United Way of Southwest Ala., Inc., No. CIV. A-98-1142-P-C, 2000 WL 210694, at *7 (S.D. Ala. 2000) (involving an employee with depression who was discharged for poor performance and testified that he did not inform anyone of his emotional problems, stating "I didn't want to tell anybody. I didn't even tell my family").

506. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 67, at 31 (Question 31, Example A) (providing the example of an employee who violates a conduct rule and receives "a suspension as the second step in uniform, progressive discipline" and then requests a reasonable accommodation, concluding that the employer must grant the request, absent undue hardship).

507. *See* Danforth, *supra* note 470, at 683 (stating that "where an employee is terminated consistent with the employer's policy of terminating anyone who engages in like behavior, and the disabled employee then makes his first request for a reasonable accommodation," "the employer is not required to rescind the discharge").

508. The *Den Hartog* court errs on this point. The court provides that as a first step in a disability-related misconduct case, "an employer should normally consider whether a mentally disabled employee's purported misconduct could be remedied through a reasonable accommodation," and if so, "the employer should attempt the accommodation." *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1088 (10th Cir. 1997). The court ignores the important issue of whether the employee requested a reasonable accommodation before engaging in the misconduct. If not, under the general rule regarding the duty of reasonable accommodation, the court is not required to excuse the past misconduct. *See supra* note 501 and accompanying text. Accordingly, this approach differs from the inquiry into whether a plaintiff is qualified for his or her position. Such an inquiry considers whether the plaintiff will be able to perform the essential functions of the job in the future if he or she receives a reasonable accommodation.

509. *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285-86 (7th Cir. 1996).

determine an appropriate accommodation, and when an employee has a mental illness, “[t]he employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”⁵¹⁰

Relying on these cases, some plaintiffs have argued that, given their employers’ knowledge of their mental disabilities, the employers should have been on notice that the disabilities required accommodation.⁵¹¹ Taking this reasoning a step further, some plaintiffs have contended that their misconduct or poor work performance should have put their employers on notice both that the plaintiffs had mental disabilities and that they required accommodation.⁵¹² Both arguments pose dangers to the equal treatment of employees with disabilities. The first argument encourages employers to assume that employees with disabilities are limited in ways relevant to the workplace and thus need special treatment.⁵¹³ The second argument encourages employers to associate misconduct and poor performance with mental disabilities by assuming that employees with such problems must be disabled.⁵¹⁴

510. *Id.* at 1285; *see also* *Miller v. Ill. Dep’t of Corr.*, 107 F.3d 483, 486 (7th Cir. 1997) (stating that if “the nature of the disability is such as to impair the employee’s ability to communicate his or her needs, as will sometimes be the case with mental disabilities, the employer, provided of course that he is on notice that the employee *has* a disability, has to make a reasonable effort to understand what those needs are even if they are not clearly communicated to him”).

511. *See, e.g., Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 163-64 (5th Cir. 1996) (holding that, although employer knew that plaintiff with performance problems had bipolar disorder, employer had no duty to accommodate him because plaintiff mentioned no limitations that he experienced as a result of his disability).

512. *See, e.g., Rogers v. CH2M Hill, Inc.*, 18 F. Supp. 2d 1328, 1336-39 (M.D. Ala. 1998) (involving plaintiff who claimed that his depressed demeanor along with vague statements that he made to his supervisors about “feeling kind of down and depressed,” meant that his employer should have known of his disability of depression because it was obvious); *Adams v. Rochester Gen. Hosp.*, 977 F. Supp. 226, 236 (W.D.N.Y. 1997) (involving plaintiff who claimed that his employer should have known about and accommodated his disability of depression because he made three mistakes in his work and behaved “strangely” at times).

513. *See Taylor*, 93 F.3d at 164 (noting that “the ADA does not require an employer to assume that an employee with a disability suffers from a limitation” and that “better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs”).

514. *See Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) (“The ADA hardly requires that merely because some perceived tardiness and laziness is rooted in disability, an employer who has not been informed of the disability, and who has no reason to know of the disability, is bound to retain all apparently tardy and lazy employees on the chance that they may have a disability that causes their behavior.”); *Rogers*, 18 F. Supp. 2d at 1342 (reasoning that “[p]lacing upon the employer the duties to confront a dilatory employee, to question that employee about whether he or she has a mental illness, and to propose a reasonable accommodation for that employee” would, in effect, equate mental illness with an inability to perform a job, “the very opposite of the intent of the ADA”); *Lippman v. Sholom Home, Inc.*, 945 F. Supp. 188, 192 (D.

Under some circumstances, an employee's conduct may be so unusual for that employee and so symptomatic of a disability that the conduct might provide an employer with notice of the employee's disability, of the need for accommodation, and of the employee's disability-related inability to request an accommodation.⁵¹⁵ Often, however, this argument aims primarily at avoiding the effect of the rule that a second chance is never a reasonable accommodation. Accordingly, this line of cases presents the same issue as the disparate impact analysis in the previous subsection: should the duty of reasonable accommodation ever require providing a disabled employee a second chance? Before answering that question, it is useful to consider what reasonable accommodations other than a second chance might assist disabled employees in avoiding workplace misconduct.

2. Examples of Reasonable Accommodation Relevant to Compliance with Conduct Rules

Assuming that a plaintiff satisfies the timing requirement of the duty of reasonable accommodation, what types of accommodation might enable him or her to comply with conduct rules in the future?⁵¹⁶ Courts generally agree that a leave of absence to obtain treatment is a form of reasonable accommodation.⁵¹⁷ Commentators have outlined other possibilities that "may help an employee with a disability remain calm and in control of disability-related impulses," such as allowing the employee a brief cooling-off period when he or she becomes angry or stressed, or allowing the

symptomatic of a disability, and then divine that the employee actually suffers from a disability.").

515. See *Hedberg*, 47 F.3d at 934 (stating that "it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability" and providing the example of "an employee who suffers frequent seizures at work"). One possible example is the case of *Landefeld v. Marion General Hospital, Inc.*, involving a physician who engaged in the bizarre behavior of stealing mail from the hospital mailboxes of other physicians and shortly thereafter was diagnosed with bipolar disorder. 994 F.2d 1178, 1179 (6th Cir. 1993). Cf. *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381-82 (7th Cir. 2003) (holding that plaintiff's unusual behavior—sleeping on the job after years of being a model employee—may have provided his employer with notice that plaintiff had a "serious health condition" possibly entitling him to leave under the Family and Medical Leave Act, and that the plaintiff's major depression may have rendered him incapable of telling his employer that he needed leave). *But see Rogers*, 18 F. Supp. 2d at 1336-37 ("The court is inclined to believe that symptoms of depression or anxiety could never clearly be such manifestations of an illness that the employer would be held to have imputed knowledge of that illness.").

516. Although courts are divided on the issue, plaintiffs should be able to request reasonable accommodation for any of the limitations caused by their disabilities, not just those connected to their substantially limited major life activities. See *supra* notes 365-75 and accompanying text.

517. See, e.g., *Rascon v. U S W. Communications, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998) (holding that employer should have provided an employee with PTSD, who had problems with anger and fighting in the workplace, with the four months of leave he requested for treatment).

employee to call supportive individuals during the workday.⁵¹⁸ In addition, because mental disabilities are so context-dependent, commentators have suggested ways of altering the workplace environment to reduce the likelihood of disability-related misconduct, such as eliminating harassing conduct in the workplace, reducing the amount of overtime the employee must work, transferring the employee away from an abusive supervisor, or training supervisors to approach the employee in a less confrontational manner and to provide clearer instructions and constructive feedback on performance.⁵¹⁹ Educating supervisors and co-workers about mental disabilities also may reduce the likelihood that they will find disability-related behavior disturbing.⁵²⁰

Courts have rejected many of these proposed accommodations, holding, for example, that it is not a required reasonable accommodation to reassign a disabled employee to a new supervisor.⁵²¹ Many employers also have been resistant to behavioral, rather than physical, modifications to the workplace, despite the inexpensive nature of many such changes.⁵²² Nonetheless, employer surveys have shown that the most common accommodations for mental disabilities include “adaptations of the interpersonal environment to protect the worker’s privacy and reduce stress,” “extra tolerance for unusual behavior,” and “written instructions.”⁵²³ Given the context-dependent nature of mental disabilities,

518. Hubbard, *supra* note 236, at 925.

519. *See id.* at 909-10, 924-25; Stefan, *supra* note 236, at 840-44.

520. *See* Hubbard, *supra* note 236, at 912 (“When supervisors and co-workers have more information about mental disorders, they are likely to become less fearful of employees with those disorders and less likely to misinterpret or overreact to their behavior.”).

521. *See, e.g.,* Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999) (holding that it was not a required reasonable accommodation to assign the plaintiff to a different supervisor); Reed v. Lepage Bakeries, Inc., 102 F. Supp. 2d 33, 38 (D. Me. 2000) (holding that it was not a reasonable accommodation for the plaintiff, who suffered from bipolar disorder, to walk away from her supervisor when she thought she was likely to lose control). Interestingly, courts may be more likely to find that a behavioral accommodation is reasonable where the employee’s misconduct is due to a physical, rather than mental, disability. *See, e.g.,* Gilday v. Mecosta County, 124 F.3d 760, 761, 766 (6th Cir. 1997) (finding that a paramedic with diabetes, who was discharged for rudeness to patients and colleagues caused by blood-sugar fluctuations, should have received a transfer to a less-busy station where he could have better followed his regimen, because “[a]n employer cannot deny an accommodation that the worker claims will make him able to perform the job and then argue that the worker’s allegedly correctable performance justified termination”).

522. Hubbard reasons that such resistance may be because employers “do not understand the behavioral aspects of mental disorders or believe that issues concerning supervision and workplace culture are their prerogative.” Hubbard, *supra* note 236, at 906; *see also* Stefan, *supra* note 236, at 800 (noting that employer attitudes toward the impact of abusive or stressful work environments on employees with mental disabilities “mirror[] past attitudes toward the employment of women and minorities: as long as such employees fit into the workplace culture and do not demand that it change, they will be accepted”).

523. Caroline L. Kaufmann, *Reasonable Accommodations to Mental Health Disabilities at* Published by UF Law Scholarship Repository, 2005

courts should not assume that behavioral accommodations are unreasonable or will be ineffective in reducing or eliminating disability-related misconduct.

Dr. Brohm contended that if he received a leave of absence to receive treatment for his sleep apnea, he would no longer fall asleep during surgical procedures.⁵²⁴ Hamilton may have been able to avoid angry outbursts at co-workers if his employer permitted him to leave his work area and take a brief walk when he began to lose his temper. Simpkins likely would not have become hysterical, needing to leave the workplace before she could notify her direct supervisors, if the supervisors had been less confrontational when they met with her and if they had provided her with more notice of defects in her performance before placing her on “final” warning. All of these accommodations could have avoided future misconduct by the plaintiffs. Because the plaintiffs did not request accommodation before committing their misconduct, however, they now must request an additional accommodation: a second chance to comply with their employer’s conduct rules.

3. A Second Chance

The concept of fault pervades most cases involving disability-related misconduct. Indeed, courts’ attempts to discern the meaning of misconduct have focused on the idea that conduct compelled by a disability is not misconduct, implicitly suggesting that misconduct involves some element of fault by a disabled employee.⁵²⁵ Similarly, the seminal case holding that a second chance is not a reasonable accommodation under the ADA involved clear evidence of employee fault. In *Siefken v. Village of Arlington Heights*, the court rejected the ADA claim of a police officer who was discharged after he erratically drove his squad car at high speed through residential areas while experiencing a diabetic reaction.⁵²⁶ The court noted that, although the incident would not have occurred but for the plaintiff’s diabetes, “the more immediate cause of the incident leading to his termination was his failure to monitor his condition.”⁵²⁷ Although courts have cited *Siefken* repeatedly for the proposition that a second chance is never a reasonable accommodation under the ADA,⁵²⁸ the court’s precise holding was that “when an employee knows that he is afflicted with

Work: Legal Constructs and Practical Applications, 21 J. PSYCHOL. & L. 153, 153-54, 160 (1993).

524. Brohm v. JH Props. Inc., 947 F. Supp. 299, 302 (W.D. Ky. 1996), *aff’d*, 149 F.3d 517 (6th Cir. 1998).

525. See *supra* notes 226-28 and accompanying text.

526. 65 F.3d 664, 665-67 (7th Cir. 1995).

527. *Id.* at 666.

528. See, e.g., Burch v. Coca-Cola Co., 119 F.3d 305, 319 n.14 (5th Cir. 1997); Wooten v. Acme Steel Co., 986 F. Supp. 524, 528 (N.D. Ill. 1997).

a disability, needs no accommodation from his employer, and fails to meet 'the employer's legitimate job expectations,' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA."⁵²⁹ Several of the cases following *Siefken* have involved evidence of employee fault in not taking prescribed medication for their disabilities, which led to their misconduct.⁵³⁰ Other "no second chance" cases feature evidence of employee fault in failing to seek diagnosis and treatment of their conditions before their discharge, despite having notice of problems with their behavior.⁵³¹

The amount of employee fault leading to workplace misconduct will vary from case to case. Reviewing the sample cases, Dr. Brohm seems most at fault, by failing to seek medical attention for his sleeping problems until after his discharge, two months after receiving reports that he was sleeping during surgical procedures. Simpkins seems least at fault: there is no evidence that her behavior manifested symptoms of depression which should have led her to seek medical attention before the leaving-work incident that caused her discharge.

In addition, it is also noteworthy that the misconduct at issue in *Siefken*—erratic, high-speed driving of a squad car through residential areas⁵³²—posed a considerable danger of serious physical injury to others.

529. *Siefken*, 65 F.3d at 667 (citation omitted).

530. For example, the employee who suffered from bipolar disorder in *Hardy v. Sears, Roebuck & Co.* was discharged for insubordination and making personal threats against his supervisors. CIV. A. No. 4:95-CV-0215-HLM, 1996 WL 735565, at *1-2 (N.D. Ga. Aug. 28, 1996). Although the plaintiff had received treatment for his bipolar disorder for several years, *id.* at *1, the court noted that "[p]laintiff failed to take his prescribed dose of lithium, voluntarily reducing his use of the medication on several occasions and forgetting to take his noon dosage on others." *Id.* at *8. According to the court, "[p]laintiff's failure to take his medication directly increases the risk of aggressive behavior, and the ADA's requirement of reasonable accommodation 'in no way requires an employer to place its other employees in jeopardy.'" *Id.* (quoting *Palmer v. Circuit Court*, 905 F. Supp. 499, 511 (N.D. Ill. 1995)). The court then cited *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995), for the proposition that "the ADA does not require that employers give employees a 'second chance' to follow a prescribed medication regimen as an accommodation." *Hardy*, 1996 WL 735565, at *1-2; *see also* *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 996, 1006 (S.D. Ind. 2000) (finding that employee diagnosed with anxiety and depression, who was discharged for absenteeism and failing to call in to report his absences, failed to control his controllable disabilities by discontinuing to see his psychiatrist, who had prescribed him medication).

531. In *Rogers v. CH2M Hill, Inc.*, for example, despite having received notice of problems with his performance throughout the nine-and-a-half months that he worked for his employer, the plaintiff did not see a physician for his depression until five days before his employer terminated him, after the decision to discharge had been made. 18 F. Supp. 2d 1328, 1332 (M.D. Ala. 1998). The court found that "[p]laintiff's attempts to hold CH2M Hill liable . . . are really nothing more than a defensive mechanism to avoid taking responsibility for his own failure to seek treatment." *Id.* at 1340.

532. The plaintiff stopped only when he was pulled over by police officers from another jurisdiction; at that time, he was forty miles outside his jurisdiction. *Siefken*, 65 F.3d at 665.

Like the amount of employee fault, the severity of misconduct varies among cases. For example, Dr. Brohm's falling asleep during surgical procedures seems more severe than does Hamilton's angry outburst and slap of his co-worker's hand, which seems more severe than Simpkins's leaving work without notifying her direct supervisor.

Given that the seminal case for the "no second chance" rule involved both evidence of employee fault leading to the misconduct and misconduct that was severe in nature, should a second chance be available as a reasonable accommodation when there is little evidence of employee fault and where the misconduct is of low severity? Such a rule would not conflict with the fundamental policy behind prohibiting second chances as a reasonable accommodation—encouraging prompt action by employees in seeking diagnosis and treatment of their disabilities and in discussing with their employers potential problems in following workplace conduct rules—because evidence of unreasonable employee delay would constitute fault. Moreover, such a rule is also consistent with the reasoning behind a disparate impact challenge to zero tolerance conduct rules.

Some courts are likely to reject the proposed rule, reasoning that a second chance is never a reasonable accommodation because it does not alter working conditions so as to enable the employee to perform the essential functions of the job. In *Wooten v. Acme Steel Co.*, for example, the plaintiff verbally resigned from his employment one Friday night during a severe depressive episode, then asked his foreman to disregard his resignation the following Monday morning.⁵³³ His employer refused to allow the plaintiff to rescind his resignation or to reinstate him, despite the plaintiff's explanation that his resignation was the result of a severe depressive episode.⁵³⁴ The severity of the plaintiff's misconduct—is resigning from his employment can be deemed "misconduct"—is very low; there was no evidence that his employer had taken any action in reliance on the plaintiff's dismissal during the weekend before he asked to rescind his resignation. Nonetheless, the court held that allowing the plaintiff a second chance at employment was not a reasonable accommodation because "the ADA's reasonable accommodation provisions refer to changes in 'ordinary work rules, facilities, terms, and working conditions,' not altering the employment relationship itself."⁵³⁵

Yet couldn't allowing the *Wooten* plaintiff a second chance at employment be viewed as altering the *ordinary* work rule of never allowing

533. 986 F. Supp. 524, 526 (N.D. Ill. 1997).

534. *Id.* at 526-27.

535. *Id.* at 529; see also *Stauffer v. Bayer Corp.*, No. 3:96-CV-661RP, 1997 WL 588890, at *4, *11 (N.D. Ind. July 21, 1997) (holding that the ADA did not require the reinstatement of a plaintiff with adjustment disorder who resigned while upset at work because the ADA "does not require an employer to give an employee a 'second chance'").

employees who resign to rescind their resignations, in order to accommodate the limitations of an employee with depression?⁵³⁶ Moreover, not all reasonable accommodations involve changing the workplace to enable the plaintiff to perform the essential functions of the job. Allowing an employee a leave of absence to seek treatment does not directly enable him or her to perform the essential functions of the job during the leave period, but most courts agree that it may be a reasonable accommodation if the employee likely will be able to perform the job's functions following the leave.⁵³⁷ Similarly, while a second chance does not directly enable an individual to perform a job's essential functions, it could be a reasonable accommodation if the employee likely will be able to perform the job's functions after receiving the second chance.

The likelihood of the employee being able to perform the job's functions in the future suggests another limitation on second chance as a reasonable accommodation: the likelihood that the employee will repeat the misconduct in the future. While a second chance might be reasonable, allowing a third or fourth chance is much less likely to deter misconduct and would be more difficult for an employer to administer. This limitation suggests that the *Wooten* court properly denied the plaintiff's request for a second chance. The plaintiff in *Wooten* alleged that he resigned due to his "uncontrollable depression,"⁵³⁸ probably in order to distinguish his case from *Siefken* such that he would seem less at fault. This allegation is problematic, however, because it suggests that the plaintiff would likely resign and seek reinstatement in the future, and the court concluded that "reinstating him whenever he resigns during a depressive episode" would be unreasonable.⁵³⁹

Courts should recognize that a second chance at employment is a reasonable accommodation where (1) there is little evidence of employee fault with respect to both the misconduct and not requesting a reasonable accommodation prospectively; (2) the misconduct is of low severity; and (3) there is little likelihood that the misconduct will recur.⁵⁴⁰ The third

536. The *Wooten* plaintiff also could argue that his employer's policy of never allowing employees to rescind their resignations had a disparate impact on him because of limitations caused by his disability—his poor judgment during severe depressive episodes—and was not job-related nor consistent with business necessity.

537. *But see* *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003) (finding that a leave of absence was not a reasonable accommodation for an employee with depression because "[t]he sort of accommodation contemplated by the Act is one that will allow the person to 'perform the essential functions of the employment position,'" and "[n]ot working is not a means to perform the job's essential functions") (quoting 42 U.S.C. § 12111(8) (2000)).

538. 986 F. Supp. at 529.

539. *Id.*

540. Laura F. Rothstein has suggested that a second chance may be an appropriate reasonable accommodation depending on whether the job "involves public safety, health care, role modeling,

factor involves the same inquiry as the requirement that the plaintiff be qualified to fall within the protected class. If the plaintiff is likely to engage in the misconduct in the future, he or she may be unable to perform the essential elements of his or her job and thus may not be qualified.⁵⁴¹ If the misconduct does not relate to an essential function of the plaintiff's job, the plaintiff can argue that the employer's application of a conduct rule prohibiting such behavior has a disparate impact on the plaintiff and is not job-related or consistent with business necessity.⁵⁴²

The second factor, the severity of the misconduct, involves an examination of both the objective severity of the plaintiff's behavior and its impact on the employer's operations. For example, while Simpkins's leaving work without notifying her immediate supervisor initially appears of low severity, its severity would increase if her employer could show that her departure left the company unresponsive to time-sensitive communications from its customers.⁵⁴³ Similarly, evidence that Hamilton's angry outburst and slap of his co-worker's hand caused employees to feel unsafe in the workplace would increase the severity of his misconduct.

The first factor, evidence of employee fault, relates both to the misconduct and to the employee's failure to request a reasonable accommodation prospectively. Employees not diagnosed with an impairment before misconduct occurred may be at fault in failing to seek diagnosis and treatment within a reasonable time after receiving notice that they might have an impairment. Relevant to both what constitutes notice and what is a reasonable time is the nature of the plaintiff's disability, in light of the fact that denial and unclear thinking are associated with many mental disabilities. Problems with behavior or performance at home or at work—especially if family, friends, or work associates brought those problems to the plaintiff's attention—could constitute notice of a possible impairment. Employees previously diagnosed with an impairment may be at fault for failing to take prescribed medication or otherwise to follow their physician's instructions.

Employees aware of their disability often will be at fault if they failed to request prospectively a reasonable accommodation that would enable

fiduciary or similar trust, [or] supervisor and consistency issues" and depending on the type of misconduct. Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 967, 973 (1997). Rothstein does not mention specifically that employee fault should be a relevant factor.

541. See *supra* notes 435-49 and accompanying text.

542. See *supra* notes 465-86 and accompanying text. Because Ray's profane outbursts are likely to continue, he cannot satisfy the third requirement for receiving a second chance as a reasonable accommodation. Unless he can prove disparate treatment, his only argument is that applying the conduct rule to him constitutes disparate impact discrimination.

543. See *supra* note 499.

them to avoid misconduct. However, such employees will not be at fault if they reasonably failed to realize that the disability was likely to result in conduct that conflicted with a work rule. For example, even though Hamilton knew that he might have PTSD before his angry outburst at work, perhaps it was reasonable for him to be unaware that PTSD often causes irritability and outbursts of anger. Failure to request reasonable accommodation prospectively also may be reasonable if the employee, due to his or her disability, did not understand the work rule. In *Walsted v. Woodbury County*, for example, the court rejected the employer's contention that its discharge of the plaintiff—who worked as a custodian in the Department of Motor Vehicles and whom the employer knew to be “borderline mentally retarded”—for theft of license plate stickers did not violate the ADA, where no one informed the plaintiff that the stickers were valuable so “she practiced wrapping boxes and used the stickers as decorations to seal packages that she made.”⁵⁴⁴

VI. CONCLUSION

Retaining disabled employees who engage in misconduct poses some dangers for employers. Employers may face liability in tort if the employee injures another employee, a customer, or a member of the public. An employer that discharges a disabled employee following violence or threats of violence may be able to rely on the direct threat defense to ADA liability, however, if it bases the discharge decision on an individualized assessment of the risks posed by the employee in light of current medical knowledge. Moreover, disabled employees who are unlikely to cause physical injury to others nonetheless may pose other liability risks for employers. For example, an employee's misconduct, causally connected to his or her disability, may amount to sexual harassment of another employee for which the employer could be liable.⁵⁴⁵ Potential solutions to this problem include finding workplace conduct rules prohibiting such

544. 113 F. Supp. 2d 1318, 1322-23, 1342 (N.D. Iowa 2000). The court reasoned that special training or instruction would have constituted a reasonable accommodation for the plaintiff that would have enabled her to avoid the misconduct. *Id.* at 1337; *see also* *Fernbach v. Dominick's Finer Foods*, 936 F. Supp. 467, 486-69, 471, 473 (N.D. Ill. 1996) (stating that employer might have violated the ADA by discharging plaintiff—whom the employer knew had “substantial neurological impairments” following a stroke—for theft of merchandise that plaintiff had placed in his employee locker until he could afford to purchase it, if plaintiff did not understand the store merchandise policy because of his disability).

545. *See, e.g.*, *Gaspar v. Perry*, No. 97-1542, 1998 U.S. App. LEXIS 14933, at *2-3, *8-10 (4th Cir. July 2, 1998) (involving an employee who suffered a frontal lobe dysfunction after a motorcycle accident—which caused him to be “impulsive, disinhibited, excessively loquacious, and to have difficulty reading social cues”—who then asked a female co-worker, who was returning to the building after a run, if she was wearing a “racer-type” bra and also approached a co-worker at a business reception and, while kneeling at her feet, “begged her not ever to cut her long, beautiful hair”).

harassment to be job-related and consistent with business necessity, or concluding that any proposed accommodation that places an employer at serious risk of sexual harassment liability imposes an undue hardship.

Despite these dangers, courts must reject the common approach where misconduct means the plaintiff loses. Such an approach severely restricts the protections provided by the ADA to individuals with disabilities, particularly mental disabilities which are likely to manifest themselves in the form of conduct. Courts should not assume that plaintiffs who engaged in misconduct cannot prove disparate treatment, thereby dismissing claims based on the inability to establish a prima facie case. Rather, courts should scrutinize the record for evidence of pretext, keeping in mind that employers may view misconduct committed by employees with mental disabilities more severely because of the stigma and stereotypes associated with such disabilities.

While indicating that discharge based on disability-related misconduct is not necessarily disparate treatment, the Supreme Court in *Raytheon Co. v. Hernandez* emphasized the availability of the disparate impact theory of discrimination in ADA cases.⁵⁴⁶ Workplace conduct policies prohibiting behavior that disabled individuals find very difficult to control may operate as a barrier to equality in the workplace and violate the ADA unless the employer can demonstrate that such policies relate to essential job functions. More specifically, avoiding the disturbance of co-workers and customers is not an essential function of every job, regardless of the nature and extent of the interaction with those persons that a particular job requires.

Finally, courts should take a broader view of the duty of reasonable accommodation, considering ways to alter the workplace environment to reduce the likelihood of disability-related misconduct. Although ideally employees with disabilities will request such accommodations prospectively, before they engage in misconduct, many employees with mental disabilities will not request a reasonable accommodation until after their disabilities affect their workplace conduct. Under those circumstances, courts should hold that a second chance at employment is a reasonable accommodation where there is little evidence of employee fault with respect to both the misconduct and not requesting a reasonable accommodation prospectively; the misconduct is of low severity; and there is little likelihood that the misconduct will recur. Only by considering carefully the three forms of discrimination prohibited by the ADA will courts fulfill the promise of the statute to all disabled employees, even those whose disabilities manifest themselves in the form of conduct.

546. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003).
<https://scholarship.law.ufl.edu/flr/vol57/iss2/>