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Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws

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DISABLING COMPLEXITY: THE AMERICANS WITH DISABILITIES ACT OF 1990 AND ITS INTERACTION WITH OTHER FEDERAL LAWS

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INTRODUCTION

Some areas of the law are neatly organized and packaged. For example, federal tax laws can generally be found in the United States Tax Code. Commercial law has the Uniform Commercial Code at its foundation. The Uniform Probate Code has codified estate laws in many states. However, labor and employment laws have been adopted in a hodge-podge fashion. Courts, attorneys, employers and employees must have a vast store of knowledge and expertise when analyzing issues concerning the workplace. American labor and employment law can be found in the United States Constitution, state constitutions, federal statutes and regulations, state statutes and regulations, local ordinances and regulations, and common law principles. A simple listing of statutes implicating federal labor and employment law illustrates the breadth and depth of federal legislation in this important area of national policy.[1]

1. The Reconstruction Era Civil Rights Acts, including the Civil Rights Act of 1866, 42 U.S.C. § 1981; and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985; the Equal Pay Act, 29 U.S.C. § 206(d); the Fair Labor Standards Act, 29 U.S.C. §§ 201-209; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; the Civil Rights Restoration Act of 1987, 20 U.S.C. 1687 *et seq.*; the Congressional Accountability Act of 1995, 2 U.S.C. § 1301 *et seq.*; the Civil Rights Act of 1964, 42 U.S.C. § 2000d & e *et seq.*; the Civil Rights Act of 1991; the Glass Ceiling Act of 1991; the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988; the Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009; the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115; the Davis-Bacon Act, 40 U.S.C. § 276a; the Walsh-Healey Act, 41 U.S.C. §§ 35-45; the Service Contract Labor Standards Act of 1965, 41 U.S.C. §§ 351-358; the Portal-to-Portal Pay Act of 1947, 29 U.S.C. §§ 251-262; the Older Workers Benefit Protection Act, 29 U.S.C. §§ 623-630; the Federal Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801; the Wagner-Peyser Act, 29 U.S.C. § 49; the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311; the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781; the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324B; the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k); the Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1211-1222, 3352; the Railway Labor Act of 1945, 29 U.S.C. §§ 151-163, 181-188; the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654; the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. §§ 706(8), 791, 793-794a; the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2011-2014; the National Labor Relations Act and Labor Management Relations Act, 29 U.S.C. §§ 141-197; the Labor-Management Re-

Given the daunting backdrop of federal legislation impacting the labor and employment arena, the task of understanding how all of the federal legislation—not to mention the state and local legislation—interrelates may be an impossible task even for legal experts. One vital area of federal employment legislation involves protecting the rights of individuals with disabilities. The Americans with Disabilities Act of 1990[2] ("ADA") was a long-awaited piece of federal legislation which seeks "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[3] The ADA also seeks "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities."[4] To fully understand the ADA and to ensure its purposes are fulfilled, other federal employment statutes must not diminish the ADA's goals. This article discusses how the ADA interacts with other critical federal employment statutes.[5]

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porting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531; the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678; the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219; the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1451; the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1105; the Privacy Act of 1974, 5 U.S.C. § 522a; Title IX of Education Amendments to the Higher Education Act of 1965, 20 U.S.C. §§ 1681-1688; the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135; the Job Training Partnership Act, 29 U.S.C. §§ 1501-1781; the Federal Employee's Compensation Act, 5 U.S.C. §§ 8101-9193; the Social Security Act of 1935, 42 U.S.C. §§ 423 *et seq.*; the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950; and the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109.

2. 42 U.S.C. § 12101-12213.

3. 42 U.S.C. § 12101(b)(1).

4. 42 U.S.C. § 12101(b)(2)-(3).

5. Because this article addresses the critical interactions between the ADA and other federal employment statutes, it will not discuss the majority of the laws mentioned above or any state or local laws. Thus, this article will not discuss how the ADA interacts with state workers' compensation statutes, although courts, attorneys, employers and individuals with disabilities must understand how these laws interact. Notwithstanding this paper's omission of such a discussion, the reader may wish to review some of the vast and expansive literature on this subject. *See, e.g.*, Scott A. Carlson, *The ADA and the Illinois Workers' Compensation Act: Can Two "Rights" Make a "Wrong"?*, 19 S. ILL. U. L. J. 567 (1995); Barbara L. Kramer, Hayes and Mobley: *Bridging the Definition of Disability under the Ohio Workers' Compensation Act and the Americans with Disabilities Act of 1990*, 45 CLEV. ST. L. REV. 733 (1997); Ranko Shiraki Oliver, *The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law*, 16 U. ARK. LITTLE ROCK L.J. 327 (1994); Gregory G. Pinski and Angela L. Rud, *The Employer's "Bermuda Triangle:" An Analysis of the Intersection Between Workers' Compensation, ADA, and FMLA*, 76 N. D. L. REV. 69 (2000); Alison Steiner, *The Americans with Disabilities Act of 1990 and Workers' Compensation: The Employee's Perspective*, 62 MISS. L. J. 631 (1993); EEOC Notice #915.002, *EEOC Enforcement Guidance: Workers' Compensation and the ADA*.

Specifically, this article focuses on how the ADA affects and is affected by other federal laws. Part I discusses the ADA's interrelationship to the Family and Medical Leave Act of 1993. Part II discusses the ADA's interaction with the Occupational Safety and Health Act of 1970. Part III discusses the applicability of the hostile work environment theory under Title VII of the Civil Rights Act of 1964 to the ADA. Part IV discusses the ADA's relationship to the Social Security Act of 1935. Finally, Part V discusses the ADA's interaction with the National Labor Relations Act and national labor policy. Given the disabling complexity of the vast amount of federal employment legislation, especially the laws impacting our national disability policy, every citizen must critically ask whether our Nation enjoys a single, clear, effective, compassionate policy toward individuals with disabilities.

I. SO CLOSE, YET SO FAR AWAY: THE ADA'S INTERACTION WITH THE FAMILY AND MEDICAL LEAVE ACT OF 1993

A. INTRODUCTION

The ADA can often interact with the Family and Medical Leave Act of 1993[6] ("FMLA").[7] However, it is important to remember the FMLA is a leave-oriented act,[8] while the ADA is a work-oriented act.[9] Although the FMLA focuses on leave and the ADA focuses on work, understanding the interaction between these two employment statutes can be difficult. One author has noted sixty-three percent of respondents to a Society for Human Resource Management survey

6. 29 U.S.C. §§ 2601-2654.

7. *See, e.g.*, Gregory G. Pinski & Angela L. Rud, *The Employer's "Bermuda Triangle:" An Analysis of the Intersection Between Workers' Compensation, ADA, and FMLA*, 76 N. D. L. REV. 69 (2000); James A. Passamano, *Employee Leave Under the Americans with Disabilities Act and the Family Medical Leave Act*, 38 S. TEX. L. REV. 861 (1997); Lisa J. Gitnik, *Note: Will the Interaction of the Family and Medical Leave Act and the Americans with Disabilities Act Leave Employees with an "Undue Hardship?,"* 74 WASH. U. L. Q. 283 (1996); David W. Wilhelmus & Mary Tiede Wilhelmus, *The Interaction of the Americans with Disabilities Act, the Family Medical Leave Act, and the Pregnancy Discrimination Act and Their Impact on Libraries*, 88 LAW LIBR. J. 231 (1996).

8. *See* 29 U.S.C. § 2601(b)(2) (stating one of the FMLA's purposes is "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition"); 29 C.F.R. § 825.101(a) (stating the "FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition").

9. *See* 42 U.S.C. § 12111(8) (stating a qualified individual with a disability "is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); § 12112(a) (prohibiting discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment").

"reported frequent or occasional uncertainty about coordinating leave under the ADA, the FMLA, and short-term and long-term disability programs."[10] The same author noted fifty-eight percent of those responding to the same survey "reported uncertainty about whether an employee who requested FMLA leave was also covered by the ADA."[11] Indeed, the interaction between the FMLA, the ADA, and state workers' compensation laws has been referred to as the Bermuda Triangle.[12] An employee can have rights under both the ADA and the FMLA, under the ADA and not the FMLA, under the FMLA and not the ADA, or no rights under either the ADA or the FMLA. Therefore, one must understand how the ADA and the FMLA interact.

When the ADA and the FMLA interact, both statutes must be interpreted and applied such that neither is adversely impacted by the other. The ADA specifically states that it does not "invalidate or limit the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act."[13] Likewise, the FMLA specifically mandates that it does not "modify or affect any Federal . . . law prohibiting discrimination on the basis of . . . disability."[14] Although the ADA and the FMLA may be implicated at the same time, both statutes stand on their own and must be individually analyzed under their varying standards.[15] The most critical distinction be-

10. *See, e.g.*, Lawrence P. Postol, *Sailing the Employment Law Bermuda Triangle*, 18 LAB. LAW. 165, 166 (2002) (citing *Disabilities: SHRM Survey Finds Uncertainty about ADA/FMLA Interaction*, 57 DAILY LABOR REPORT (BNA) A-7 (Mar. 23, 1999)).

11. *Id.*

12. *See, e.g., id.*

13. 42 U.S.C. § 12201(b).

14. 29 U.S.C. § 2651(a); *see also* § 2651(b) ("[n]othing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."); 29 C.F.R. § 825.702(a). Section 825.702(a) provides, in pertinent part:

> Nothing in [the] FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). [The] FMLA's legislative history explains that [the] FMLA is "not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the [ADA], or the regulations issued under [the ADA]. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA] . . . .
>
> *Id.*

15. Before addressing the interaction, or overlap, between the ADA and the FMLA, one must understand who is covered under each statute. Neither the ADA nor the FMLA applies to all employers and all employees. Similarly, an employer who is subject to the ADA may not be subject to the FMLA. The ADA defines employer as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding

tween the ADA and the FMLA involves the standard under which employees gain protection under both employment statutes. For that reason, this section will focus only on those varying standards of coverage under the ADA and the FMLA.

B. THE ADA AND THE FMLA

The ADA prohibits discrimination against qualified individuals with disabilities.[16] Specifically, the ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[17] A qualified individual with a disability is "an individual with a disability who, with or without reasonable ac-

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calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(A). However, the ADA excludes from its definition of employer "(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986." § 12115(5)(B).

The FMLA defines employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i); *see also* § 2611(4)(A)(ii)-(iv) (stating that an employer includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer[,] any successor in interest of an employer[,] any 'public agency' [as defined in the Fair Labor Standards Act of 1938, and] the General Accounting Office and the Library of Congress."); 29 C.F.R. §§ 825.104-.109.

The ADA broadly defines an employee as "an individual employed by an employer," including United States citizens employed in foreign countries. 42 U.S.C. § 12111(4). The FMLA has a more limited definition of employee: "[t]he term 'eligible employee' means an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested under [29 U.S.C. § 2612]; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). The FMLA excludes from its definition of employee "any Federal officer or employee covered under [5 U.S.C. § 6381, or] any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B); 29 C.F.R. §§ 825.110, 111. Another critical difference between the ADA and the FMLA involves Eleventh Amendment Immunity. Title I of the ADA and the FMLA have not been treated the same when it comes to the States' Eleventh Amendment immunity from suit. *Compare* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (holding "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under [Title I of the ADA]"), *with* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003) (holding Congress validly abrogated the States' sovereign immunity from suit by private individuals for money damages under the FMLA). *But see* Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004) (holding Title II of the ADA, "as it applies to the class of cases implicating the fundamental right of access to the courts," validly abrogated States' Eleventh Amendment immunity from suit).

16. 42 U.S.C. § 12112(a).

17. 42 U.S.C. § 12112(a); *see also* § 12112(b) (construing the term "discriminate").

commodation, can perform the essential functions of the employment position that such individual holds or desires."[18]

The FMLA, on the other hand, provides qualified employees with up to twelve workweeks of leave per year.[19] Specifically, a qualified employee can receive her federally mandated leave for the birth of a child, placement of an adopted or foster child with the employee, to care for certain relatives with serious health conditions, or when a serious health condition prevents the employee from performing her job.[20] Employers are prohibited from discriminating against or interfering with employees who seek to exercise their FMLA rights.[21]

It is essential to understand how the ADA and the FMLA interact. The most critical distinction between the ADA and the FMLA lies in what health conditions are covered. The ADA only protects qualified individuals with disabilities.[22] Therefore, an individual must have a qualifying disability to benefit from the ADA's protection.[23] The FMLA, on the other hand, does not cover individuals with disabilities. Instead, the FMLA uses a distinct term for coverage—"serious health condition."[24] While the Supreme Court has actively interpreted the term "disability" under the ADA, the Court has not addressed the FMLA's use of the term "serious health condition."[25]

C. The ADA's Focus on Disability

The ADA's most important definition is what constitutes a disability. The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being

18. 42 U.S.C. § 12111(8).
19. 29 U.S.C. § 2612(a)(1).
20. 29 U.S.C. § 2612(a)(1).
21. 29 U.S.C. § 2615(a)-(b).
22. *See* 42 U.S.C. § 12112(a).
23. 42 U.S.C. § 12102(2) (defining disability).
24. 29 U.S.C. § 2611(11). Because of the apparent similarities between the terms "disability" and "serious health condition," this article will focus on the FMLA's definition of "serious health condition," and will not discuss the FMLA's other applicable terms, e.g., birth, adoption, serious health condition of certain family members. *Id.*
25. The ADA specifically charged the Equal Employment Opportunity Commission (EEOC) with issuing regulations implementing Title I dealing with employment. 42 U.S.C. § 12116. Interestingly enough, the term disability is defined in a generally applicable provision of the ADA, outside of Title I. § 12102. Thus, the Supreme Court has recognized that "no agency has been delegated authority to interpret the term 'disability.'" Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (citing 42 U.S.C. § 12102(2)); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002). Notwithstanding the lack of Congressional authority, the EEOC has issued regulations defining disability. 29 C.F.R. § 1630.2(g)-(k). The FMLA, on the other hand, charged the Secretary of Labor with issuing regulations implementing the FMLA, which includes the definition of serious health condition. 29 U.S.C. §§ 2611(11), 2654. The Labor Secretary has complied with this congressional charge. 29 C.F.R. § 825.114.

regarded as having such an impairment."[26] In a trio of cases issued on the same day in 1999, the Supreme Court limited the ADA's reach by narrowly interpreting the term disability.[27] The Supreme Court again limited the scope of the term disability in 2002.[28]

In *Sutton v. United Air Lines, Inc.*,[29] twin sisters with severe myopia were precluded from interviewing for commercial airline pilot positions because their uncorrected vision was worse than 20/100.[30] With corrective lenses, each sister had at least 20/20 vision and could "function identically to individuals without a similar impairment."[31] The twins sued for disability discrimination under the ADA, which ultimately led to the Supreme Court deciding the effect mitigating measures have on an individual's disability. Specifically, the Court asked whether an individual's disability should be determined by taking into account corrective measures.[32] The Court recognized the EEOC had already issued interpretive guidance that an ADA disability determination is made "without regard to mitigating measures."[33] The Court determined "that the approach adopted by the [EEOC's] guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA."[34] The Court held "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."[35]

In addition to holding eligibility for ADA protection depends on measures that mitigate an impairment, the Supreme Court, in Sutton, also addressed circumstances when an employer regards an individual as having a disability under the ADA.[36] The ADA protects an individual who is "regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[37] The Supreme Court recognized two ways in which an in-

26. 42 U.S.C. § 12102(2).

27. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

28. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

29. 527 U.S. 471 (1999).

30. *Sutton*, 527 U.S. at 475-76.

31. *Id.* at 475.

32. *Id.* at 481.

33. *Id.* at 480 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)).

34. *Id.* at 482.

35. *Id.* at 475; *see also Kirkingburg*, 527 U.S. at 565-66 (holding mitigating measures include "measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems"); *Murphy*, 527 U.S. at 521 (holding employee's hypertension was not an ADA-qualifying disability when controlled by medication).

36. *Sutton*, 527 U.S. at 489-94; *see* 42 U.S.C. § 12102(2)(C).

37. 42 U.S.C. §§ 12102(2)(B), 12102(2)(C).

dividual may be regarded as having a disability.[38] First, an individual is regarded as having a disability when "a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities."[39] Second, an individual is regarded as having a disability when "a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[40] The analysis must focus on whether a covered entity "entertain[s] misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting."[41]

The Court specifically recognized an employer can legally "prefer some physical attributes over others."[42] However, the Court noted an employer violates "the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."[43] Thus, the Court made clear that "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."[44]

When deciding whether an impairment substantially limits a major life activity, the Court stated that "'substantially' suggests 'considerable' or 'specified to a large degree.'"[45] The Court also noted the EEOC's regulations interpret "substantially limits" as "'[u]nable to perform' or '[s]ignficantly restricted.'"[46] The Court again took up the task of defining "substantially limits" three years later in *Toyota Motor Manufacturing, Ky., Inc. v. Williams*.[47]

38. *Sutton*, 527 U.S. at 489.
39. *Id.*
40. *Id.*
41. *Id.*; *see also* 42 U.S.C. § 12101(a)(7) (Congressional finding that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society").
42. *Sutton*, 527 U.S. at 490.
43. *Id.*
44. *Id.* at 490-91.
45. *Id.* at 491 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (1976)).
46. *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(i), (ii) (1998)).
47. 534 U.S. 184 (2002).

In *Toyota*, an employee sued her employer for failing to provide a reasonable accommodation under the ADA for the employee's carpal tunnel syndrome and related impairments.[48] The employee asserted her physical impairments substantially limited her in the major life activity of performing manual tasks.[49] Thus, the Supreme Court was faced with determining "the proper standard for assessing whether an individual is substantially limited in performing manual tasks."[50] The Court asked "what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks."[51]

Following *Sutton*'s lead, the Court in *Toyota* determined "substantially . . . suggests 'considerable' or 'to a large degree.'"[52] The Court determined Congress's use of the term "substantial" "clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."[53] The Court then interpreted the term "major" to mean "important."[54] With these definitions in hand, the Court defined the term "major life activities" as "those activities that are of central importance to daily life."[55] Thus, the Court held that, when performing manual tasks is the major life activity in question, the "manual tasks . . . must be central to daily life."[56] To qualify as a major life activity, the Court stated that tasks can be viewed independently or collectively.[57] However, the Court announced that the ADA's definition of disability must "be interpreted strictly to create a demanding standard."[58]

After examining the ADA's language defining disability, the Court held "that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[59] The Court announced that household chores, bathing, and brushing one's teeth are examples of

48. *Toyota*, 534 U.S. at 187.

49. *Id.* at 190. Although not relevant to this discussion, the employee also contended her impairments limited her ability to engage in the major life activities of housework, gardening, playing with her children, lifting, and working. *Id.*

50. *Id.* at 192.

51. *Id.* at 196.

52. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (1976)); *see also Sutton*, 527 U.S. at 491 (quoting same definition for the term substantially).

53. *Id.* at 197 (citing *Kirkingburg*, 527 U.S. at 565).

54. *Id.*

55. *Id.*

56. *Id.* at 198.

57. *Id.* at 197.

58. *Id.*

59. *Id.* at 198.

manual tasks that are of central importance to people's daily lives.[60] The Court also stated the impact of the impairment must be permanent or long-term.[61]

The Supreme Court also commanded lower courts to interpret the ADA's terms "strictly to create a demanding standard for qualifying as disabled," and mandated that courts determine the existence of an ADA-qualifying disability in "a case-by-case manner."[62] In making a case-by-case assessment of a person's claim to have an ADA-qualifying disability, the Court made clear "[i]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment."[63] The Court noted an individualized assessment of the effect an impairment has on an individual's major life activity "is particularly necessary when the impairment is one whose symptoms vary widely from person to person."[64]

Given the Supreme Court's pronouncement that the standard to qualify as disabled under the ADA is a demanding one,[65] it should come as no surprise that many individuals asserting ADA claims are unsuccessful because they are unable to prove they have an ADA-qualifying disability.[66]

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60. *Id.* at 202.

61. *Id.* at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2001)).

62. *Id.* (quoting 42 U.S.C. § 12102(2) (defining disability "with respect to an individual")).

63. *Id.*

64. *Id.* at 199.

65. *Id.* at 197.

66. *See, e.g.*, McGeshick v. Principi, 357 F.3d 1146, 1148-51 (10th Cir. 2004) (holding individual's Meniere's disease, tinnitus and vertigo are not ADA-qualifying disabilities); Ristrom v. Asbestos Workers Local 34 Joint Apprenticeship Comm., 370 F.3d 763, 769-72 (8th Cir. 2004) (holding individual's attention deficit disorder and depression are not ADA-qualifying disabilities); Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 821-22 (8th Cir. 2003) (holding individual's epilepsy not an ADA-qualifying disability); Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1130 (10th Cir. 2003) (holding individual's bipolar disorder, Attention Deficit Disorder and hypothyroidism not ADA-qualifying disabilities); Liljedahl v. Ryder Student Transp. Servs., Inc., 341 F.3d 836, 841 (8th Cir. 2003) (holding individual's cancer and lung cancer not qualifying disabilities under ADA-analogous state statute); Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655-57 (5th Cir. 2003) (holding individual's chronic pancreatitis not an ADA-qualifying disability); Whitlock v. Mac-Gray, Inc., 345 F.3d 44, 46 (1st Cir. 2003) (holding individual's Attention Deficit Hyperactivity Disorder not an ADA-qualifying disability); Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 686 (8th Cir. 2003) (holding individual's back impairment not an ADA-qualifying disability); *Mahon v. Crowell*, 295 F.3d 585, 591-92 (6th Cir. 2002) (same); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (holding individual's diabetes not an ADA-qualifying disability).

D. THE FMLA'S FOCUS ON SERIOUS HEALTH CONDITION

Although the Supreme Court has interpreted the ADA's use of the term "disability," the Court has not interpreted the FMLA's use of the term "serious health condition." Because the Court has not interpreted the FMLA's critical term, it has also not restricted the meaning of that term. Unlike the ADA's demanding standard to qualify as having a disability,[67] the FMLA's standard cannot be considered demanding. Thus, many individuals claiming to have FMLA-qualifying serious health conditions are successful in obtaining leave, unlike many individuals attempting to meet the demanding standard to have an ADA-qualifying disability.[68] The FMLA has a relatively straightforward definition of what constitutes a serious health condition: "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[69] Thus, it is quite obvious the FMLA broadly defines what constitutes a serious health condition, requiring an illness, injury, impairment or condition simply to involve inpatient care or continuing treatment by a health care provider. Complying with Congress's mandate to implement the FMLA, the Secretary of Labor issued an extensive regulation further developing the term "serious health condition."[70] Indeed, the Secretary of Labor has issued a lengthy answer to the question of "[w]hat is a 'serious health condition' entitling an employee to FMLA leave?"[71] Although one must still work through the definition of serious health condition to determine whether an employee is entitled to FMLA benefits, the standard is not demanding.

The EEOC has issued a fact sheet to provide technical assistance on common questions about the interaction between the ADA and the FMLA. When asked whether the ADA's definition of disability is the

67. *See Toyota*, 534 U.S. at 197.

68. *See* Miller v. AT&T, 250 F.3d 820 (4th Cir. 2001) (influenza can be an FMLA-qualifying serious health condition); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151 (1st Cir. 1998) (atrial fibrillation); Brock v. United Grinding Tech., Inc., 257 F. Supp. 2d 1089 (S.D. Ohio 2003) (depression); Niimi-Montalbo v. White, 243 F. Supp. 2d 1109 (D. Haw. 2003) (back injury); Swanson v. Senior Res. Connection, 254 F. Supp. 2d 945 (S.D. Ohio 2003) (depression); Corcino v. Banco Popular de Puerto Rico, 200 F. Supp. 2d 507 (D.V.I. 2002) (pharyngitis); Peter v. Lincoln Technical Inst., 255 F. Supp. 2d 417 (E.D. Pa. 2002) (sleep apnea). *But see* Frazier v. IBP, Inc., 200 F.3d 1190 (8th Cir. 2000) (holding an employee's shoulder injury not an FMLA-qualifying serious health condition); Haefling v. UPS, Inc., 169 F.3d 494 (7th Cir. 1999) (neck injury); Joslin v. Rockwell Int'l Corp., 8 F. Supp. 2d 1158 (N.D. Iowa 1998) (adverse reaction to allergy shot); Roberts v. Human Dev. Ass'n, 4 F. Supp. 2d 154 (E.D.N.Y. 1998) (post-menopausal vaginal bleeding).

69. 29 U.S.C. § 2611(11).

70. *See* 29 C.F.R. § 825.114-.115.

71. 29 C.F.R. § 825.114. The Secretary's expanded definition of the FMLA's term "serious health condition" is not complicated, but deserves a careful study.

same as the FMLA's definition of serious health condition, the EEOC stated "[a]n FMLA 'serious health condition' is not necessarily an ADA 'disability.'"[72] The EEOC opined, however, that some serious health conditions under the FMLA, such as most cancers and serious strokes, may qualify as disabilities under the ADA.[73] On the other hand, the EEOC stated other serious health conditions under the FMLA, such as pregnancy, a broken leg or a hernia, may not be ADA-qualifying disabilities, because such conditions may not substantially limit a major life activity.[74]

The EEOC also addressed how the ADA's three-pronged definition of disability interacts with the FMLA's definition of serious health condition. The EEOC noted that, although an individual may have a record of a serious health condition, that circumstance alone would not necessarily require a finding that the individual has a record of an ADA-qualifying disability. The reasoning is simple—under the ADA, an individual has a record of a disability only when the individual has a record of an impairment that substantially limits a major life activity, not whether an individual has a record of a serious health condition.[75]

Finally, the EEOC addressed the ADA's regarded as disabled prong of the disability definition. The EEOC duly noted that, just because an individual has an FMLA-qualifying serious health condition, that does not mean the employer regards the individual as having an ADA-qualifying disability.[76] As discussed above, the Supreme Court has stated an individual is regarded as having a disability when "a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or when "a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."[77] It is important to recognize the FMLA only grants rights when an employee has an FMLA-qualifying serious health condition, so being regarded as having an FMLA-qualifying serious health condition provides no benefits under the FMLA.

While the ADA grants protection to an individual who has a disability, or even a record of a disability or is regarded as having a disability, the FMLA only grants protection to an individual who actually

72. *See* EEOC Guidance, *Facts About the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, Q. 9 at 3 (November 1995), *available at* http://www.eeoc.gov/docs/fmlaada.html.

73. *Id.*

74. *See id.*

75. *See id.*

76. *Id.*

77. *Sutton*, 527 U.S. at 489.

has a serious health condition (or who has a family member with a serious health condition). The FMLA does not provide protection for an individual who is perceived to have a serious health condition. Not surprisingly, the FMLA also does not consider mitigating measures when determining whether an individual has a serious health condition, as does the ADA when determining whether an individual has a disability.

Because the ADA and the FMLA seemingly overlap, as both involve impairments of some sort, it is common for plaintiffs to allege ADA and FMLA violations in the same lawsuit.[78] Notwithstanding any desire to blend an ADA claim with an FMLA claim, one must always separately analyze eligibility for protection under either statute, as each statute establishes different standards and effectuates different national employment policies.[79] By keeping the statutes analytically separate, courts can decide a plaintiff has rights under one statute and not the other.

E. Judicial Interaction Between the ADA and the FMLA

The United States Court of Appeals for the Eighth Circuit has confronted the interaction between the ADA and the FMLA, illuminating how the two employment laws diverge on a single set of facts and underscoring why a separate analytical framework must be applied to the ADA and the FMLA. In *Spangler v. Federal Home Loan Bank of Des Moines*,[80] Theresa Spangler, a bank employee, was diagnosed with dysthymia, a form of depression.[81] In 1993, Spangler took six weeks of leave to treat her depression.[82] In 1997, Spangler took

78. *See, e.g.*, Bones v. Honeywell Int'l, Inc., 366 F.3d 869 (10th Cir. 2004); Brenneman v. MedCentral Health Sys., 366 F.3d 412 (6th Cir. 2004); Buie v. Quad/Graphics, Inc., 366 F.3d 496 (7th Cir. 2004); Rinehimer v. Cemcolift, Inc., 292 F.3d 375 (3d Cir. 2002).

79. Although not implicated by the current discussion of the potential interaction between the ADA and the FMLA given the similar standards enunciated by both statutes, it is worth noting a First Circuit Court of Appeals decision striking down a Department of Labor regulation co-opting an EEOC regulation peripherally discusses the interaction between the ADA and the FMLA. In Navarro v. Pfizer Corp., 261 F.3d 90, 92 (1st Cir. 2001), the First Circuit recognized the Secretary of Labor, when implementing the FMLA, adopted certain definitions the EEOC had issued in implementing the ADA. The First Circuit, while recognizing "the comparative jurisprudence of the ADA and the FMLA," rejected the Labor regulations adopting the EEOC's durational requirements as it applies to the ADA, determining the FMLA does not require such a demanding showing as does the ADA. *Id.* at 104-05 (stating "we think it highly unlikely that, with so much less at stake under the FMLA, Congress would have required FMLA litigants to make the same durational showing as ADA litigants").

80. 278 F.3d 847 (8th Cir. 2002).

81. Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 848 (8th Cir. 2002).

82. *Spangler*, 278 F.3d at 848.

more leave to undergo treatment.[83] At that time, Spangler notified her supervisor she took the leave to treat her depression, and later told other supervisors about her depression.[84] Between 1993 and 1997, Spangler was frequently absent or tardy from work, missing between twelve and thirty days per year.[85] Spangler's excessive tardiness and absenteeism came to a head in 1997, and her performance appraisal specifically noted this problem.[86] In January 1998, Spangler's string of absences prompted a warning and six-month probation, with specific notice that she could not miss more than two workdays or she would face discharge.[87] Spangler missed two days of work during the probationary period, and in the two months after her probation ended, Spangler racked up four more unexcused absences.[88] Spangler was again placed on probation in late August 1998.[89] On September 15, Spangler missed work due to transportation trouble.[90] On September 16, Spangler called the bank and left a message informing her supervisor she would miss work because of "depression again."[91] When Spangler missed work the next day, her supervisor discharged her.[92]

Spangler sued her employer, alleging her discharge violated the ADA and the FMLA.[93] The district court granted summary judgment to Spangler's employer on both claims.[94] Analytically separating the ADA and the FMLA claims, the Eighth Circuit first addressed Spangler's ADA claim.[95] The court began its analysis by stating its oft-repeated principle that regular attendance is an essential job function.[96] After determining Spangler was unable to perform her essential job functions and thus not entitled to ADA protection, the court affirmed the district court's grant of summary judgment to the bank on the ADA claim.[97]

After disposing of Spangler's ADA claim, the court focused on Spangler's FMLA claim.[98] The court immediately recognized that

83. *Id.*
84. *Id.*
85. *Id.* at 849.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 849-50.
92. *Id.* at 850.
93. *Id.* at 848.
94. *Id.*
95. *Id.* at 850.
96. *Id.* (citing Pickens v. Soo Line R.R. Co., 264 F.3d 773, 777 (8th Cir. 2001)).
97. *Id.*
98. *Id.* at 851-53.

"[t]he rights Congress created under the FMLA are fundamentally different than those granted under the ADA."[99] While noting the ADA provides no protection to an employee who is unable to perform her job's essential functions, the court contrasted that with the FMLA's design to protect an employee who is unable to perform her job's functions from losing her job while taking FMLA-qualifying leave.[100] The court recognized the FMLA's leave period provides an employee with the opportunity to treat a condition while unable to perform her job.[101] Thus, the court announced that Spangler's FMLA claim was not automatically barred just because Spangler's ADA claim was defeated by her inability to perform the essential functions of her job.[102] Because the bank knew about Spangler's depression, her previous leaves of absence to treat her depression, and that she said she needed time off for depression, the court held a fact issue remained on Spangler's FMLA claim such that summary judgment was inappropriate.[103]

A federal district court decision also contains a good discussion of the interaction between the ADA and the FMLA. In *Swanson v. Senior Resource Connection*,[104] Benita Swanson missed numerous workdays, which resulted in her supervisor counseling her to improve her attendance.[105] A little over a year after her counseling, Swanson experienced "fatigue, stress, weight loss, lack of motivation and sleeping disruptions, all of which had an impact on her work."[106] At that time, Swanson received a written reprimand for her excessive absenteeism and tardiness.[107] Three months later, Swanson's supervisor issued another written reprimand for being tardy or absent twenty-six times, informing Swanson she would be discharged for the next infraction.[108] The day after receiving the written reprimand, Swanson was diagnosed with depression.[109] Swanson's doctor opined that the "depression substantially limited [Swanson]'s ability to sleep and work, but that with treatment, [Swanson's] difficulties could be alleviated."[110] Swanson's doctor then directed her to take two weeks of leave from work.[111] The day after being diagnosed with depression,

99. *Id.* at 851.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 853.
104. 254 F. Supp. 2d 945 (S.D. Ohio 2003).
105. Swanson v. Senior Res. Connection, 254 F. Supp. 2d 945, 948 (S.D. Ohio 2003).
106. *Swanson*, 254 F. Supp. 2d at 948.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

Swanson went to work and requested two weeks of leave as directed by her doctor.[112] Swanson's employer granted her two weeks of FMLA leave.[113] Swanson received a letter four days later informing her she had been discharged.[114] Swanson sued her employer for violating the FMLA and the ADA.[115]

The United States District Court for the Southern District of Ohio first discussed the viability of Swanson's FMLA claim, determining Swanson had established a submissible case of FMLA discrimination.[116] The court next determined Swanson's request for FMLA leave was also a requested accommodation for her disability.[117] Once the court determined factual issues existed on the FMLA leave issue, the court then decided that it logically followed "that a genuine issue of material fact also exists when the question is rephrased in the disability discrimination context to ask whether Swanson's employer failed to accommodate a reasonable request for accommodation."[118] The court's discussion of how the FMLA implicates the ADA is most pertinent to the discussion here because it provides an instructive example of how the FMLA implicates the ADA.[119]

The court furnished a helpful discussion of the interaction between the ADA and the FMLA. The court "clarified that Swanson's disability discrimination claim is not at odds with her FMLA claim."[120] Although Swanson's employer attempted "to play Swanson's evidence relating to her respective claims off on each other," the court was not impressed.[121] The court recognized an employee alleging disability discrimination must show her ability to perform her job's essential functions with or without reasonable accommodation.[122] The court then recognized that "[h]onoring an employee's two-week FMLA leave request, where her physician has recommended the leave for the beneficial effect it might have on the employee's long-term ability to function properly at work, can be a reasonable accom-

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 947.
116. *Id.* at 950-58.
117. *Id.* at 961.
118. *Id.*
119. Although Swanson's disability claim fell under Ohio law, rather than the ADA, the case still is insightful because Ohio disability law tracks the ADA. *See id.* at 958-59. The discussion will specifically focus on the court's handling of Swanson's claim that her employer violated disability law by failing to accommodate her disability through leave, which implicated the FMLA.
120. *Swanson*, 254 F. Supp. 2d at 961.
121. *Id.*
122. *Id.*

modation itself (not to mention a duty imposed by Congress)."[123] The court noted, "[a]lthough Swanson must demonstrate for purposes of her FMLA claim that she needed two week's leave because she could not, during that time, perform the functions of her job, there is no reason why she cannot also demonstrate that she would have been able to perform the essential functions of her job upon her return from same."[124] Because the record allowed an inference that Swanson could perform the essential functions of her job if she had been given two weeks leave, the court held Swanson's disability discrimination claim for failure to accommodate was for the jury once her employer "cut short her leave under the FMLA."[125]

Although the ADA and the FMLA use different language—disability versus serious health condition—for eligibility for coverage, and serve different purposes—pro-work versus pro-leave—the ADA and the FMLA significantly interact. Because the ADA and the FMLA are routinely implicated by a single set of circumstances, the initial focus must critically ask whether an individual has an ADA-qualifying disability and/or an FMLA-qualifying serious health condition. Once that critical determination is made, a substantive discussion of what rights the individual enjoys is merited.

The bottom line is an individual's eligibility for ADA protection must be analyzed separately according to the ADA's standards without interference or seepage from the FMLA. Of course, the opposite is equally true. Because both the ADA and the FMLA represent different federal employment policies, they must stand on their own and should be analyzed under their unique analytical frameworks to vindicate their underlying purposes. Blending the ADA and the FMLA for ease will not result in either statute reaching its full potential.

F. Conclusion

Because both the ADA and the FMLA involve physical or mental impairments, the two statutes are often implicated by a single set of circumstances. However, neither the ADA nor the FMLA benefit from a combined analytical framework to determine eligibility for protection under either statute. The ADA, a statute designed to open the job market for individuals with disabilities, focuses on whether an individual has a disability. The FMLA, designed to allow individuals with certain physical conditions to take unpaid leave without fear of discharge, focuses on whether an individual has a serious health condition. The only proper way to determine eligibility under the ADA and

123. *Id.*
124. *Id.* at 961-62.
125. *Id.* at 962.

the FMLA is to faithfully follow the statutory and regulatory definitions for both the ADA and the FMLA, and to recognize the statutes use different language and serve different purposes. By adhering to this command, federal employment policy can be applied consistently and fairly to further Congressional intent.

II. WORKPLACE SAFETY MEETS WORKERS WITH DISABILITIES: THE INTERACTION BETWEEN THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 AND THE ADA

A. INTRODUCTION

The ADA's interaction with the Occupational Safety and Health Act of 1970 ("OSHA") may also pose complex issues for courts, employers, employees and attorneys. Whenever an individual with a disability poses a threat to the health and safety of herself or others in the workplace, both the ADA and OSHA must be considered. For the most part, when the threat of harm is substantial and real, the ADA's anti-discrimination protections for individuals with disabilities must yield to workplace safety. However, the ADA does not yield lightly. Only a critical and unflinching application of workplace safety concerns will trump the ADA's prohibition against discrimination based on disabilities.

B. OSHA CONFRONTS THE ADA

1. OSHA Mandates Workplace Safety

By enacting a comprehensive statute such as OSHA, Congress announced a national policy guaranteeing workplace safety.[126] When studying workplace safety, Congress found "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."[127] Congress declared a national policy "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[128] To meet this policy, Congress sought to encourage "employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing pro-

126. *See* 29 U.S.C. §§ 651-678.
127. 29 U.S.C. § 651(a).
128. 29 U.S.C. § 651(b).

grams for providing safe and healthful working conditions."[129] Additionally, Congress sought to provide "medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience"[130]

OSHA's General Duty Clause requires every employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[131] Employees do not escape OSHA's requirements either, as they are also required to follow OSHA's mandate: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."[132]

Employers violate OSHA at their own peril; penalties can be steep.[133] For example, an employer who willfully violates OSHA is subject to a civil penalty between $5,000 and $70,000 per violation.[134] A willful violation causing an employee's death subjects an employer to a $10,000 fine and six months imprisonment.[135] Finally, an employer who knowingly makes false statements or representations about its OSHA compliance is subject to a $10,000 fine and six months imprisonment.[136] A serious violation exists "if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."[137]

If an individual, because of her disability, poses a threat to the health and safety of others in the workplace, does an employer violate OSHA by allowing the individual to work? If an employer refuses to allow an individual with a disability to work because of the threat to others in the workplace, does the employer violate the ADA? This veritable Hobson's choice[138] places an employer in the unenviable position of potentially violating one federal labor law in order to comply

129. 29 U.S.C. § 651(b)(1).
130. 29 U.S.C. § 651(b)(7).
131. 29 U.S.C. § 654(a)(1).
132. 29 U.S.C. § 654(b).
133. *See* 29 U.S.C. § 666.
134. 29 U.S.C. § 666(a); *see also* §§ 666(b) (civil penalty for serious violation), 666(c) (civil penalty for violation that is not serious), and 666(d) (civil penalty for failure to correct a violation).
135. 29 U.S.C. § 666(e).
136. 29 U.S.C. § 666(g).
137. 29 U.S.C. § 666(k).
138. A Hobson's choice involves "the necessity of accepting one of two or more equally objectionable things." WEBSTER'S THIRD NEW INT'L DICTIONARY 1076 (1993).

with another. Fortunately, the two statutes can be reconciled to promote workplace safety without unduly infringing on the right to work of individuals with disabilities.

2. *EEOC's Conflict Provision*

Conflicts in the law are inevitable. Though confronted with an apparent conflict between OSHA and the ADA, the conflict resolution principles contained in the ADA's implementing regulations serve as a guide to navigating the apparent conflict. Congress specifically authorized the EEOC to interpret the ADA,[139] and the EEOC has complied with this Congressional charge by issuing an exhaustive set of regulations.[140] Realizing the ADA may conflict with other federal laws, the EEOC promulgated 29 C.F.R. § 1630.15(e), which specifically provides a defense to an ADA discrimination charge whenever "a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required."[141] When an individual with a disability poses a threat to the health or safety of others in the workplace, can an employer rely on section 1630.15(e) if the employer refuses to allow the individual to work? Unfortunately, courts have rarely confronted the interaction between section 1630.15(e) and OSHA's General Duty Clause.

3. *Isolated Cases involving the ADA's Conflict with OSHA*

Although interpretive caselaw does not provide much assistance in solving the apparent conflict between the ADA and OSHA, two courts have discussed the interaction between the two federal workplace statutes. In *EEOC v. Murray, Inc.*,[142] Raymond Waits, an insulin-dependent diabetic, worked as a forklift operator for his employer, Murray, Inc.[143] After Waits had worked for Murray for about twenty-four years, Murray implemented a medical screening program for forklift operators, which automatically excluded an employee from operating a forklift if the employee had been diagnosed with insulin-dependent diabetes.[144] Once Waits disclosed he was an insulin-dependent diabetic, Murray removed Waits from his forklift position

139. 42 U.S.C. § 12116.
140. 29 C.F.R. § 1630.
141. 29 C.F.R. § 1630.15(e).
142. 175 F. Supp. 2d 1053 (M.D. Tenn. 2001).
143. EEOC v. Murray, Inc., 175 F. Supp. 2d 1053, 1055 (M.D. Tenn. 2001).
144. *Murray*, 175 F. Supp. 2d at 1055-56 (noting the medical screening program also excluded individuals with other impairments such as hearing problems, epilepsy and heart problems).

and eventually discharged him.[145] Murray did not consider—and would not accept—any further medical information or examinations to determine the effect the diabetes had on Waits's ability to safely operate a forklift.[146] The EEOC sued Murray for violating the ADA by discharging Waits because of his diabetes.[147]

Murray asserted OSHA's General Duty Clause as a defense to disability discrimination.[148] Murray contended that, because employees with insulin-dependent diabetes created a hazard likely to kill or seriously harm other employees, OSHA required Murray to eradicate this recognized hazard.[149] The EEOC disagreed, arguing OSHA did not require excluding all individuals with certain impairments from operating forklifts.[150] The EEOC recognized some individuals with disabilities could be excluded from the workplace.[151] For example, the EEOC acknowledged Murray could preclude from the workplace a diabetic with frequent blackouts due to uncontrolled blood sugar because of that individual's specific risk to workplace safety.[152] However, the EEOC contended the ADA prevents an employer from simply relying on generalizations when fulfilling OSHA's requirements.[153] Thus, the EEOC argued the ADA required Murray to conduct individualized assessments of specific risks to determine who posed a threat by operating a forklift.[154]

The United States District Court for the Middle District of Tennessee agreed with the EEOC's "well-taken" argument.[155] The court held a per se exclusion of all individuals with certain medical conditions could only be authorized when an employer shows "the condition necessarily results in a specific limitation that would preclude all individuals with the condition from being able to operate a forklift safely."[156] According to the court, if an employer cannot make such a showing, OSHA's General Duty Clause does not require the employer "to exclude these individuals from operating forklifts and fails as a defense to a claim of disability discrimination."[157] Rejecting Murray's

145. *Id.* at 1056.
146. *Id.*
147. *Id.*
148. *Id.* at 1066 (asserting 29 C.F.R. § 1630.15(e) (EEOC's conflict provision) and 29 U.S.C. § 654(a)(1) (OSHA's General Duty Clause)).
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1066-67.
157. *Id.* at 1067.

asserted OSHA defense, the court denied Murray's motion for summary judgment.[158]

The United States District Court for the Southern District of Texas has also addressed OSHA's interaction with the ADA, but in backhanded terms. In *Rayha v. United Parcel Service, Inc.*,[159] Edward Rayha had worked for United Parcel Service ("UPS") for ten years when the Occupational Safety and Health Administration ("Administration") required UPS to formalize its process for disposing of packages leaking hazardous substances.[160] To comply with OSHA, UPS required all employees to be certified in wearing respiratory equipment.[161] Rayha's limited respiratory capacity rendered him unable to pass his physical examination because he could not wear the protective gear safely and without threat of physical injury.[162] In response, UPS transferred Rayha from his job handling hazardous packages to another position without the respiratory requirement.[163] Claiming UPS violated the ADA, Rayha sued UPS. The district court found Rayha was not a qualified individual with a disability, and, even if he were, UPS made the appropriate accommodations.[164] However, relevant to this discussion, the court held "any attempt on the part of UPS to permit Rayha to perform [his package] clerk duties without proper certification would be in violation [of] OSHA regulations."[165] Unfortunately, these cases do not furnish clear guidance on how and when to apply the EEOC's conflict regulation to situations involving workplace safety.

4. *Federal Law May Require Employers to Exclude Certain Individuals*

When federal law requires specific action by employers, the EEOC's conflict regulation routinely protects employers from claims of disability discrimination in violation of the ADA. For example, the Department of Transportation's motor carrier safety regulations require commercial drivers to have medical certification that they are physically qualified to drive.[166] Courts have regularly held that section 1630.15(e) provides a defense to an ADA charge to employers who refuse to employ ADA-qualifying individuals who do not obtain the

158. *Id.*
159. 940 F. Supp. 1066 (S.D. Tex. 1996).
160. Rayha v. United Parcel Serv., 940 F. Supp. 1066, 1067 (S.D. Tex. 1996).
161. *Rayha*, 940 F. Supp. at 1067.
162. *Id.*
163. *Id.*
164. *Id.* at 1068-70.
165. *Id.* at 1069.
166. *See, e.g.*, 49 C.F.R. §§ 391.11(a), 391.41(a).

required medical certification.[167] Thus, when federal law requires employers to exclude certain individuals, courts will not hold employers liable for disability discrimination under the ADA.

Nevertheless, federal law seldom requires an employer to exclude a class of individuals from the workplace. Even when a federal law does not specifically exclude workers from the workplace, employers may still confront potential unsafe workers with disabilities. In these situations, an employer must determine what to do when an individual with a disability poses a threat to the health or safety of herself or others in the workplace. The ADA has provided guidance on this issue—at least to some extent.

C. Direct Threat Defense[168]

1. The ADA's Direct Threat Defense

In addition to the EEOC's conflict regulation, the ADA itself explicitly authorizes discrimination against individuals with disabilities in limited circumstances: "[i]t may be a defense to a charge of discrimination under this Act 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 shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."[169] In addition to that general defense, the ADA specifically provides for a defense to employment discrimination based on qualification standards: "The 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."[170] This provision sets forth the ADA's direct threat defense. The ADA defines "direct threat" as "a *significant risk to the health or safety of others* that cannot be eliminated by reasonable accommodation."[171]

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167. *See* Bay v. Cassens Transport Co., 212 F.3d 969, 974 (7th Cir. 2000); Prado v. Continental Air Transp. Co., 982 F. Supp. 1304, 1307 (N.D. Ill. 1997); *see also* Thoms v. ABF Freight Sys., Inc., 31 F. Supp. 2d 1119, 1127 (E.D. Wis. 1998) (stating "[t]he ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity") (quoting EEOC Technical Assistance Manual at IV-16).

168. A portion of this section was published for the benefit of Nebraska attorneys in the September 2003 edition of The Nebraska Lawyer, with the understanding that it was part of a larger paper to be published at a later date in another journal or law review. *See* Tory L. Lucas, *So What If I'm Gonna Hurt Myself: The ADA's Direct Threat Defense*, The Nebraska Lawyer (Sept. 2003).

169. 42 U.S.C. § 12113(a).

170. 42 U.S.C. § 12113(b) (emphasis added).

171. 42 U.S.C. § 12111(3) (emphasis added).

Clearly, an employer may assert this defense when an individual with a disability poses a direct threat to the health or safety of other individuals in the workplace. In these circumstances, an employer would not need OSHA's protection when deciding how to respond to a direct threat to the health or safety of others posed by an individual with a disability. Instead, if the employer satisfied the requirements of the direct threat defense, the employer will not be liable for discriminating against an individual with a disability.

However, nothing in the ADA's direct threat defense authorizes an employer to discriminate against an individual with a disability when that individual poses a direct threat to her own health or safety, as opposed to the health or safety of other individuals in the workplace. Must an employer turn to OSHA to decide whether to protect an employee with a disability from herself? Although this is an interesting question, Congress did not wholly leave the issue to courts to reconcile OSHA's General Duty Clause with the ADA's prohibition against discrimination against individuals with disabilities. The ADA specifically authorized the EEOC to issue and enforce regulations implementing the ADA.[172] The EEOC, complying with this Congressional charge, promulgated regulations adding the dangers individuals with disabilities pose to themselves.

2. *The EEOC's Direct Threat Defense*

Under express Congressional authority, the EEOC has interpreted the ADA in an exhaustive set of regulations.[173] The EEOC has specifically interpreted the direct threat defense and expanded the defense under the EEOC's regulations.[174] While the ADA limits the direct threat defense to the health or safety of others in the workplace,[175] the EEOC extended the defense to include those circumstances where an individual with a disability poses a direct threat to the health or safety of herself or others in the workplace.[176]

The EEOC follows the ADA's general defense to discrimination charges whenever qualification standards have "been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation."[177] However, when it comes to the direct threat defense, the EEOC charts a different course: "The term 'qualification standard' may include a requirement that an individual shall not pose a *direct threat to the*

172. 42 U.S.C. §§ 12116, 12117.
173. *See* 42 U.S.C. § 12116; 29 C.F.R. § 1630.
174. 29 C.F.R. § 1630.15(b)(2).
175. 42 U.S.C. § 12113(b).
176. 29 C.F.R. § 1630.15(b)(2).
177. 29 C.F.R. § 1630.15(b)(1).

health or safety of the individual or others in the workplace."[178] As can readily be seen, the EEOC extends the direct threat defense to include direct threats to the individual's own health or safety in addition to others in the workplace. The EEOC defines direct threat as "a *significant risk of substantial harm to the health or safety of the individual or others* that cannot be eliminated or reduced by *reasonable accommodation*."[179] The EEOC requires any direct threat determination "be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job" and "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[180]

In the summer of 2002, the United States Supreme Court, in *Chevron U.S.A. Inc. v. Echazabal*,[181] held the EEOC properly interpreted the ADA by expanding the direct threat defense to include threats to self.[182] In doing so, the Court recognized the interaction between OSHA and the ADA.[183] Before the Supreme Court decided the EEOC properly expanded the ADA's direct threat defense, some courts followed the EEOC regulations, allowing employers to discriminate against individuals with disabilities who posed a direct threat to their own health or safety, regardless of the threat posed to other individuals in the workplace.[184] Other courts refused to ordain the EEOC's expansion of the direct threat defense because it contradicted the ADA's plain language and legislative history.[185] While the courts rejecting the EEOC's expansion of the direct threat defense provided compelling reasons for doing so, the courts following the EEOC's direct threat defense provided little analysis. However, the courts discussing the ADA's direct threat defense rarely mentioned how the direct threat defense interacted with OSHA.

178. 29 C.F.R. § 1630.15(b)(2) (emphasis added).
179. 29 C.F.R. § 1630.2(r) (emphasis added).
180. 29 C.F.R. § 1630.2(r).
181. 536 U.S. 73 (2002).
182. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002).
183. *Echazabal*, 536 U.S. at 85.
184. *See, e.g.*, Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1290 (10th Cir. 2000); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996).
185. *See, e.g.*, Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1072 (9th Cir. 2000), *rev'd*, 536 U.S. 73 (2002); Kalskett v. Larson Mfg. Co., 146 F. Supp. 2d 961, 985 (N.D. Iowa 2001); Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111 (N.D. Ill. 1996).

D. LOWER COURTS TACKLE DIRECT THREAT DEFENSE

1. Some Courts Defer to the EEOC's Direct Threat Defense

Some courts blindly followed the EEOC's expansion of the ADA's direct threat defense. The United States Court of Appeals for the Eleventh Circuit cavalierly addressed the direct threat defense in *Moses v. American Nonwovens, Inc.*[186] In *Moses*, an employer fired an employee because of the employee's epilepsy.[187] The employee stipulated that, had he continued working, he would have had seizures on the job.[188] His assigned jobs included sitting on a platform above fast-moving rollers, sitting underneath a conveyor belt, and working next to exposed machinery with temperatures of 350 degrees.[189] The court recognized each of the employee's "assigned tasks presented grave risks to an employee with a seizure disorder."[190] After his employer fired him for posing a direct threat to his own safety, the employee sued under the ADA.[191] The employer asserted the direct threat defense and the district court granted summary judgment in the employer's favor.[192] The Eleventh Circuit affirmed, stating an "employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety."[193] In reaching this conclusion, the court simply cited both the ADA's and the EEOC's direct threat provisions.[194] Two years later, the Eleventh Circuit again suggested the direct threat defense applies to threats to one's own health or safety.[195]

The United States Court of Appeals for the Tenth Circuit has also confronted the ADA's direct threat defense. Without providing helpful analysis, the Tenth Circuit, in *Borgialli v. Thunder Basin Coal Co.*,[196] stated the ADA provides "a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself or others."[197] Regardless of the language used by the Tenth Circuit and the Eleventh Circuit, neither court discussed the disparity between the ADA's plain language and the EEOC's addition of the threat-to-self defense. These courts also failed to discuss whether OSHA applies to a workplace situation in which an individual with a disability

186. 97 F.3d 446 (11th Cir. 1996).
187. Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996).
188. *Moses*, 97 F.3d at 447.
189. *Id.* at 447-48.
190. *Id.* at 447.
191. *Id.*
192. *Id.*
193. *Id.* (quoting 42 U.S.C. § 12113(b)).
194. *Id.* (citing 42 U.S.C. § 12113(a), (b); 29 C.F.R. § 1630.2(r)).
195. *See* LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998).
196. 235 F.3d 1284 (10th Cir. 2000).
197. Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1290 (10th Cir. 2000).

poses a direct threat to her own health and safety. As seen below, courts unwilling to yield to the EEOC had conducted the only reasoned analysis of the direct threat defense.

2. *The Ninth Circuit Rejects EEOC's Expanded Direct Threat Defense*

In *Echazabal v. Chevron USA, Inc.*,[198] the Ninth Circuit Court of Appeals took direct aim at the EEOC's expansion of the direct threat defense.[199] In *Chevron*, the court asked "whether the 'direct threat' defense available to employers under the [ADA] applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace."[200] Noting this was a question of first impression for the Ninth Circuit, the court observed the issue had received little treatment in other circuits, and, in the circuits that had addressed the issue, none provided useful analysis.[201] Therefore, the court began an exhaustive analysis of the threat-to-self defense.

a. The Majority Opinion

Quoting the ADA, the court aptly concluded, "the language of the direct threat defense plainly does not include threats to the disabled individual himself."[202] Based on the plain language of the ADA, the court stated it could have held, without further analysis, that the ADA does not allow an employer to use the direct threat defense when the employee poses a threat to his own health or safety.[203] Notwithstanding, the court analyzed the ADA's legislative history.[204]

Noting that "direct threat" is used hundreds of times in the ADA's legislative history, the court observed that nowhere is the direct threat defense accompanied by a reference to a threat to the employee himself.[205] The court explained that nearly every time direct threat is mentioned it is joined by a reference to a threat to other individuals.[206] The Ninth Circuit then quoted the ADA's co-sponsor, Senator

198. 226 F.3d 1063 (9th Cir. 2000), *rev'd*, 536 U.S. 73 (2002).
199. As demonstrated in Section II(E), *infra*, the Supreme Court later took direct aim at the Ninth Circuit's decision.
200. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1064 (9th Cir. 2000) *rev'd*, 536 U.S. 73 (2002).
201. *Id.* at 1066.
202. *Id.* at 1067.
203. *Id.*
204. *Id.* at 1067-69.
205. *Id.* at 1067.
206. *Id.*; *see also* Kalskett v. Larson Mfg. Co., 146 F. Supp. 2d 961, 984-85 (N.D. Iowa 2001) (agreeing with Ninth Circuit's *Echazabal* opinion that legislative history supports plain meaning that the direct threat defense does not include threats to self);

Edward Kennedy, who pronounced "[i]t is important, however, that the ADA specifically refers to the health and safety threat to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health."[207] The court also observed Congress believed "overprotective rules and policies" are forms of discrimination confronting individuals with disabilities,[208] and recognized the Supreme Court has generally "interpreted federal employment discrimination statutes to prohibit paternalistic employment policies."[209]

After concluding the ADA's plain language and legislative history rejected the EEOC's expansion of the direct threat defense, the court squarely addressed the employer's arguments.[210] First, the employer argued the court should defer to the EEOC's contrary interpretation of the ADA.[211] Dismissing this argument, the court rejected the EEOC's interpretation because it plainly contradicts Congress's clear intent: "the language of the direct threat defense plainly expresses Congress's intent to include within the scope of § 12113 defense only threats to other individuals in the workplace."[212] The employer's second argument was Congress's clear intent should be ignored "because forcing employers to hire individuals who pose a risk to their own health or safety would expose employers to tort liability."[213] Referring to dictum from the Supreme Court in *International Union, United Auto, Aerospace, & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*,[214] the Ninth Circuit rejected this argument because "the Supreme Court strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law."[215]

The court then discussed the employer's claim that the individual with a disability posing a direct threat to his own safety is not a qualified individual with a disability because he is not otherwise qualified

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Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1112 (N.D. Ill. 1996) (revealing that "the House Judiciary Report mentions threat or risk 'to other individuals' or 'to others' nine times without once mentioning threat or risk to the disabled person himself" and stating "the legislative history provides little support for the EEOC's view that a 'direct threat' includes a threat to the plaintiff himself").

207. *Echazabal*, 226 F.3d at 1067-68.

208. *Id.* at 1068 (quoting 42 U.S.C. § 12101(a)(5)).

209. *Id.* (citing Dothard v. Rawlinson, 433 U.S. 321 (1977); UAW v. Johnson Controls, 499 U.S. 187 (1991)).

210. *Id.* at 1069-70.

211. *Id.* at 1069.

212. *Id.*

213. *Id.* at 1069-70.

214. 499 U.S. 187 (1991).

215. *Echazabal*, 226 F.3d at 1070.

to perform the essential job functions.[216] The court summarily rejected this contention because the employer's "reading of 'essential functions' would, by definitional slight-of-hand, circumvent Congress's decision to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work."[217] Although the court stated it would, in most circumstances, defer to an employer's decision as to what constitutes an essential job function, it nevertheless rejected the employer's decision in the instant case, holding "the risk that [the employee]'s employment might pose to his own health does not affect the question whether he is a 'qualified individual with a disability.'"[218] The court then summed up its analysis and holding:

> [W]e conclude that the ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake.[219]

b. The Vociferous Dissent

However, the three-judge panel was not unanimous, as Judge Stephen S. Trott wrote a scathing dissent.[220] The dissent contended that an employee who poses a direct threat to his own safety is not otherwise qualified under the ADA: "I do not understand how we can claim [an employee who poses a threat to his own safety] can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizarre."[221]

The dissent noted both state and federal statutes overflow with laws designed to protect workers from harm.[222] Judge Trott recognized America has readily "rejected the idea that workers toil at their own peril in the workplace."[223] Citing California and Arizona laws

216. *Id.*
217. *Id.* at 1071.
218. *Id.* at 1072.
219. *Id.*
220. *Id.* at 1073-75 (Trott, J., dissenting).
221. *Id.* at 1073-74 (Trott, J., dissenting).
222. *Id.* at 1074 (Trott, J., dissenting).
223. *Id.* (Trott, J., dissenting).

where "it is a crime knowingly to subject workers to life-endangering conditions," the dissent maintained that the court, in effect, repealed those laws with its ruling.[224]

The dissent also observed the potential interaction between OSHA and the ADA when confronted with an individual with a disability who poses a direct threat to his own safety. Stating his concern for workplace safety, Judge Trott made the following impassioned plea: "[s]o much for OSHA. Now, our laws give *less* protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards. Precisely the workers who need protection can sue because they receive what they need."[225] In addition to concluding the employee was not otherwise qualified, the dissent stated "the EEOC has rationally and humanely spoken" on the direct threat defense and the court should have deferred to the EEOC's interpretation.[226] Therefore, the dissent would have blessed the EEOC's direct threat defense.

Gaining momentum in its perspicacious review of the majority opinion, the dissent decried:

> [T]he majority's holding leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper. The possible examples of this Pickwickian ruling are endless. I doubt that Congress intended such a result when it enacted laws to protect persons with disabilities.[227]

Finally, the dissent in *Echazabal* would have allowed the employer to assert undue hardship as an affirmative defense to the discrimination charge: "I believe it would be an undue hardship to require an employer to place an employee in a life-threatening situation. Such a rule would require employers knowingly to endanger workers. The legal peril involved is obvious, and a simple human to human matter, such a moral burden is unconscionable."[228] In the final analysis, the dissent gleefully acknowledged a conflict among the

224. *Id.* (Trott, J., dissenting).
225. *Id.* (Trott, J., dissenting).
226. *Id.* (Trott, J., dissenting).
227. *Id.* In a similar vein, a legal commentator criticized the Ninth Circuit's *Echazabal* opinion for failing to understand the gravity of the safety issues involved: "In its attempt to rid the workplace of paternalism, the court turned its back on the state and federal safety laws that forbid employers from knowingly subjecting workers to life-endangering conditions. As a result, employers now have an ugly choice to make: risk an employee's life or risk a discrimination suit under the ADA." Deborah Leigh Bender, *Notes & Comments:* Echazabal v. Chevron*: A Direct Threat to Employers in the Ninth Circuit*, 76 WASH. L. REV. 859, 891 (2001).
228. *Echazabal*, 226 F.3d at 1074 (Trott, J., dissenting).

circuits: "[f]inally, and fortunately, we have created a conflict with the Eleventh Circuit . . . . I say 'fortunately' because this conflict will compel the Supreme Court—or Congress—to resolve this dispute—unless we do so ourselves by way of en banc review."[229] Judge Trott's prophesy was realized when the Supreme Court resolved the circuit split by authorizing the EEOC's expansion of the direct threat defense. An examination of the Supreme Court's decision is contained in section II.(E).

3. Courts Adopting a Hybrid Analysis

Analyzing the direct threat defense as the Ninth Circuit did in *Echazabal*, some courts have agreed the defense does not apply to threats to one's own health or safety. These courts nevertheless allowed employers to claim an employee is not protected under the ADA as a qualified individual with a disability when he poses a direct threat to his own health or safety. Unfortunately, these courts did not discuss OSHA's impact on the EEOC's direct threat defense.

In one of the first cases to address the direct threat issue, an Illinois federal trial court concluded, in *Kohnke v. Delta Airlines, Inc.*,[230] "that any 'direct threat' jury instruction must refer to a direct threat to others, not a direct threat to [the disabled employee] himself."[231] With a precise analysis, the court quickly dismissed, as untenable, the EEOC's expansion of the direct threat defense to include threats to self.[232] Reviewing the ADA's plain meaning, legislative history, and caselaw (which was nonexistent at the time), the court determined the direct threat defense only applies to threats to others in the workplace.[233] Notwithstanding its refusal to concede the existence of a threat-to-self defense, the court still allowed the employer to raise the employee's safety in another context. Specifically, the court held an employer may be able to assert the affirmative defense that a qualification standard excluding an employee with a disability who poses a direct threat to his own safety if the standard is job related and consistent with business necessity.[234] The court also suggested an employee still must prove he is a qualified individual with a disability, which he may not be able to do if he poses a direct threat to his own safety.[235]

A federal district court in Iowa also provided a compelling discussion of the direct threat defense, aligning itself with *Kohnke*. In *Kal-*

229. *Id.* at 1074-75 (Trott, J., dissenting) (citation omitted).
230. 932 F. Supp. 1110 (N.D. Ill. 1996).
231. Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111 (N.D. Ill. 1996).
232. *Kohnke*, 932 F. Supp. at 1111.
233. *Id.* at 1113.
234. *Id.* at 1113 (citing 42 U.S.C. §§ 12111(3), 12112(b)(6), 12113(a), (b)).
235. *Id.* (citing 42 U.S.C. §§ 12111(8), 12112(a)).

skett v. Larson Manufacturing Co.,[236] the court rejected the argument that an employer can use the direct threat defense against an individual with a disability when the individual poses a direct threat to the individual's own health or safety.[237] Specifically, the court concluded, "the defense of direct threat to oneself is not a defense authorized by the plain language of the statute authorizing the defense of direct threat to others."[238] Instead of analyzing the case under the direct threat defense, the court analyzed the threat to the individual's own health and safety under the qualification element of the individual's prima facie ADA claim.[239] Thus, the court held an individual with a disability "has the burden to demonstrate whether she is qualified to perform the essential functions of [her] job without risk of injury to herself. In other words, if [the individual] cannot perform the essential functions of a job without risk of injury to herself, and that risk of injury cannot be prevented by a reasonable accommodation, [the individual] cannot perform the essential functions of the job as required by the qualification element."[240]

With some courts accepting the EEOC's direct threat defense, the Ninth Circuit rejecting it, and other courts transporting the direct threat defense to the plaintiff's prima facie case, employees with disabilities were subject to different standards depending on where they worked. Additionally, the interaction between OSHA and the ADA's direct threat defense barely had been raised or analyzed. Fortunately, the Supreme Court entered the fray and ended the confusion, recognizing the EEOC's expansion of the ADA's direct threat defense reasonably harmonized OSHA and the ADA.

E. The Supreme Court Blesses EEOC's Direct Threat Defense, Satisfies OSHA's Demands

Rejecting the Ninth Circuit's ruling with respect to the EEOC's direct threat defense, the United States Supreme Court held the ADA permits the EEOC's regulation.[241] In *Echazabal*, the Court scrupu-

236. 146 F. Supp. 2d 961 (N.D. Iowa 2001).
237. Kalskett v. Larson Mfg. Co., 146 F. Supp. 2d 961, 985 (N.D. Iowa 2001).
238. *Id.* (citing 42 U.S.C. § 12113(b)).
239. *Id.* at 985-86.
240. *Id.* at 986; *see* Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999) (holding direct threat defense arises only after an individual with a disability proves he is qualified to do his job); *see also* Rizzo v. Children's World Learning Ctrs., Inc., 213 F.2d 209, 212 (5th Cir. 2000) (stating that the "question of who bears the burden of establishing that an individual's disability poses a direct health or safety threat to the disabled employee or others is not a simple one"); Daughtery v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995) (holding "that, as a matter of law, a driver with insulin diabetes presents a genuine substantial risk that he could injure himself or others").
241. *Echazabal*, 536 U.S. at 78.

lously explained its reasoning for deferring to the EEOC's interpretation of the direct threat defense.[242] The Court also harmonized OSHA and the ADA.[243]

The Court recognized the ADA "creates an affirmative defense for action under a qualification standard 'shown to be job-related [and] . . . consistent with business necessity.'"[244] Citing the ADA's direct threat defense as "[s]uch a standard," the Court immediately admitted the EEOC's direct threat regulation "carries the defense one step further."[245]

Echazabal contended the ADA's direct threat defense constituted a textual bar to the EEOC's expansive regulation, leaving no gaps for the EEOC to fill.[246] Echazabal recognized the "job-related" and "business necessity" defense would have authorized a threat-to-self defense, but argued the addition of the specific threat-to-others defense eliminated the possibility of a threat-to-self defense.[247] To bolster this argument, Echazabal showed how the EEOC had recognized a threat-to-self defense under the Rehabilitation Act of 1973[248] ("Rehabilitation Act") before the ADA was enacted, arguing the limited ADA direct threat defense precludes regulatory expansion.[249] The Court recognized the Ninth Circuit relied on this argument in applying the interpretive canon, *expressio unius exclusio alterius*, which means "expressing one item of an associated group or series excludes another left unmentioned."[250] However, the Court rejected the expression-exclusion rule for three reasons.[251]

First, the Court interpreted the ADA's text as indicating Congress used the harm-to-others provision simply as an example of a legitimate qualification standard that is job-related and consistent with business necessity.[252] The Court illustrated that the qualification standards captured by the "job related" and "business necessity" defense "may include" a direct threat to others.[253] Classifying the defenses contained in sections 12113(a) and (b) as "spacious defensive categories," the Court decided they gave the EEOC "a good deal of discretion in setting the limits of permissible qualification standards."[254]

242. *Id.*
243. *Id.*
244. *Id.* (quoting 42 U.S.C. § 12113(a)).
245. *Id.* at 78-79 (quoting 29 C.F.R. § 1630.15(b)(2)).
246. *Id.* at 79-80.
247. *Id.* at 79.
248. 29 U.S.C. §§ 701–797b.
249. *Echazabal*, 536 U.S. at 79-80.
250. *Id.* at 80 (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).
251. *Id.* at 80-84.
252. *Id.* at 80.
253. *Id.*
254. *Id.*

Second, the Court recognized the ADA does not contain an established series of terms, including threats to others and self, from which an omission of one establishes a negative implication of the other.[255] Echazabal claimed history shows Congress deliberately omitted the threat-to-self defense.[256] Specifically, Echazabal reminded the Court how the Rehabilitation Act, like the ADA, contained only a threat-to-others defense, but the EEOC expanded it to include threat-to-self as well.[257] Echazabal argued that because Congress passed the ADA without a threat-to-self defense after the EEOC had expanded the Rehabilitation Act's threat-to-others defense, Congress deliberately rejected the threat-to-self defense.[258] The Court rejected this argument for two reasons. First, although the EEOC amplified the Rehabilitation Act's text by including a threat-to-self defense, three other interpreting agencies did not.[259] Given no standard usage by agencies, the Court refused to connect threat-to-self with threat-to-others such that the expression-exclusion rule would apply to Congress's action.[260] The Court then recognized Congress passed the ADA's threat-to-others defense by using the same language it had used in the Rehabilitation Act, "knowing full well what the EEOC had made of that language."[261] Thus, Congress's use of identical language could mean either it rejected the EEOC's addition of the threat-to-self defense or assumed the EEOC had the authority to expand the defense again under the ADA as it had done under the Rehabilitation Act.[262] "Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible."[263]

Finally, the Court briefly engaged in slippery-slope reasoning as further justification for rejecting the expression-exclusion rule.[264] Recognizing Congress chose to specify only threats to others in the workplace, the Court noted strict application of the expression-exclusion rule would disallow a defense when an employee poses a threat to others outside the workplace as well.[265] The Court then provided the following example: "If Typhoid Mary had come under the ADA, would

255. *Id.* at 81-82.
256. *Id.* at 82.
257. *Id.*
258. *Id.* at 81-82.
259. *Id.* at 82.
260. *Id.*
261. *Id.* at 83.
262. *Id.*
263. *Id.*
264. *Id.* at 83-84.
265. *Id.*

a meat packer have been defenseless if Mary had sued after being turned away?"[266]

Concluding Congress's inclusion of the threat-to-others defense did not exclude the threat-to-self defense, the Court then analyzed whether *Chevron* deference should attach to the EEOC's direct threat defense.[267] In deferring to the EEOC's expansion of the direct threat defense, the Court focused on the interaction between the ADA and OSHA.[268] Specifically, the Court acknowledged an employer's decision to hire an individual with a disability who poses a direct threat to his own safety "would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker."[269] Thus, the Court concluded the EEOC made a proper substantive choice between two competing objectives found in federal employment law.[270]

The Court then rejected the argument that the EEOC's direct threat defense allows the type of paternalism the ADA tried to outlaw.[271] The Court decided the EEOC reasonably interpreted the ADA to strike at "untested and pretextual stereotypes," but refused to force employers to ignore "specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."[272] In addition, the Court stressed the direct threat defense's particularized enquiry requirement disallows an employer from claiming it excluded an individual with a disability for the individual's own good when the employee really does not pose a direct threat to his own safety.[273]

Finally, the Court rejected the argument that the ADA's direct threat defense had been rendered mere surplusage.[274] The Court stated that, just because the threat-to-self defense could reasonably fall within the general job-related and business necessity defense, Congress's decision to specifically include the direct threat defense was not a useless act.[275] For instance, specifically including the defense avoided litigation or rulemaking fights over the issue.[276] Fur-

266. *Id.* at 84.
267. *Id.* (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
268. *Id.* at 85.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 85-86.
273. *Id.* (citing 29 C.F.R. § 1630.2(r)).
274. *Id.* at 87.
275. *Id.*
276. *Id.*

thermore, the Court noted "[a] provision can be useful even without congressional attention being indispensable."[277]

Given the Supreme Court's blessing of the EEOC's direct threat defense, any potential conflict between OSHA's workplace safety rules and the ADA's anti-discrimination provisions should be minimal, at best. Because the direct threat defense has been interpreted narrowly, OSHA and the ADA should rarely conflict when analyzing cases involving alleged threats to individuals in the workplace.

F. Narrowly Applying the Direct Threat Defense

Given the Supreme Court's validation of the EEOC's expanded direct threat defense, it is imperative for courts, employers, employees, and attorneys to understand when and how the defense applies. It is equally important to understand Congress and the EEOC chose to elevate workplace safety over accommodating individuals with disabilities who pose a direct threat to themselves or other individuals in the workplace. Although the Supreme Court has blessed this rational interpretation of two competing federal labor laws, the Court has also narrowly interpreted the direct threat defense. This narrow interpretation should harmonize any conflict between OSHA and the ADA, as well as assure the direct threat defense is sparingly utilized to preclude employment opportunities for individuals with disabilities.

The direct threat defense creates complex and difficult issues. Individuals with disabilities have been stereotyped for centuries and fear is a huge discriminator.[278] The direct threat defense, as applied to an individual who poses a threat to his own safety, could be applied sporadically and illogically to individuals with disabilities based on stereotypes and fear. Although OSHA mandates safe workplaces, the ADA attempts to negate a paternalistic employer's ability to discriminate against individuals with disabilities based on unsubstantiated stereotypes and fears. Americans clearly have an interest in assuring individuals with disabilities have the right to make their own employment decisions rather than paternalistic employers. For the most part, the ADA supports such a view. However, in the limited circumstances in which the direct threat defense may apply, the employee's safety outweighs the employee's right to work. Because the direct threat defense precludes an individual with a disability from working, the defense should be asserted only in limited circumstances.

Although it may appear at first blush that an individual with a disability could easily be denied a job opportunity based on the likeli-

277. *Id.*
278. *See, e.g.*, 42 U.S.C. § 12101(a)(2), (a)(5)-(7).

hood she would pose a direct threat to her own health or safety, that is not true. If properly applied, the narrowly interpreted direct threat defense will exclude individuals with disabilities in rare circumstances for three main reasons.

1. Individualized Assessment Required

First, decisions based on unsubstantiated fears and stereotypes will not carry the day.[279] To show an individual cannot perform her job safely without posing a significant risk of substantial harm to her own health or safety, an employer must rely on more than mere stereotypes or simple speculation. As the EEOC has propounded, the direct threat determination can be made only after an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."[280] Therefore, the threat cannot be based on some future event, and the danger posed cannot be based on the employee's duty to perform non-essential functions. Instead, the threat must be based on the current state of the disability and the existing threat it poses to the individual's safety while performing the job's essential functions.

The direct threat assessment must also "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[281] Assumptions and best guesses will not suffice. When deciding whether the direct threat defense applies, an employer should consider the following factors: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."[282] A proper consideration of these factors, along with the appropriate individualized assessment based on "the most current medical knowledge and/or on the best available objective evidence," will not allow the direct threat defense to be abused.[283]

279. *See Echazabal*, 536 U.S. at 86.

280. 29 U.S.C. § 1630.2(r); *see also Murray*, 175 F. Supp. at 1065 n.14 (stating the direct threat defense does not apply when an employer fails to engage in an individualized assessment of an employee's disability).

281. 29 U.S.C. § 1630.2(r).

282. 29 U.S.C. § 1630.2(r). These factors are commonly referred to as the "*Arline* factors." *Echazabal*, 236 F.3d at 1027 n.2 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987)).

283. *See, e.g., id.* at 1026-35 (reversing grant of summary judgment to employer on direct threat defense because fact issues remained as to whether the employer properly made an individualized assessment of the employee's disability and the threat involved).

2. Significant Threat Required

Second, the direct threat standard does not allow an employer to exclude an individual with a disability when that individual's disability might pose a direct threat to his own health or safety. Instead, the employee must pose a significant risk to his health or safety.[284] The Supreme Court has recognized that, "[b]ecause few, if any, activities in life are risk free, [the ADA does] not ask whether a risk exists, but whether it is significant."[285] Furthermore, the standard does not simply require a significant risk of any harm to the employee's health or safety. Instead, the EEOC requires a significant risk of substantial harm to meet this standard.[286] Therefore, a high probability must exist that the individual with a disability is a danger to herself and that the resulting injury would be substantial. When this heightened standard is combined with the required individualized assessment based on a reasonable medical judgment, misuse of the direct threat defense should be diminished.

Indeed, the Supreme Court has revealed the direct threat defense is not readily attainable. In *Bragdon v. Abbott*,[287] a dentist's examination of an HIV-infected patient discovered a cavity.[288] The dentist informed the patient that he did not fill cavities of HIV-infected patients at his office.[289] However, the dentist offered to fill the cavity at a local hospital, with the patient absorbing the additional cost of using the hospital's facilities.[290] The patient sued the dentist under the ADA's prohibition of disability discrimination in places of public accommodation,[291] and the dentist asserted a direct threat defense.[292] The district court granted summary judgment to the patient, holding the dentist presented no genuine issue of material fact that the patient posed a direct threat to others.[293] On appeal, the Supreme Court recognized Title III of the ADA,[294] like Title I dealing with employment,[295] contains an exclusion where the "individual poses a direct threat to the health or safety of others."[296] As the Supreme Court further recognized, Title III's direct threat provision parallels Title I's

284. *See* 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r).
285. Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (citing *Arline*, 480 U.S. at 287).
286. *See* 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).
287. 524 U.S. 624 (1998).
288. *Bragdon*, 524 U.S. at 629.
289. *Id.*
290. *Id.*
291. *See* 42 U.S.C. § 12182(a).
292. *Bragdon*, 524 U.S. at 629.
293. *Id.* at 629-30.
294. *See* 42 U.S.C. §§ 12181-12189.
295. *See* 42 U.S.C. §§ 12111-12117.
296. *Bragdon*, 524 U.S. at 629 (citing 42 U.S.C. § 12182(b)(3)).

employment provision, so the Court's analysis applies with equal force to employment cases applying the direct threat defense.

In determining whether the direct threat defense applied, the Supreme Court had to decide whether the patient posed "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[297] The Court stressed that "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must based on medical or other objective evidence."[298] It is important to note the Court refused to defer to the dentist's judgment of the potential risk: "[a]s a health care professional, [the dentist] had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability . . . [because he] receives no special deference simply because he is a health care professional."[299] The dentist was unable to show objective, medical evidence that treating the patient in the hospital was safer than treating her in his well-equipped office.[300]

The dentist argued "the use of high-speed drills and surface cooling with water created a risk of airborne HIV transmission."[301] The Court rejected this assertion because it was based on inconclusive studies.[302] The dentist also asserted that the Center for Disease Control ("CDC") "had identified seven dental workers with possible occupational transmission of HIV."[303] The Court also rejected this evidence because, although the "dental workers were exposed to HIV in the course of their employment," the "CDC could not determine whether HIV infection had resulted from this exposure . . . because [the workers] did not present themselves for HIV testing at an appropriate time after this occupational exposure."[304] Regardless, the Court stated this evidence, "[s]tanding alone, [would not likely] meet the objective, scientific basis for finding a significant risk to the [dentist]."[305]

At its core, the *Bragdon* Court announced the direct threat defense's medical judgment or objective evidence standards cannot be

297. *Id.* at 648-49 (citing 42 U.S.C. § 12182(b)(3)).
298. *Id.* at 649.
299. *Id.*
300. *Id.* at 651.
301. *Id.* at 653.
302. *Id.*
303. *Id.* at 653-54.
304. *Id.* at 654.
305. *Id.*

based on good faith beliefs, inconclusive studies, or potential threats. The threat must be current and objectively verifiable. *Bragdon* is a high hurdle for those wishing to assert the direct threat defense against an individual with a disability who seeks to work.[306]

3. *Reasonable Accommodation May Eliminate Threat*

Finally, even if an employer has diligently conducted the individualized assessment based on objective medical evidence that would satisfy *Bragdon*'s high standard, and concluded the employee poses an immediate direct threat to her own health or safety, the direct threat defense is still not authorized. Even if an individual's disability poses a direct threat to her health or safety, the ADA requires an employer to make a reasonable accommodation (that would not pose an undue hardship on the employer) so an individual with a disability can perform a position's essential functions.[307] In the informal, interactive process, the employer and employee should strive to accommodate the individual's disability to eliminate the threat to the employee's health or safety.[308] When engaging in the interactive process, the employer and employee should seek to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[309] The ADA and EEOC regulations do not provide an exhaustive list of the types of reasonable accommodations available. However, reasonable accommodations are

306. *See also Echazabal*, 336 F.3d at 1027-35 (discussing *Bragdon* and emphasizing need for individualized assessment of disability's threat based on objective evidence). Another hurdle employers might face when asserting the direct threat defense will occur when courts place the burden of proof on the employer to establish the employee actually presents a direct threat to the health and safety of herself or others in the workplace. *See, e.g., id.* (stating that "Because it is an affirmative defense, the burden of establishing a direct threat lies with the employer"); Hargave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) (holding employer bears the burden to prove an employee poses a direct threat to others in the workplace); Dadian v. Village of Wilmette, 269 F.3d 831, 841 (7th Cir. 2001) (noting "it is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation"). However, not all courts place the burden on employers to establish an employee poses a direct threat. *See* Branham v. Snow, 392 F.3d 896, 907 n.5 (7th Cir. 2004) (noting "there is a dispute among the circuits regarding the burden of proof with respect to the question of whether an employee poses a direct threat to his own safety or that of others"). In some circuits, an employee with a disability may very well bear the burden to prove she does not pose a direct threat to the safety of herself or others. *See, e.g.*, McKenzie v. Benton, 388 F.3d 1342, 1356 (10th Cir. 2004) (holding the burden of proof is on the employee to prove she is not a direct threat to other people in the workplace); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (placing burden of proof on employee to show she is a qualified employee and does not pose a direct threat to others); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (per curiam) (same).

307. 42 U.S.C. § 12112(b)(5)(A).

308. 29 C.F.R. § 1630.2(o)(3).

309. 29 C.F.R. § 1630.2(o)(3).

only limited by the imagination and creativity of those seeking an appropriate accommodation. At a minimum, the EEOC regulations state reasonable accommodations may include: "[m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities."[310] With some work from both the employer and employee, the use of the direct threat defense should be rendered moot whenever an appropriate accommodation can be discovered.

The interactive process might discover reasonable accommodations that would avoid an unsafe workplace in violation of OSHA while protecting an individual's right to work. Surely, a serious, interactive discussion of possible accommodations could thwart the absurd results hypothesized by Judge Trott's dissent in *Echazabal*.[311] An ironworker walking the high beams cannot be placed at risk of falling because of a severe case of vertigo. However, a reasonable accommodation might be the use of a harness or reassignment to a job that is fully enclosed. Surely, OSHA would frown on a honey producer allowing a beekeeper who is deathly allergic to bees to roam freely amongst the bees. A reasonable accommodation could be the provision of shots or protective gear. Finally, a power saw operator with narcolepsy should not just operate the saw as though no risk of injury exists, awaiting a serious OSHA violation. A reasonable accommodation might include a unique shut-off device or protective guards to protect the employee from injury. These protective devices would protect other employees in the workplace as well, which would satisfy both OSHA and the ADA.

You may recall the Eleventh Circuit, in *Moses*, held that because an employee posed a direct threat to his own health or safety, the employer could fire him.[312] The employee had epilepsy and stipulated he would have had seizures on the job if he continued to work.[313] His essential job functions included working above fast-moving rollers, underneath a conveyor belt, and next to hot machines.[314] Was no reasonable accommodation available to ensure the employee's safety? Once the court determined the direct threat defense may apply, the

310. 29 C.F.R. § 1630.2(o)(2).
311. *Echazabal*, 226 F.3d at 1074-75 (Trott, J., dissenting).
312. *Moses*, 97 F.3d at 447.
313. *Id.*
314. *Id.* at 447-48.

court should have focused on whether a reasonable accommodation would have protected the employee from harm while still being able to perform his job's essential functions. Focusing on the interactive process and the reasonable accommodation element would have protected both the employee's and employer's rights, which would also satisfy OSHA and the ADA. The bottom line is that, once it has been properly shown an individual with a disability poses a direct threat to her own health or safety, the employer and employee still must seek a reasonable accommodation to eliminate the threat. This interactive process, combined with the tough standards discussed above, should limit misuse of the direct threat defense.

4. Summary

The ADA's direct threat defense, as expanded by the EEOC, elevates workplace safety over accommodating individuals with disabilities who pose direct threats to the health and safety of themselves and others in the workplace. The Supreme Court has ordained this rational interpretation, which harmonizes two competing federal labor laws—OSHA and the ADA. The ADA's direct threat defense will have two practical purposes. First, if an employer cannot meet the strict requirements of the direct threat defense, then he may not discriminate against the individual with a disability who the employer believes might be unsafe. Second, if the employer can meet the strict requirements of the direct threat defense, then the ADA's defense provides the employer protection against violating OSHA. Thus, the Supreme Court's strict interpretation of when the direct threat defense applies should void all safety concerns. The threat-to-self defense allows some paternalistic behavior to ensure a safe work environment, without gutting the purposes behind either OSHA or the ADA. Although some members of Congress clearly did not intend the ADA's direct threat defense to apply to threats to self, the EEOC has made the rational policy decision to harmonize OSHA and the ADA by protecting individuals with disabilities who threaten their own health and safety.

G. Conclusion

The interaction and potential conflict between OSHA and the ADA becomes abundantly clear when an individual with a disability poses a direct threat to herself or others in the workplace. Fortunately, the direct threat defense, as expanded by the EEOC, harmonizes the two federal labor laws. If an employee does not pose a direct threat to the health or safety of herself or other individuals in the workplace, then OSHA is not impacted. Similarly, if the employee

does pose a direct threat, then OSHA requires the employer—and employee—to take protective precautions. The ADA's direct threat defense is a protective measure. The direct threat defense allows the employer to remove the employee from the dangerous position unless a reasonable accommodation would remove the potential threat. However, the direct threat defense is a narrow defense, and, if properly applied, OSHA's safe-workplace requirement will be met, as will the ADA's anti-discrimination mandate.

When the Supreme Court unanimously announced the EEOC properly expanded the direct threat defense to include threats to self, it only reinforced the EEOC's attempt to harmonize any potential conflict between OSHA and the ADA. Applying the direct threat defense to threats to self will ensure individuals with disabilities will not endanger themselves in violation of OSHA, while the strict application of the defense will ensure individuals with disabilities are not discriminated against based on stereotypes, myths, speculation or unfocused paternalism. Requiring employers to conduct an individualized assessment based on the most current medical knowledge or best available objective evidence to determine whether an individual poses a significant risk of substantial harm to himself will not allow stereotypes, fear and unreasonable inferences to run amok. By buttressing this heightened standard with the required interactive process to find reasonable accommodations, the direct threat defense should be used only as a last resort. With these standards in mind, courts, employers, employees, and attorneys should be well equipped to analyze the difficult question of whether an individual poses a direct threat to her own health or safety. These standards will also ensure employers and employees comply with the national employment policies enunciated in OSHA and the ADA.

III. DISABILITY-BASED HARASSMENT: NOT TITLE VII'S CLONE

A. INTRODUCTION

Sexual harassment, outlawed by Title VII of the Civil Rights Act of 1964[315] ("Title VII"), has been discussed frequently in landmark United States Supreme Court cases.[316] While the Supreme Court has held sexual harassment violates Title VII, which has spawned a tre-

315. 42 U.S.C. § 2000e-2.

316. *See, e.g.*, Pa. State Police v. Suders, 124 S. Ct. 2342 (2004); Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

mendous amount of harassment litigation, the court has never decided whether disability-based harassment claims exist under the ADA.

Notwithstanding the Supreme Court's lack of involvement in this area of the law, lower federal courts have had little trouble holding disability-based harassment claims cognizable under the ADA.[317] In doing so, these courts simply have applied traditional Title VII sexual harassment jurisprudence to the ADA-based claims.[318] Although it seems readily apparent and hardly debatable that the ADA outlaws disability-based harassment, a simple overlay of Title VII harassment analysis onto ADA-based harassment claims may be inappropriate. This section discusses the interaction between disability-based harassment and sexual harassment, noting disability-based harassment has developed in the shadows of Title VII sexual harassment jurisprudence. Although Title VII sexual harassment jurisprudence is highly analogous and clearly assists when analyzing disability-based harassment cases, disability-based harassment jurisprudence requires a somewhat different understanding than sexual harassment jurisprudence to protect fully the rights of individuals with disabilities afforded them under the ADA.[319]

B. The ADA Follows Title VII's Lead

1. *Prohibited Employment Practices under the ADA and Title VII*

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . *terms, conditions, and privileges of employment*."[320] Likewise, Title VII prohibits an employer from discriminating against an individual "with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin."[321] As can readily be seen by a simple reading of these two statutes, the ADA closely tracks the language Congress used in enacting Title VII twenty-six years before it enacted the ADA. Specifically, both statutes use the "terms, conditions [and] privileges of employment" language. Therefore, Title VII harassment cases interpreting that identical language should provide

317. Lanman v. Johnson County, Kan., 393 F.3d 1151, 1155 (10th Cir. 2004); Shaver v. Indep. Stave Co., 350 F.3d 716, 720 (8th Cir. 2003); Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229 (5th Cir. 2001); Fox v. GMC, 247 F.3d 169 (4th Cir. 2001); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1106 (S.D. Ga. 1995); .

318. *Id.*

319. *See, e.g.*, *Shaver*, 350 F.3d at 720 ("In determining whether a hostile work environment claim has been made out under the ADA, we think it proper to turn to standards developed elsewhere in our anti-discrimination law, adapting them to the unique requirements of the ADA").

320. 42 U.S.C. § 12112(a) (emphasis added).

321. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

guidance as to Congress's intent when it used identical language when enacting the ADA.

Until 2001, no federal circuit court had decided whether the ADA prohibits disability-based harassment. District courts, on the other hand, had been faced with numerous disability-based harassment cases, routinely holding the ADA prohibits disability-based harassment.[322] Legal literature was not chock full of discussions about the viability of disability-based harassment claims, but commentators had begun to write on the subject a few years after the ADA's passage.[323] In the spring of 2001, two circuit courts joined district courts in holding the ADA prohibits disability-based harassment. Before discussing those two cases, it is prudent to discuss the first district court case that provided a thorough analysis of the issue when it recognized a disability-based harassment claim under the ADA.

2. *District Court Uncovers Harassment Theory Under the ADA*

In 1995, the United States District Court for the Southern District of Georgia held the ADA prohibits disability-based harassment.[324] In reaching this conclusion, the court provided a powerfully reasoned opinion that cannot be lightly brushed aside. In *Haysman v. Food Lion, Inc.*,[325] Neil Haysman suffered an on-the-job injury to his knee and back after just four months of working for his employer.[326] After missing a year and a half of work while collecting temporary total disability benefits, Haysman returned to work in a temporary light duty job.[327] Over the next year and a half, Haysman allegedly endured a harassing work environment.[328] According to Haysman, his supervisors required him to do more than his doctor allowed him to do.[329] Haysman also alleged numerous other acts of harassment, like his store manager berating him in front of others and accusing him of "snowballing" the company based on his disability.[330] The

322. *See* Ballard v. Healthsouth Corp., 147 F. Supp. 2d 529 (N.D. Tex. 2001); Johnston v. Henderson, 144 F. Supp. 2d 1341 (S.D. Fla. 2001); Johnson v. City of Mason, 101 F. Supp. 2d 566 (S.D. Ohio 2000); Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653 (D.P.R. 1997); Haysman v. Food Lion, Inc., 893 F. Supp. 1092 (S.D. Ga. 1995); Hogue v. MQS Inspection, 875 F. Supp. 714 (D. Colo. 1995); Mannell v. American Tobacco Co., 871 F. Supp. 854 (E.D. Va. 1994).

323. *See, e.g.*, Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994).

324. *Haysman*, 893 F. Supp. at 1106.

325. 893 F. Supp. 1092 (S.D. Ga. 1995).

326. *Haysman*, 893 F. Supp. at 1097.

327. *Id.*

328. *Id.* at 1097-98.

329. *Id.* at 1098.

330. *Id.*

manager thought Haysman was a "joke" and stated he was "so called hurt."[331] The assistant manager told Haysman he "would break him" and "ride him" until he quit.[332] In addition, this manager told Haysman to work every minute of his workday regardless of the pain.[333] Haysman claimed the assistant manager also used extreme profanity towards him and would strike and kick the injured parts of his body.[334]

Because a theory of disability-based harassment had not yet developed, Haysman asserted a failure to accommodate theory under the ADA.[335] Specifically, he claimed his employer failed to reasonably accommodate his disability by verbally harassing and physically abusing him to make him quit.[336] The district court rejected this theory and recast his claim as one of being subjected to a hostile work environment, but the employer contended hostile work environment is not an actionable theory under the ADA.[337]

The court initially provided a summary of Title VII harassment jurisprudence that affords employees the right to be free from harassment that affects a "term, condition or privilege of employment," the language used in Title VII.[338] Comparing the ADA's language to that of Title VII, the court wrote, "[i]t would seem illogical to hold that ADA language identical to that of Title VII was intended to afford disabled individuals less protection than those groups covered by Title VII."[339] The court also pointed out the ADA relies on Title VII's "enforcement powers, remedies and procedures."[340] After reviewing the two federal anti-discrimination statutes' identical language and same enforcement provisions, the court recognized the EEOC's regulations prohibit disability-based harassment.[341] Under its regulation prohibiting retaliation and coercion, the EEOC makes it "unlawful to coerce, intimidate, threaten, *harass* or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part."[342]

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331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *See id.* at 1106.
336. *Id.*
337. *Id.*
338. *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)).
339. *Id.* at 1106-07
340. *Id.* at 1107.
341. *Id.* at 1106 (quoting 29 C.F.R. § 1630.12).
342. 29 C.F.R. § 1630.12(b) (emphasis added). Although the EEOC recognizes the ADA prohibits disability-based harassment, it is interesting to note the EEOC has not

The court then briefly mentioned that the few other district courts that had addressed this issue had held that disability-based harassment is actionable under the ADA and that standard Title VII harassment analysis should apply.[343] In doing so, the court recognized that not a single case held that disability-based harassment is not prohibited under the ADA.[344]

Finally, the court used the ADA's purpose to protect qualified individuals with disabilities from workplace discrimination to bolster its holding that harassment is actionable under the ADA.[345] The court stated that a "contrary rule would have the illogical result of making an employer liable for firing a qualified individual because of a disability or its necessary consequences, while leaving untouched the unscrupulous employer who took the 'safe route' by harassing a disabled individual with the intent of making him quit."[346]

Based on this sound and persuasive reasoning, the court held harassment is actionable under the ADA.[347] After deciding such a theory exists, the court then simply followed standard Title VII analysis of harassment claims.[348] In doing so, the court provided the necessary elements to prove a harassment claim under the ADA: (1) the employee is a qualified individual with a disability under the ADA; (2) the employee was subjected to unwelcome harassment; (3) the harassment was based on the employee's disability; (4) the harassment was severe and pervasive enough to affect a "term, condition or privilege of employment;" and (5) employer liability.[349] The *Haysman* court's precision analysis would be replicated six years later when two circuit

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reported the number of such charges filed in the 1990s. Instead, the EEOC only tracked sexual, racial and national origin harassment claims under Title VII. *See Trends in Harassment Charges Filed With The EEOC, available at* eeoc.gov/stats/harassment.html. Specifically, the EEOC reports that 109,472 charges of harassment based on sex, race and national origin were filed with it in the 1990s, but does not report the number of disability-based harassment charges filed under the ADA during that time.

343. *Haysman*, 893 F. Supp. at 1106 (citing Hogue v. MQS Inspection, Inc., 875 F. Supp. 714 (D. Co. 1995); Mannell v. Am. Tobacco Co., 871 F. Supp. 854 (E.D. Va. 1994); Davis v. York Int'l Corp., 1993 WL 524761 (D. Md. 1993)).

344. *Id.*

345. *Id.* The ADA's purpose is "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b).

346. *Haysman*, 893 F. Supp. at 1106-07.

347. *Id.* at 1107.

348. *Id.*

349. *Id.*

courts finally confronted the transparent question of whether the ADA prohibits disability-based harassment.

3. *Circuit Courts Validate Disability-Based Harassment Claim*

Following the *Haysman* court's clear and articulate endorsement of a disability-based harassment theory, no circuit court followed suit for almost six years. Finally, during a fifteen-day stretch in 2001, two circuit courts held for the first time that disability-based harassment is actionable under the ADA, each proclaiming to be the first circuit court to so hold. Both courts followed the sound reasoning found in *Haysman*.

a. The Fifth Circuit Affirms the Obvious

In *Flowers v. Southern Regional Physician Services, Inc.*,[350] the United States Court of Appeals for the Fifth Circuit became the first appellate court to decide "whether the ADA embodies a claim for disability-based harassment."[351] The Fifth Circuit held that it does.[352] Sandra Flowers had been a medical assistant for a doctor for a year and a half when her supervisor discovered she was infected with Human Immunodeficiency Virus ("HIV").[353] She was discharged eight months later.[354] Claiming she had been discharged because of her disability and had been subjected to harassment, Flowers sued her employer under the ADA and tried her case to a jury.[355] The jury determined her disability was a motivating factor in her discharge and that she had been subjected to disability-based harassment.[356] The jury awarded Flowers $350,000 on her hostile work environment harassment claim, which was later reduced pursuant to statute.[357] The employer appealed, arguing the ADA does not recognize a harassment claim.[358]

After noting a number of circuit courts had indicated a harassment claim is cognizable under the ADA, the court recognized none had affirmatively held such a cause of action exists.[359] Like the *Haysman* court, the Fifth Circuit's analysis focused on "the ADA's language, purpose and remedial framework," deciding Congress intended

350. 247 F.3d 229 (5th Cir. 2001).
351. *Flowers*, 247 F.3d at 233.
352. *Id.* at 235.
353. *Id.* at 231.
354. *Id.*
355. *Id.* at 231-32.
356. *Id.* at 232.
357. *Id.* (citing 42 U.S.C. § 1981a(b)(3)(B)).
358. *Id.*
359. *Id.*

the ADA "to eradicate disability-based harassment in the workplace."[360]

Initially, the court simply looked at the ADA's plain language and compared it to Title VII.[361] The court recognized the anti-discrimination provisions of both statutes were almost identical.[362] Because of the near identical language of the ADA and Title VII, the court discussed how the Supreme Court has authorized harassment claims under Title VII based on the "term, condition, or privilege of employment" language.[363] Based on the Supreme Court's interpretation of Title VII, the court interpreted the ADA's use of the same "terms, conditions, and privileges of employment" language as evincing Congressional intent to "strike at harassment in the workplace."[364]

In addition to recognizing the similar language in Title VII and the ADA, the court also recognized like purposes and remedial structures.[365] Specifically, the court stated "Title VII and the ADA are aimed at the same evil —employment discrimination against individuals of certain classes."[366] Similarly, the court stated the ADA is also "part of the same broad remedial framework" as Title VII.[367] Thus, courts routinely subject the ADA to Title VII analysis.[368] The court then concluded that, in addition to identical language, the purposes and remedial framework of Title VII and the ADA command the recognition of a disability-based harassment cause of action.[369]

b. Other Circuit Courts Approve the Disability-Based Harassment Theory

Fifteen days later, the Fourth Circuit Court of Appeals, in *Fox v. GMC*,[370] presented the following "issue of first impression in the appellate courts: is a hostile work environment claim cognizable under the Americans with Disabilities Act?"[371] After working for GM for twelve years, Robert Fox suffered a non-work related injury to his

360. *Id.* at 233.
361. *Id.*
362. *Id.* (comparing 42 U.S.C. § 12112(a) with 42 U.S.C. § 2000e-2(a)(1)).
363. *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989), and Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).
364. *Id.*
365. *Id.* at 234.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. 247 F.3d 169 (4th Cir. 2001).
371. *Fox*, 247 F.3d at 172. Of course, the Fourth Circuit's assertion that it faced an issue of first impression in the appellate courts was simply not true, as the Fifth Circuit Court of Appeals had issued its decision in *Flowers* two weeks earlier. *See Flowers*, 247 F.3d at 229.

back and was placed on disability leave.[372] Over a decade later, he returned to work, but reinjured his back within a year and took disability leave again, this time for two months.[373] Once he returned to work with a light-duty restriction, he lasted just over a year until he once again hurt his back and took another year of disability leave.[374] He then returned to work, this time lasting ten months, before taking disability leave again.[375] During this final period, he was restricted to light-duty work.[376] It was during this time period that he claimed he was subjected to a hostile work environment based on his disability.[377]

Fox claimed his co-workers resented his supervisor's accommodation of his restrictions and complained about it to another supervisor, Tom Dame, and the general foreman, Bill Okal.[378] Dame and Okal then took pictures of the work Fox was performing and told Fox's supervisor not to accommodate Fox because the tasks Fox refused to do were no different from the tasks he was performing.[379] Okal insisted that Fox perform the tasks Fox claimed aggravated his back.[380]

For two days, Dame actually supervised Fox.[381] While Fox was working at a light-duty table, Dame, using loud and profane language, asked Fox to perform a task outside of his ability.[382] When Fox said he could not do it, Dame asked "Why the F can't you do it?"[383] When Fox explained he was limited because of his medical condition, Dame said, "I don't need any of you handicapped M—F—'s. As far as I am concerned you can go the H home."[384] During a meeting with several management and union officials, Okal asked, "how in the F do you take a S-H-I-T with these restrictions?"[385] Other officials then started making fun of workers with disabilities.[386] After the meeting, Okal

372. *Fox*, 247 F.3d at 172.
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 173.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.* Fox and many other witnesses did not want to use profane language at trial, so they either spelled the word or used the first letter instead. *Id.* n.2. Thus, it is left to the reader to interpret the meaning of "Why the F can't you do it?" and other similar phrases used at Fox's trial.
384. *Fox*, 247 F.3d at 173.
385. *Id.*
386. *Id.*

did not stop requiring Fox to perform jobs he could not physically perform.[387]

Fox then met with his neurologist, who restricted him to the light-duty table work only.[388] Instead of assigning Fox to the large group light-duty table, Okal made Fox sit at an individual table and chair directly in front of his office, which was located in a hazardous area.[389] To make matters worse, the table and chair were too low for the six-feet, seven-inch Fox, causing a reaggravation of his back injury.[390]

Because of the alleged harassment, Fox applied for a truck driver position, but Okal refused to allow Fox to take the physical examination required for that position.[391] Okal also allegedly told other employees not to talk to employees with disabilities.[392] Co-workers often ostracized those individuals with disabilities and would not even bring them materials when they were at the light-duty table.[393] Okal also would not let employees with disabilities work overtime.[394] Other employees confirmed Fox's allegations.[395] Fox alleged the verbal harassment was almost constant.[396] Okal referred to workers with disabilities as "handicapped people" and "hospital people."[397] Okal and Dame would also refer to workers with disabilities as "handicapped MFs" and "911 hospital people."[398]

Because of this conduct, Fox suffered physical and emotional injury.[399] His doctor concluded the harassment caused depression and anxiety, which worsened Fox's condition.[400] Although Fox could physically perform the light-duty work, he was no longer able to continue to work in the environment because of the ongoing harassment.[401] He was placed on disability leave once again.[402] This time, he was on disability leave for three years, during which time he received over two years of temporary total disability benefits.[403] Fox then brought a hostile work environment lawsuit against GM, claiming a violation of

387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.* at 173-74.
392. *Id.* at 174.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* at 175.
403. *Id.*

the ADA.[404] After the first trial ended in a hung jury, a second jury found Fox had been subjected to a hostile work environment and awarded him $200,000 in compensatory damages, $3,000 in medical bills, and $4,000 in lost overtime.[405] GM appealed, claiming the ADA does not recognize a hostile work environment claim.[406]

Following a *Flowers*-like analysis, the Fourth Circuit had "little difficulty in concluding that the ADA, like Title VII, creates a cause of action for hostile work environment harassment."[407] In so holding, the court focused on the ADA's express reference to Title VII, the two statutes' identical language, and the same purposes of the two civil rights statutes—to prohibit illegal employment discrimination.[408]

The court then analyzed the facts of the case to determine whether the jury's verdict could stand.[409] In doing so, the court listed the prima facie case as the court did in *Haysman*.[410] GM argued Fox was not a qualified individual with a disability under the ADA and that the harassment was not severe or pervasive enough to constitute a hostile work environment.[411] Rejecting these arguments, the court affirmed the jury verdict that Fox was subjected to a hostile work environment and upheld the jury's award, except for the overtime award.[412]

The Eighth Circuit Court of Appeals recently joined the Fourth and Fifth Circuits in officially proclaiming the ADA prohibits disability-based harassment. In *Shaver v. Independent Stave Co.*,[413] the court recognized "[e]ven broad, remedial statutes such as the ADA do not give federal courts a license to create causes of action after the manner of the common law," but instead courts "must be disciplined by the text of the statute itself."[414] Turning to the ADA's text, the court realized Congress, when enacting the ADA, "borrowed the phrase 'terms, conditions, and privileges of employment' directly from Title VII of the Civil Rights Act of 1964."[415] Given Congress's decision to borrow exact language from Title VII, the court noted that, "[a]s early as 1971, courts had construed the [identical] phrase in Title VII to create an action based on a hostile work environment, and by the

404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.* at 176.
408. *Id.* at 175-76.
409. *Id.* at 176-79.
410. *Id.* at 177.
411. *Id.*
412. *Id.* at 179.
413. 350 F.3d 716 (8th Cir. 2003).
414. *Shaver*, 350 F.3d at 720.
415. *Id.* (comparing 42 U.S.C. § 12112(a) with 42 U.S.C. § 2000e-2(a)(1)).

time that the ADA was passed in 1991, this interpretation was clearly established as the controlling federal law on the subject."[416]

Based on this succinct and straightforward analysis, the court had no difficulty concluding that, when Congress "included the phrase 'terms, conditions, and privileges of employment' in the ADA, it was using a legal term of art that prohibited a broad range of employment practices, including workplace harassment."[417] To date, no court has been willing to deny individuals with disabilities a harassment theory under the ADA, and it seems highly unlikely a creative court could distinguish the identical language contained in the ADA and Title VII.[418]

C. Disability-Based Harassment Indisputably Prohibited by ADA

No court has rejected the idea that disability-based harassment is a cognizable claim under the ADA. Any real debate over whether to recognize such a claim would be somewhat misplaced. The reasoning in *Haysman*, *Flowers*, *Fox* and *Shaver* is simply too compelling for any court to reject a disability-based harassment claim. Based on the similar language, purpose and broad remedial framework of the ADA and Title VII, it seems safe to conclude Congress intended the ADA to prohibit disability-based harassment. This position is bolstered by the fact that Congress, in enacting the ADA, used Title VII's identical language, which the Supreme Court had already held prohibited harassment under Title VII. It would fly in the face of statutory construction and common sense to hold that Congress, in using Title VII's exact language in the ADA's remedial framework, did not wish to protect individuals with disabilities from harassment in the workplace, even though it intended that same language to protect other individuals from workplace harassment.

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416. Id. (citing *Meritor Sav. Bank*, 477 U.S. at 65-66), and Rogers v. EEOC, 454 F.2d 234, 238-39 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

417. *Shaver*, 350 F.3d at 720.

418. No court has denied the existence of a disability-based harassment theory under the ADA, while numerous courts of appeal have indicated a proclivity to recognize such a cause of action. *See, e.g.*, *Trepka* v. Bd. of Educ. of the Cleveland City Sch. Dist., 28 Fed. Appx. 455, 460-62 (6th Cir. 2002) (unpublished opinion) (affirmed summary judgment for employer on ADA hostile work environment claim); EEOC v. Sears, 233 F.3d 432, 440 (7th Cir. 2000); Silk v. City of Chicago, 194 F.3d 788, 803 (7th Cir. 1999); Vollmert v. Wisconsin DOT, 197 F.3d 293, 297 (7th Cir. 1999) (assumed without deciding that a hostile work environment claim is cognizable under the ADA); Walton v. Mental Health Ass'n, 168 F.3d 661, 666-67 (3d Cir. 1999) (assumed without confirming that a cause of action for disability-based harassment exists based on the ADA's similarity to Title VII); Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998) (affirmed dismissal of ADA harassment claim).

Although the United States Supreme Court has not had an opportunity to extend its Title VII harassment jurisprudence to the ADA, it is doubtful any court will deny the existence of a disability-based harassment theory. Such a confusing holding would provide individuals with disabilities less protection than those protected under Title VII, even though Congress used identical language in the two anti-discrimination statutes. Therefore, this issue is—or will become—well settled as more disability-based harassment claims are litigated and more appellate courts explicitly recognize such claims. Therefore, the critical issue surrounding disability-based harassment is not whether such a claim is cognizable, but how closely such a theory will follow Title VII's lineage.

D. Critical Issues Focus on Proper Analysis of Disability-Based Harassment Claims

The focal point of these disability-based harassment claims will not be whether such claims exist. The important issues will revolve around an employee's prima facie case and the employer's available defenses to such claims. As stated in both *Haysman* and *Fox*, the prima facie case for disability-based harassment has parroted the prima facie case for hostile work environment claims under Title VII. Specifically, courts have routinely used the following prima facie case for disability-based harassment under the ADA: (1) the employee is a qualified individual with a disability under the ADA; (2) the employee was subjected to unwelcome harassment; (3) the harassment was based on the employee's disability; (4) the harassment was severe and pervasive enough to affect a "term, condition or privilege of employment"; and (5) employer liability.[419]

This cookie-cutter approach to analyzing ADA-based harassment claims under the cloak of Title VII jurisprudence,[420] without additional analysis taking into account the unique aspects of the ADA, may create a number of analytical problems. Courts must resolve any analytical problems so a consistent body of disability-based harassment law develops that adequately supports the ADA's unique purposes, rather than simply bowing to Title VII jurisprudence.

419. *See, e.g.*, *Fox*, 247 F.3d at 177; *Haysman*, 893 F. Supp. at 1107.

420. *See Silk*, 194 F.3d at 804 (stating that, to establish a harassment claim under the ADA, plaintiffs "must follow the methodology already established in the parallel area of Title VII litigation").

1. Does An Individual Have a Disability under the ADA?

Title VII protects individuals from discrimination based on "race, color, religion, sex, or national origin."[421] The first element of the prima facie case in a Title VII harassment case—that an employee is a member of a protected class—is usually rather easy to establish. Rarely will litigation focus on whether an individual claiming Title VII harassment is a member of a protected class.

Under the ADA, however, determining whether an individual is protected is not an easy task. Instead, this crucial determination is made on an individualized, case-by-case basis.[422] To gain the ADA's protection against disability-based harassment, an individual must be a qualified individual with a disability.[423] As seen by the discussion in Section I covering Supreme Court decisions interpreting the ADA, the determination of whether an individual even has an ADA-qualifying disability is not an easy one. Indeed, the Supreme Court has set a high hurdle for qualifying as an individual with a disability under the ADA by announcing that the ADA's definition of disability must "be interpreted strictly to create a demanding standard."[424] An individual claiming disability-based harassment under the ADA will not be able to "merely submit evidence of a medical diagnosis of an impairment" to gain the ADA's protection.[425] Instead, the ADA requires individuals seeking the ADA's protection "to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial."[426] Given the ADA's demanding standard, numerous individuals claiming to have an ADA-qualifying disability fail in their endeavors to establish such a disability.[427] Given the lack of success for many ADA liti-

421. 42 U.S.C. § 2000e-2(a)(1).

422. *See, e.g., Toyota*, 534 U.S. at 197-98.

423. 42 U.S.C. §§ 12111(8) (defining qualified individual with a disability), 12112(a) (prohibiting discrimination against a qualified individual with a disability).

424. *Toyota*, 534 U.S. at 197.

425. *Id.* at 198.

426. *Id.* (quoting *Kirkingburg*, 527 U.S. at 567).

427. *See, e.g.*, McGeshick v. Principi, 357 F.3d 1146, 1148-51 (10th Cir. 2004) (holding individual's Meniere's disease, tinnitus and vertigo not ADA-qualifying disabilities); Ristrom v. Asbestos Workers Local 34 Joint Apprenticeship Comm., 370 F.3d 763, 769-72 (8th Cir. 2004) (holding individual's attention deficit disorder and depression not ADA-qualifying disabilities); Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 821-22 (8th Cir. 2003) (holding individual's epilepsy not an ADA-qualifying disability); Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1130 (10th Cir. 2003) (holding individual's bipolar disorder, Attention Deficit Disorder and hypothyroidism not ADA-qualifying disabilities); Liljedahl v. Ryder Student Transp. Servs., Inc., 341 F.3d 836, 841 (8th Cir. 2003) (holding individual's cancer and lung cancer not qualifying disabilities under ADA-analogous state statute); Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655-57 (5th Cir. 2003) (holding individual's chronic pancreatitis not an ADA-qualifying disability); Whitlock v. Mac-Gray, Inc., 345 F.3d 44, 46 (1st Cir. 2003) (holding individual's

gants in disparate treatment cases, individuals claiming disability-based harassment may also meet the same fate.

Similarly, the ADA utilizes a three-prong definition of disability. In addition to protecting individuals who actually have disabilities,[428] the ADA also protects individuals who have a record of or are regarded as having a disability.[429] This unique aspect of ADA jurisprudence differs from other protected characteristics. Instead of simply focusing on the difficult question of whether an individual actually has a physical or mental impairment that substantially limits a major life activity—which in itself is more difficult than determining, for example, whether an individual is black or is a woman under Title VII—a court must also determine whether the individual has a record of or is regarded as having a disability.

In addition to facing a demanding standard under the ADA on the first element, the Supreme Court has made the first prong of the analysis even more difficult to apply in a disability-based harassment claim by its *Sutton* trilogy. As discussed in Section I above, an individual claiming to have an ADA-qualifying disability must show she has a disability in light of available mitigating measures.[430] Given the Supreme Court's restrictive interpretation of what constitutes an ADA-qualifying disability, an individual seeking the ADA's protection against workplace harassment will not be able to establish easily the first element of her prima facie case. Thus, although an ADA harassment claim may track a Title VII harassment claim, the difficulty of satisfying the first element of the prima facie varies greatly. The ADA's unique and demanding requirement for qualifying as an individual with a disability makes it difficult for individuals to satisfy the first element of a harassment claim under the ADA.

Attention Deficit Hyperactivity Disorder not an ADA-qualifying disability); Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 686 (8th Cir. 2003) (holding individual's back impairment not an ADA-qualifying disability); *Mahon v. Crowell*, 295 F.3d 585, 591-92 (6th Cir. 2002) (same); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (holding individual's diabetes not ADA-qualifying disability).

428. 42 U.S.C. § 12102(2)(A).

429. 42 U.S.C. § 12102(2)(B)-(C); *Sutton*, 527 U.S. at 489 (discussing the requirements to be regarded as being disabled).

430. *See, e.g.*, *Sutton*, 527 U.S. at 475 (holding "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment"); *see also Kirkingburg*, 527 U.S. at 565-66 (holding mitigating measures include "measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems"); *Murphy*, 527 U.S. at 521 (holding employee's hypertension was not an ADA-qualifying disability when controlled by medication).

2. Is the Harassment Unwelcome?

The second element of the prima facie case may also cause problems if simply recast in Title VII terms. As routinely stated, the second element of an employee's prima facie case is that the employee was subjected to unwelcome harassment. Although conduct must be unwelcome to constitute harassment, an individual with a disability may not be able to communicate that the conduct at issue is indeed unwelcome.

If an employee's disability precludes the employee from asserting that the conduct is unwelcome, would the employee be precluded from making a disability-based harassment claim? This issue would cut both ways. On the one hand, conduct is not prohibited unless it is unwelcome. I wear glasses. If a co-worker consistently called me the potentially derogatory term "four eyes" and I also participated by calling her four-eyes, it would stretch the imagination to conclude that one of us was subjected to unwelcome harassment. It is wholly reasonable to expect at least some indication that a person who feels she is subjected to unwelcome harassment would show some disfavor and inform the harasser that the conduct is indeed unwelcome. To be sure, welcome conduct does not meet the definition of harassment.

On the other hand, an individual's disability potentially could make it difficult to adequately inform a harasser that his conduct is unwelcome. For instance, a person with bi-polar disorder may not be capable of complaining about offensive conduct while in the depressive state. The depression may be so debilitating that the employee simply endures abuse without taking any action. Likewise, a person with a multiple personality disorder might actually enjoy taking part in certain conduct at times, while at other times would not wish to take part because of her disability. Based on these potential issues, which may be farfetched and theoretical, courts should be vigilant to look for such cases. If such issues arise, courts may be required to fashion a second element that allows an exception if the employee's disability prevents the employee from informing the harasser or others that the harassment is unwelcome.

3. Is the Harassment Based on the Employee's Disability?

The third element of the prima facie case requires the harassment to be based on an employee's disability. To meet this element, an individual with a disability must be able to show the alleged harasser knew or at least should have known of the employee's disability. As an individual's disability may not be known or readily apparent, this element could result in the preclusion of numerous disability-based harassment claims. Indeed, a number of discrimination lawsuits

under the ADA have failed because a plaintiff was unable to show the employer knew of the employee's alleged disability.[431]

A few examples will illustrate how this element might be difficult to implement. If an employee has a mental disability, many co-workers will have no knowledge that the employee has such a disability. For example, an employee with dyslexia may not inform anyone at work of this disability.[432] If co-workers or supervisors consistently poke fun at the employee based on spelling mistakes or reading errors, and these harassers have no knowledge of the employee's dyslexia, would the employee with dyslexia be able to satisfy this element of the prima facie case? Furthermore, if the employee wanted the harassment to stop, does the employee have to inform the harassers that she has dyslexia?

What about this scenario: A supervisor in a hospital consistently uses such items as pens, highlighters and notepads, which oftentimes are provided freely by pharmaceutical representatives to market their products. The supervisor just hit the "jackpot" and has reams of notepads marketing the anti-depressant Prozac. The supervisor often uses these notepads when writing notes to employees. This supervisor has repeatedly written distasteful and nasty comments on these notepads when addressing one employee. For instance, the supervisor has made comments like "you must not be thinking," "get your head in the game," "stop moping around and pouting while at work," and "you must be totally out of your mind to act this way." If the employee is clinically depressed and taking Prozac, would the supervisor who consistently criticizes the employee by using the Prozac notepad be subject to a harassment claim? What if the supervisor had absolutely no idea about the employee's mental disability?

Finally, the mere fact an individual with a disability receives a legally required accommodation under the ADA may lead to harassing workplace conditions.[433] When an employee receives an accommodation for her disability, most employees will never know the employee even has a disability. Only those with a need to know of the employee's disability should ever find out, unless of course the employee voluntarily shares such information with individuals who have no need to know. What happens when other employees harass an indi-

431. *See, e.g.*, *Ristrom*, 370 F.3d at 371-72 (holding employer did not know plaintiff had an ADA-qualifying disability); Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380-81 (3d Cir. 2002) (holding employee failed to establish discrimination claim because employer did not know about employee's asthma).

432. Dyslexia is defined as a learning disorder marked by impairment of the ability to recognize and comprehend written words. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 432 (4th ed. 2000).

433. *See Haysman*, 893 F. Supp. at 1106 (converting a claim for failure to provide a reasonable accommodation to a claim of disability-based harassment).

vidual with a disability because they believe the employee is receiving preferential treatment, but, in reality and unbeknownst to the harassers, the employee is receiving a legally required accommodation under the ADA?

For example, an employee with an ADA-qualifying disability may be forced to undergo medical treatment every morning from 6:00 a.m. to 8:00 a.m. and cannot arrive at work on time for her 7:30 a.m. shift. The employer accommodates her disability and allows her to arrive at work every day at 8:30 a.m., a full hour after other employees are required to arrive. The employee does not inform any of her co-workers of her medical treatment and they begin to consistently harass her on her "relaxed" schedule and how she gets treated so well while everyone else would be fired if they showed up late every day. Would this conduct be based on the individual's disability, even though co-workers do not know the employee has a disability?

The earlier discussion of the workplace harassment an individual with a disability endured in *Fox* reveals how the third element can be satisfied.[434] Once Fox sought accommodations for his debilitating back injury, and after Fox's supervisor sought to accommodate Fox's injury with certain restrictions, "some of Fox's co-workers resented this accommodation."[435] Indeed, these co-workers even complained to another supervisor and the general foreman of the plant.[436] The culture even changed at the plant, as several employees testified they and other individuals with disabilities were harassed because of their disabilities.[437] The supervisors actually encouraged co-workers "to ostracize the disabled workers and prevent them from doing their assigned tasks by refusing to give them necessary materials," which was a part of the medical restrictions placed on Fox.[438] Given the severe and pervasive nature of the workplace harassment Fox endured at the hands of his supervisors and co-workers, the Fourth Circuit refused to disturb the jury's finding that Fox had been harassed based on his disability.[439]

Harassing an individual with a disability is unlawful, but it will not always be as clear-cut that the harassment is based on the individual's disability. Cases such as *Fox* will come along where the evidence shows supervisors actively encouraged other employees to harass an

434. *Fox*, 247 F.3d at 172.
435. *Id.*
436. *Id.*
437. *Id.* at 174.
438. *Id.* at 179.
439. *Id. But see Silk*, 194 F.3d at 803, 808 (holding "the barrage of harassing conduct after he was given permanent day-shift work" as an accommodation for his disability was not actionable under the ADA); *Walton*, 168 F.3d at 667 (holding a supervisor's offensive conduct toward an employee was not based on the employee's disability).

employee with a disability. However, this certainly will not be the rule. Instead, courts, and juries later in the litigation process, must scour the evidence to determine whether the alleged harassment was based on a disability. Given the existence of an employee's disability is oftentimes masked in the workplace, it may not be readily apparent that harassing conduct—even if it appears to implicate an individual's disability—is actually based on an employee's disability. Thus, courts and juries must be vigilant when considering the third element of a prima facie case of disability-based harassment.

4. Does the Harassment Alter a Term, Condition or Privilege of Employment?

The fourth element of the prima facie case of disability-based harassment requires a finding that the harassment is "severe and pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."[440] This element oftentimes sinks harassment cases.[441] Indeed, one circuit court has described this standard as an "elusive category."[442] The category will be no less elusive in the ADA context.

a. Reasonable Person Versus Reasonable Person with a Disability?

The fourth element of the prima facie case requires an employee to show that the harassment was so severe and pervasive that it altered a term, condition and privilege of employment. Whether workplace harassment becomes sufficiently abusive or hostile is based on whether "a reasonable person would find [the environment] hostile or abusive."[443] Under Title VII, a debate had ensued whether this standard should be that of a reasonable person or a reasonable person in the protected class. For example, in *Ellison v. Brady*,[444] the Ninth Circuit Court of Appeals stated "that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim."[445] The court reasoned, "[i]f we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of dis-

440. *Harris*, 510 U.S. at 21-22.

441. *See, e.g., Breeden*, 532 U.S. at 271-74 (holding harassing conduct was not so severe or pervasive to alter the terms and conditions of employment) (Title VII); *Shaver*, 350 F.3d at 721-22 (same) (ADA); Tuggle v. Mangan, 348 F.3d 714, 722 (8th Cir. 2003) (same) (Fourteenth Amendment); Duncan v. GMC, 300 F.3d 928, 935 (8th Cir. 2002) (same) (Title VII).

442. *Shaver*, 350 F.3d at 721.

443. *Harris*, 510 U.S. at 21-22.

444. 924 F.2d 872 (9th Cir. 1991).

445. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

crimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[446] Thus, the Ninth Circuit decided "to analyze harassment from the victim's perspective," holding "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a *reasonable woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[447]

This same debate—whether harassment under the ADA should be viewed under a reasonable person standard or under a reasonable person with a disability standard—could ensue in this area. Which standard should apply? Under Title VII, the Supreme Court has intimated that the reasonable person standard applies.[448] In addition to following the Supreme Court's lead that Title VII harassment is to be viewed under a reasonable person standard, the ADA's policy will also be fulfilled by following a reasonable person standard as opposed to a reasonable person with a disability standard.

By using the reasonable person with a disability standard, jurors without disabilities would be authorized to go into "paternalistic mode" and decide that individuals with disabilities are somehow emotionally inferior or need more protection. This paternalistic viewpoint has no place in our society, as the ADA strives to eradicate treatment of individuals with disabilities based on myths and stereotypes. As part of its findings to support passage of the ADA, Congress found "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, *based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.*"[449] Allowing jurors to assume the role of deciding what a reasonable person with a disability would find offensive would inappropriately allow paternalistic behavior by the jury, which would re-emphasize what individuals with disabilities cannot do or tolerate, as opposed to what they can do or tolerate. It would also re-emphasize that individuals with disabilities somehow differ from other individuals, as a standard that differentiates between a reasonable person with a disability and a

446. *Ellison*, 924 F.2d at 878.
447. *Id.* at 878-79.
448. *Harris*, 510 U.S. at 21 (stating that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview").
449. 42 U.S.C. § 12101(a)(7) (emphasis added).

reasonable person inherently decrees those categories are not the same. Individuals with disabilities do not need individuals without disabilities to try to understand their plight. They simply wish to be mainstreamed and not to be discriminated against based on having a disability. Therefore, the reasonable person standard should also apply to disability-based harassment claims.

b. Is the Harassment Severe or Pervasive?

According to the Supreme Court, workplace harassment will only be actionable when the harassing conduct is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[450] The Court has "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment."[451] Only "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'" can a plaintiff successfully assert a workplace harassment claim.[452] The Court also has developed a few factors to consider when determining whether a workplace environment is sufficiently hostile or abusive: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[453]

The Supreme Court has recognized a "recurring point in [its] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[454] The Court has noted that, although Title VII does not tolerate sexual harassment, it does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[455] The Supreme Court has set a lofty and demanding standard for judging hostility "to ensure that Title VII does not become a 'general civility code.'"[456] The Court promised that, if its Title VII harassment standards are "[p]roperly applied, they will filter out complaints attacking 'the ordinary tribulations of the work-

450. *Meritor Sav. Bank*, 477 U.S. at 67; Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 509 (5th Cir. 2003) (recognizing the legal standard for workplace harassment is high).

451. *Faragher*, 524 U.S. at 788.

452. *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank*, 477 U.S. at 65).

453. *Id.* at 23.

454. *Faragher*, 524 U.S. at 788.

455. *Oncale*, 523 U.S. at 81.

456. *Faragher*, 524 U.S. 788 (quoting *Oncale*, 523 U.S. at 80).

place, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[457]

These demanding standards most certainly apply in the ADA context as well. The Eighth Circuit recently decided a harassment case under the ADA based on the lack of severe or pervasive harassing conduct.[458] In *Shaver*, an employee suffered from nocturnal epilepsy since his teenage years.[459] The employee underwent an operation to remove part of his brain, which was replaced with a metal plate.[460] The employee brought an ADA harassment claim based on the following incidents of workplace harassment: his co-workers referred to him as "platehead"; his co-workers suggested he was stupid; and a co-worker said the employee "pissed his pants when the microwave was on."[461] Determining the harassment was not so severe or pervasive to alter a term or condition of employment, the Eighth Circuit affirmed the district court's summary judgment in the employer's favor on the harassment claim.[462]

Title VII standards for sexual harassment are unquestionably demanding, and these demanding standards will most certainly be applied to ADA harassment cases. Notwithstanding the demanding federal harassment standards, individuals with disabilities will still be protected when they successfully prove hostile or abusive harassment altered the terms and conditions of employment.[463] Similar to the earlier discussion concluding that disability-based harassment cases should be judged under the reasonable person standard, individuals with disabilities also should not have a different standard when it comes to whether their harassment is severe or pervasive. To hold otherwise would accentuate the differences between individuals with disabilities and everyone else. This differential treatment is intolerable. To fully mainstream individuals with disabilities into the workplace and to treat them as equals once there,[464] the standard for determining whether a hostile or abusive environment exists should be the same as the standard for other forms of workplace harassment.

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457. *Id.* (citation omitted).
458. *Shaver*, 350 F.3d at 721.
459. *Id.* at 719.
460. *Id.*
461. *Id.* at 721.
462. *Id.*
463. *See Flowers*, 247 F.3d at 237 (holding evidence supported a finding that the disability-based harassment was so severe or pervasive to alter the terms and conditions of employment); *Fox*, 247 F.3d at 179 (upholding the jury's verdict in favor of the employee because the evidence supported a finding that the harassment was so severe or pervasive to alter the terms and conditions of employment).
464. *See* 42 U.S.C. § 12101(a)(8) (stating Congress found "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").

If an individual without a disability would not be federally protected from certain harassing conduct, then an individual with a disability should not receive federal protection based on the same language that did not provide protection to the individual without a disability. Not only does this result logically flow from the similarity of the ADA and Title VII, but the result reinforces the ADA's goal to end harassment against individuals with disabilities.[465]

5. Employer Liability

The final element of a prima facie case of Title VII sexual harassment requires the employee to prove employer liability for the harassment, since respondeat superior liability—as opposed to individual liability—is built into Title VII's remedial scheme.[466] Because the ADA follows the same remedial scheme as Title VII,[467] the ADA has been interpreted to disallow individual liability, creating a respondeat superior standard for liability for ADA claims as well.[468]

Under Title VII, employer liability depends on whether the harassing conduct was carried out by co-workers or supervisors. When the harassment is carried out by co-workers, the plaintiff must show the employer was somehow negligent in allowing the harassment to take place or by failing to remedy the harassment. Specifically, the plaintiff must show "the employer knew or should have known of the harassment and failed to take prompt and effective remedial action."[469]

When the harassment is carried out by supervisors, the standard for employer liability is a bit more complicated. Although employer liability for harassing acts perpetrated by supervisors may be a bit more convoluted, one thing is crystal clear under Title VII—employers

465. *See* 42 U.S.C. § 12101(b)(2) (stating one of the ADA's purposes is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

466. Mandell v. County of Suffolk, 316 F.3d 368, 377 (2d Cir. 2003); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 262 (5th Cir. 1999); Bales v. Wal-Mart, Inc., 143 F.3d 1103, 1111 (8th Cir. 1998); Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180 (4th Cir. 1998); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998); Wathen v. G.E. Co., 115 F.3d 400, 405 (6th Cir. 1997); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996); Williams v. Banning, 72 F.3d 552, 554 (7th Cir. 1995).

467. *Compare* 42 U.S.C. § 12111(5)(A) (defining employer), *with* 42 U.S.C. § 2000e(b) (defining employer).

468. *See, e.g.*, *Silk*, 194 F.3d at 797-98 n.5; Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 808 n.1 (6th Cir. 1999); *Mason*, 82 F.3d at 1009.

469. *See, e.g.*, Erenberg v. Methodist Hosp., 357 F.3d 787, 792 (8th Cir. 2004); Cain v. Blackwell, 246 F.3d 758, 760 (5th Cir. 2001); Fenton v. HiSAN, Inc., 174 F.3d 827, 830 (6th Cir. 1999); *Walton*, 168 F.3d at 667.

are not always strictly liable for supervisor sexual harassment.[470] Instead, the Supreme Court has commanded lower courts to follow agency principles when determining whether employers are liable for supervisor harassment under Title VII.[471] In deciding agency principles control employer liability for supervisor harassment, the Court acknowledged "Congress's decision to define 'employer' to include any 'agent' of an employer[472] surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[473] Given Congress's decision to define employer under the ADA[474] the same way it defined employer under Title VII, employer liability for supervisor harassment under the ADA will be the same.

In *Meritor Savings Bank*, the Supreme Court held employers are not to be strictly liable for supervisor harassment.[475] A little over a decade later, the Supreme Court again confronted the issue of employer liability for supervisor harassment in *Ellerth* and *Faragher*.[476] Before addressing the issue of employer liability once again, the Court recognized that, "[s]ince our decision in *Meritor*, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment perpetrated by supervisory employees."[477]

In *Ellerth*, an employee suffered repeated and constant sexual harassment from her supervisor.[478] Although the employee knew about her employer's anti-harassment policy, she never reported her supervisor's harassing conduct to management.[479] Despite the persistent harassment endured by the employee, she did not suffer a tangible employment action.[480] When considering employer liability for the supervisor's harassment, the Court, following *Meritor*, applied agency principles.[481] Recognizing "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment," the Court rejected a traditional scope-of-employment analysis.[482] The Court also discussed a negligence standard, which asks

470. *Meritor Sav. Bank*, 477 U.S. at 72 (holding "employers are [not] always automatically liable for sexual harassment by their supervisors").
471. *Id.*
472. 42 U.S.C. § 2000e(b).
473. *Meritor Sav. Bank*, 477 U.S. at 72.
474. 42 U.S.C. § 12111(5)(A).
475. *Meritor Sav. Bank*, 477 U.S. at 72.
476. *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.
477. *Id.*
478. *Ellerth*, 524 U.S. at 747-48.
479. *Id.*
480. *Id.* at 766.
481. *Id.* at 754-65.
482. *Id.* at 757.

whether the employer's negligence causes the harassment; an apparent authority standard, which asks whether the supervisor used apparent authority to engage in the harassing conduct; and the aided in the agency relation standard, which asks whether the supervisor was aided in the agency relation to engage in the harassing conduct.[483] The Court focused on the aided in the agency relation standard, which "requires the existence of something more than the employment relationship itself."[484] Based on this standard, the Court determined employers are strictly liable "when a supervisor takes a tangible employment action against the subordinate."[485] According to the Supreme Court, tangible employment actions involve "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[486] In concluding employers are strictly liable for supervisor harassment culminating in a tangible employment action, the Court reasoned, "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation."[487]

After making short thrift of announcing a standard for employer liability when supervisor sexual harassment culminates in a tangible employment action, the Court observed the question of "[w]hether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious."[488] The Court recognized agency principles are only part of the liability analysis when confronted with a case involving supervisor harassment without a tangible employment action. In addition to agency principles, the Court recognized other principles are relevant to the employer liability analysis: "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would [affect] Congress's intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures."[489] The Court further recognized that, "[t]o the extent limiting employer liability could encourage employees to report

483. *Id.* at 759.
484. *Id.* at 760.
485. *Id.*
486. *Id.* at 761.
487. *Id.* at 761-62.
488. *Id.* at 763.
489. *Id.* at 764 (citations omitted).

harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."[490]

Balancing "the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Supreme Court held "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence."[491] The Court announced an employer's affirmative defense for supervisor harassment "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[492] After listing the necessary elements of the employer's affirmative defense, the Court then briefly explained the defense:

> [W]hile proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[493]

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490. *Id.*

491. *Id.* at 764-65.

492. *Id.* at 765; *see Faragher*, 524 U.S. at 807; *see also Silk*, 194 F.3d at 805 (applying *Ellerth/Faragher* affirmative defense to disability-based harassment claim perpetrated by a supervisor).

493. *Ellerth*, 524 U.S. at 765. In his dissent in *Ellerth*, Justice Clarence Thomas charged the Court with "manufactur[ing] a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define." *Id.* at 766 (Thomas, J., dissenting). Justice Thomas also levied the charge against the Court that its decision "provides shockingly little guidance about how employers can actually avoid vicarious liability," which would "ensure a continuing reign of confusion in this important area of the law." *Id.* at 771, 773. Justice Thomas prophesied that "[t]he Court's holding does guarantee one result: There will be more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have long been begging for guidance."

Finally, the Court again made crystal clear that employers are strictly liable for supervisor harassment involving a tangible employment action: "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."[494]

The employer liability element of a Title VII harassment claim, as well as the affirmative defense crafted by the Supreme Court in *Ellerth* and *Faragher*, should apply to disability-based harassment claims as well. Given Congress's decision to use the same liability language in the ADA as it had used in Title VII, it would be nonsensical for courts to somehow distinguish employer liability under the ADA from employer liability under Title VII.[495]

However, one area of contention or division may exist between the ADA and Title VII when it comes to employers asserting the *Ellerth/Faragher* affirmative defense to employer liability for supervisor harassment. While an individual protected by Title VII's cloak must utilize an employer's anti-harassment procedures, an individual with a disability may have issues surrounding an ability to understand or utilize those procedures. For instance, a blind person might be unable to read a written anti-harassment policy, so an employer could provide a Braille copy to the blind employee or explain the policy to the employee. Another circumstance that may arise would be the inability of an employee with a disability to effectively take advantage of employer-provided preventive or corrective opportunities. Although a case involving such a situation has not been reported, employers must be aware that their reasonable accommodation duty would also apply to assisting employees with disabilities in understanding and utilizing the employer's anti-harassment policies.[496]

Id. at 774. If Justice Thomas's prediction rings true, individuals with disabilities asserting claims of disability-based harassment will be affected to the same extent as individuals asserting harassment claims under Title VII.

494. *Id.*; *Faragher*, 524 U.S. at 808; *see also* Penn. State Police v. Suders, 124 S. Ct. 2342, 2352 (2004) (recognizing that *Ellerth* and *Faragher* "delineate two categories of hostile work environment claims: (1) harassment that 'culminates in a tangible employment action,' for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense") (citations omitted).

495. The Supreme Court's most recent foray into employer liability for supervisor harassment involved a constructive discharge claim. In *Suders*, the Court recognized that a constructive discharge involving official action constitutes a tangible employment action, such that no affirmative defense is available to an employer in those cases. To establish a constructive discharge claim involving supervisor harassment, the Court held that "[a] plaintiff who advances such a compound claim [i.e., harassment plus constructive discharge] must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id.* Of course, the Supreme Court's decision in *Suders* confronting constructive discharge cases should apply to ADA claims as well.

496. *See* 42 U.S.C. § 12112(b)(5)(A).

The bottom line is that, if employers have a consistent anti-harassment policy covering the necessary protected classes, including disability, employers and employees should be satisfied. Indeed, providing individuals with disabilities the same protections as individuals without disabilities makes sense and fulfills the ADA's dream of equal opportunity for individuals with disabilities. The only caveat would be the ADA's additional requirement that employers provide individuals with disabilities reasonable accommodations. If employers keep this in mind, they will faithfully follow the ADA and meet America's expectations of them.

E. Conclusion

One thing should be entirely certain—the ADA prohibits disability-based harassment to the same extent Title VII does. If courts were to deny individuals with disabilities a harassment-free work environment, while guaranteeing a harassment-free work environment for individuals without disabilities, the ADA's goal of equal opportunity for individuals with disabilities would be annihilated. As no court has erroneously held the ADA does not provide for a disability-based harassment claim, the focus when analyzing disability-based harassment claims should be on ensuring the ADA's lofty goals are met. Because the ADA and Title VII differ somewhat, most significantly in the ADA's definition of disability and its reasonable accommodation requirement, harassment claims pursued under the ADA should not simply be treated as Title VII clones. Instead, courts, attorneys, employers and individuals with disabilities must recognize where the ADA charts a different course from Title VII, and then navigate accordingly. If courts, attorneys, employers and individuals with disabilities can critically understand the differences between the ADA and Title VII, individuals with disabilities will be assured of harassment-free work environments to the same degree as other individuals in the workplace.

IV. "I CAN'T WORK; ACTUALLY I CAN": THE ADA'S TREATMENT OF STATEMENTS MADE WHILE APPLYING FOR SOCIAL SECURITY DISABILITY INSURANCE BENEFITS UNDER THE SOCIAL SECURITY ACT OF 1935

A. Introduction

While scuba diving in the Caymans, a woman is seriously injured when her oxygen tank explodes. The woman's doctor informs her she is permanently disabled and she most likely will never work again, especially not in her current job planning major events. Based on her

doctor's prognosis, the woman applies for Social Security Disability Insurance ("SSDI") benefits under the Social Security Act ("SSA"), claiming she is totally and permanently disabled and unable to work at all. Notwithstanding her sworn statements to the Social Security Administration, the woman asks her employer to accommodate her disability and allow her to return to work. Surmising this employee wants to have her cake and eat it, too, the employer ponders whether the employee is a qualified individual with a disability under the ADA if she applies for SSDI benefits claiming she is totally and permanently disabled.

Must the employer independently determine whether the employee is a qualified individual with a disability under the ADA—or can the employer rely on the employee's sworn statements to the Social Security Administration that she is unable to work? Stated another way, if an employee seeks federal benefits by saying "I am permanently and totally disabled and can't work at all," must an employer disregard that claim and independently determine whether the employee is a qualified individual with a disability under the ADA who is entitled to a reasonable accommodation that would allow her to continue working? According to a unanimous United States Supreme Court in *Cleveland v. Policy Management Systems Corp.*,[497] the employee's application for SSDI benefits does not preclude her from seeking a reasonable accommodation from her employer in order to work.[498]

This section discusses the conflict between the ADA's pro-work policy and the SSA's no-work policy. Some background on the two divergent disability statutes—the ADA and the SSA—will first be provided, followed by a discussion of the issue as it existed before the High Court decided it in *Cleveland*. The landmark *Cleveland* case will then be discussed, followed by a brief discussion of a few post-*Cleveland* cases to reveal how lower courts are dealing with this conflicting and complex area of disability law. Finally, this section will make the case that Congress must take action to assure the ADA and the SSA do not conflict, but instead carry out a consistent national policy on disability. The current national disability policy—as reflected in the ADA and the SSA—is simply unworkable and frustrates any unified national policy.

497. 526 U.S. 795 (1999).
498. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 797-98 (1999).

B. Two Disability-Based Federal Statutes: The ADA and the SSA

When the ADA was enacted, Congress found that approximately 43,000,000 Americans had at least one disability, and that this number would only grow as the population ages.[499] Congress announced our national policy is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[500] Congress also found discrimination against individuals with disabilities "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[501] By enacting the ADA, Congress sought "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[502]

Thus, Congress announced a national goal of allowing individuals with disabilities to reach self-sufficiency, avoiding the enticing trap set by dependency on government programs. Indeed, a primary sponsor of the ADA hailed it as "a broad and remedial bill of rights for individuals with disabilities" and "the 20th century Emancipation Proclamation for all persons with disabilities."[503] When President George H.W. Bush signed the ADA into law in the summer of 1990, he announced it was a day "to rejoice in and celebrate another 'Independence Day,' one that is long overdue."[504] By signing the ADA, President Bush boldly declared that "every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom." At the time the ADA was enacted, two-thirds of individuals with disabilities who were not working wanted to work, and, even more telling, eighty-two percent of those individuals with disabilities would have gladly forfeited government disability benefits to gain full-time employment.[505] The fourteen years since the enactment of the ADA have apparently not produced a sea change in the numbers of individuals with disabilities who are self-sufficient.

According to some authors, "the ADA has not led to an improvement of employment conditions to disabled persons generally."[506] One

499. 42 U.S.C. § 12101(a)(1).
500. 42 U.S.C. § 12101(a)(8).
501. 42 U.S.C. § 12101(a)(9).
502. 42 U.S.C. § 12101(b)(1).
503. 135 Cong. Rec. S. 4984 (Sen. Tom Harkin May 9, 1989); 136 Cong. Rec. S. 9689 (Sen. Tom Harkin July 13, 1990).
504. President George H.W. Bush, *Remarks on Signing the Americans with Disabilities Act of 1990* (July 26, 1990).
505. 135 Cong. Rec. S. 4985 (Sen. Tom Harkin May 9, 1989).
506. Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 Berkeley J. Emp. &

article reports that "[o]nly 26.6% of individuals with work disabilities were employed [in 1998], compared to 78.4% of nondisabled individuals. Of disabled individuals who were employed, 63.9% held full-time jobs. For nondisabled employed persons, the comparable figure is 81.5%."[507] Some studies have even concluded the employment rates of individuals with disabilities are actually decreasing since the ADA was enacted.[508] Some commentators have surmised the decrease in employment for individuals with disabilities, even in the wake of the ADA's broad national policy favoring work, can be attributed to "increases in the receipt of federal disability payments, which disabled individuals do not wish to relinquish for the sake of working."[509]

Juxtaposed with the ADA's dream of empowering individuals with disabilities to reach self-sufficiency in the job market without fear of discrimination, federal disability benefit programs stand on the opposite end of our Nation's policy toward individuals with disabilities. For the most part, our federal disability benefit programs require individuals with disabilities to be totally unable to work in order to receive benefits, leading to total dependence on government aid.

The SSA has two disability-based benefit programs.[510] One program provides for SSDI,[511] which "is a social insurance program linked to earnings."[512] The other program provides Supplemental Se-

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LAB. L. 271, 272 (2000) (citing H. Stephen Kaye, *Is the Status of People with Disabilities Improving?*, (Disability Stat. Center, Disability Stat. Abstract No. 21, 1998)). Indeed, some authors have concluded the ADA has not yielded the outcomes Congress expected. *Id.* (citing Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS 37, 52 (1997) (concluding that the ADA is "least likely to help those workers with disabilities who are most disadvantaged in the labor market"); WALTER Y. OI, EMPLOYMENT AND BENEFITS FOR PEOPLE WITH DIVERSE DISABILITIES, IN DISABILITY, WORK AND CASH BENEFITS 103 (Jerry L. Mashaw et al. eds., 1996) (stating that the ADA has not produced the anticipated growth in employment rates of the disabled); Lisa J. Stansky, *Opening Doors*, 82 A.B.A. J. 66 (Mar. 1996) (noting lack of consensus regarding whether ADA was meeting its goals); Sue A. Krenek, *Note, Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1970 (1994) (describing the ADA as a "compromise that is failing"); Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 198 (1998) ("[T]he ADA has not been as effective as hoped in increasing employment among persons with disabilities."); Steven A. Holmes, *In 4 Years, Disabilities Act Hasn't Improved Jobs Rate*, N.Y. TIMES, Oct. 23, 1994, at A18)).

507. *Id.* (citing Current Population Survey (1998), *available at* http://www.census.gov/hhes/www/disable /disabcps.html).

508. *See, e.g., id.* (citing Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUMAN RES. 693, 704-05 (2000), DARON ACEMOGLU & JOSHUA ANGRIST, THE CASE OF THE AMERICANS WITH DISABILITIES ACT 11 (1998)).

509. *Id.*

510. *See* 42 U.S.C. §§ 401-434, 1381-1383f.

511. 42 U.S.C. §§ 401-434.

512. Ken Matheny, Cleveland v. Policy Management Systems Corp. *& The Need for a Consistent Disability Policy*, 21 HAMLINE J. PUB. L. & POL'Y 283, 283 n.3 (2000).

curity Income ("SSI"),[513] which "is a public assistance program that provides subsistence benefits for those who have never worked or who have worked very little."[514] This article focuses on the SSA's main SSDI program.

To be entitled to benefits under the SSA, a person must have a disability, which is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[515] The SSA further states that an:

> [i]ndividual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.[516]

A simple reading of 42 U.S.C. § 423(d) leads to the obvious conclusion that America's noble SSDI program focuses on an individual's inability to work.

Congress gave full authority to the Social Security Administration to promulgate regulations implementing the SSA to award disability benefits to individuals with disabilities.[517] The Social Security Administration responded with a five-step process for determining whether a claimant is disabled and entitled to disability benefits under the SSA.[518] Five questions must be answered before an individual may obtain disability benefits under the SSA. First, is the claimant engaged in substantial gainful activity?[519] Second, does the claimant have a severe impairment?[520] Third, is the claimant's disability listed by the Social Security Administration in its regulations?[521] If the claimant's disability is listed, she is entitled to benefits. If the disability is not listed, then the Social Security Administration proceeds to the fourth step, which asks whether she can per-

513. 42 U.S.C. §§ 1381-1383f.
514. Matheny, 21 HAMLINE J. PUB. & POL'Y at 283 n.3.
515. 42 U.S.C. § 423(d)(1)(A).
516. 42 U.S.C. § 423(d)(2)(A).
517. 42 U.S.C. § 405(a).
518. 20 C.F.R. § 404.1520.
519. 20 C.F.R. § 404.1520(b).
520. 20 C.F.R. § 404.1520(c).
521. 20 C.F.R. § 404.1520(d); 20 C.F.R. Part 404, Subpart P, App. 1.

form her past work.[522] Finally, considering the claimant's age, educational experience, work experience, and residual functional capacity, the Social Security Administration determines whether the claimant can perform other work, which includes work that "exists in significant numbers in the national economy."[523]

The ADA, on the other hand, attempts to provide work opportunities for individuals with disabilities. Only those individuals with disabilities who can indeed work are protected by the ADA, as the ADA only protects a "qualified 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."[524] When enacting the ADA, Congress was not focused on the interaction between the ADA and the SSA. Congressional leaders simply gave assurances the ADA would lower disability benefit payments to Americans with disabilities.[525]

Obviously, an individual with a disability can receive SSDI benefits under the SSA if she cannot work anywhere in the national economy. This entitlement to federal disability benefits would seemingly preclude workplace protection under the ADA. On the other hand, if an individual with a disability can work and is thus protected under the ADA, it would seem apparent she is no longer qualified to receive SSDI benefits under the SSA. This obvious dichotomy of choices is seemingly inevitable given our current national policy toward individuals with disabilities. Unfortunately, our national disability policy does not follow seemingly straightforward logic. Instead, courts have been dealt the hand of trying to determine whether individuals receiving SSDI benefits are still entitled to sue employers for disability-based discrimination in violation of the ADA. To avoid this unfortunate passing of the legislative buck from Congress to our federal courts, Congress must rework our national disability policy.

C. Lower Courts Tackle the Issue

Before the Court "settled" the issue in *Cleveland* in 1999, the circuit courts of appeals were split on the issue of how to deal with an employee who applies for SSDI benefits and claims she is totally disabled, while at the same time requests an ADA accommodation from her employer. The courts were basically divided into three distinct camps. In one camp, courts considered the application for and receipt

522. 20 C.F.R. § 404.1520(e).
523. 20 C.F.R. §§ 404.1520(g), 404.1560(c).
524. 42 U.S.C. § 12112(a).
525. H.R. Rep. No. 101-485(II) at 43 (1990) ("[t]he Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year").

of SSDI benefits estopped an employee from claiming entitlement to ADA protection.[526] The second camp held the application for and receipt of SSDI benefits created a rebuttable presumption an employee could not be a qualified individual with a disability under the ADA.[527] Finally, the third camp held the application for and receipt of SSDI benefits was relevant to whether an employee could be a qualified individual with a disability under the ADA, but the employee was not estopped from claiming ADA rights.[528]

1. Application for SSDI Benefits Estops ADA Claims

In *McNemar v. The Disney Store, Inc.*,[529] Leonard McNemar was diagnosed with HIV in October. In November, McNemar used money from the store in which he worked to buy cigarettes. After learning about this infraction of store policy, the employer terminated McNemar, who then applied for and received New Jersey state disability benefits, Social Security disability benefits, and an exemption from repaying his education loan from the Pennsylvania Higher Education Agency. In obtaining these benefits, McNemar and his doctors certified under oath that McNemar was totally and permanently disabled and unable to work to earn money since October, even though he had continued working after the dates he provided.

Despite his statements to obtain benefits based on his permanent and total disability, McNemar filed suit against his employer for violating the ADA. The federal district court held McNemar "was judicially estopped from asserting his claims under the ADA . . . because of his prior sworn statements to various government agencies that he was totally and permanently disabled and unable to work."[530] McNemar appealed the adverse ruling.

The United States Court of Appeals for the Third Circuit asked "whether [McNemar] is judicially estopped from contending that he is a 'qualified person with a disability . . . who, with or without a reasonable accommodation, can perform the essential functions' of a job as

526. Blanton v. Inco Alloys Int'l, Inc., 108 F.3d 104, 108-09 (6th Cir. 1997); McNemar v. The Disney Store, Inc., 91 F.3d 610, 620 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 606 (9th Cir. 1996); DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995).

527. Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513 (5th Cir. 1997), *rev'd*, 526 U.S. 795 (1999).

528. Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 382 (6th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999); Rascon v. U.S. West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998); Swanks v. Wash. Metro. Area Transit Auth., 116 F.3d 582, 586 (D.C. Cir. 1997); D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 3 (1st Cir. 1996); Kennedy v. Applause, Inc., 90 F.3d 1477, 1480 (9th Cir. 1996); Robinson v. Neodata Servs., Inc., 94 F.3d 499, 502 (8th Cir. 1996).

529. 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

530. *McNemar*, 91 F.3d at 616.

contemplated by the [ADA] in light of his representations to federal and state government agencies that he is totally disabled and unable to work."[531] The court began its analysis by examining the doctrine of judicial estoppel, stating this equitable doctrine preserves the judicial system's integrity "by preventing parties from playing fast and loose with the courts in assuming inconsistent positions."[532] In determining whether the district court properly used its discretion to apply the doctrine of judicial estoppel, the court of appeals articulated a two-prong inquiry: "(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith—i.e., 'with intent to play fast and loose' with the court?"[533]

The court decided McNemar clearly asserted inconsistent positions. On the one hand, he represented to a federal agency and two state agencies that he was totally and permanently disabled and unable to work and earn money. On the other hand, he represented to the courts in his ADA claim that he was a qualified individual with a disability who was able to perform the essential functions of a job, with or without a reasonable accommodation. Thus, the Third Circuit deemed it wholly appropriate for a court to judicially estop a plaintiff from "speaking out of both sides of [his] mouth with equal vigor and credibility before [the] court."[534] Because McNemar made "unconditional assertions as to his disability" when applying for disability benefits, the circuit decided a court should not permit McNemar to "qualify those statements where the application [for benefits] itself is unequivocal."[535]

The court also addressed the argument that an individual with a disability should not be placed "in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA."[536] In response, the court concluded "there is no indication that . . . the United States Congress . . . intended to provide disability benefits to persons capable of obtaining gainful employment, and it is the province of the legislature rather than this Court to authorize such a double recovery."[537] Additionally, the court noted the "fact that the choice between obtaining

531. *Id.* at 612-13.
532. *Id.* at 617 (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)).
533. *Id.* at 618.
534. *Id.* (citations omitted).
535. *Id.* (quoting Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1361 (D. Kan. 1995)).
536. *Id.* at 620 (quoting Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1142 (1994).
537. *Id.*

federal or state disability benefits and suing under the ADA is difficult does not entitle one to make false representations with impunity . . . [or permit] one to undermine the integrity of the judicial system 'by playing fast and loose with the courts by asserting inconsistent positions.'"[538] Thus, the court affirmed the district court's decision to judicially estop McNemar from arguing he is qualified under the ADA after he consistently asserted to federal and state agencies he was permanently and totally disabled and unable to work.[539] Although the Third Circuit strictly construed statements made in the SSA setting against the claimant, other courts refused to be so strict.

2. *Application for SSDI Benefits Creates a Rebuttable Presumption Not Protected under ADA*

The United States Court of Appeals for the Fifth Circuit was unwilling to go as far as the Third Circuit, rejecting the application of the doctrine of judicial estoppel in these cases. In *Cleveland v. Policy Management Systems Corp.*,[540] the court noted the ADA requires a plaintiff to prove that he is a "qualified individual with a disability . . . who, with or without a reasonable accommodation, can perform the essential functions" of his position.[541] To receive SSDI benefits, on the other hand, the court recognized an individual must show he cannot "'engage in any substantial gainful activity by reason of any medically determined physical or mental impairment' and only if that impairment is of such severity that he is unable to do his previous work and cannot engage in any other kind of substantial gainful work which exists in the national economy."[542]

The court recognized that, when reading the ADA and the SSA "*in pari materia*, it seems logically inconsistent, at first blush, for an individual to claim that he qualifies for social security disability benefits while simultaneously maintaining that he can perform the essential functions of his position for purposes of asserting an ADA claim."[543] Undeterred by this apparently straightforward observation, the court searched for an answer to this "dilemma."[544]

The court immediately rejected a per se rule that application for or receipt of SSDI benefits judicially estops an individual from asserting a claim of discrimination under the ADA. The court provided

538. *Id.* (citation omitted).
539. *Id.*
540. 120 F.3d 513 (5th Cir. 1997), *rev'd*, 526 U.S. 795 (1999).
541. Because this case resulted in the Supreme Court opinion discussed below, only the Fifth Circuit's holding will be discussed in this section.
542. *Id.* (citation omitted).
543. *Id.*
544. *Id.*

three reasons. First, the court noted the ADA and the SSA have different analytical frameworks. Whereas the ADA requires an individualized inquiry regarding whether a person is a qualified individual with a disability, the court stated the SSA authorizes general presumptions about a person's ability to work. The court boldly concluded "an individual can have a 'disability' under the SSA definition and still be able to work."[545]

Second, the court stated the SSA does not undertake a reasonable accommodation analysis as required under the ADA. Thus, while an individual may not be able to work in the national economy without a reasonable accommodation, the court concluded the individual may be able to work if provided such an accommodation. Thus, the court concluded an individual can be "both a person with a 'disability' under the SSA and a 'qualified individual with a disability' under the ADA."[546]

Finally, the court recognized the SSA realizes an individual may be able to work while still qualifying as "disabled."[547] Specifically, the court discussed the SSA's trial work period that allows SSDI beneficiaries to work for nine months without losing their benefits.

Based on this analysis, the court held application for SSDI benefits creates a rebuttable presumption that the claimant is estopped from asserting an ADA claim:

> [W]e hold therefore that the application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability." We thus leave open the possibility that there might be instances in which the nature and content of the disability statements submitted to the SSA, in the context of the particular facts of the case, would not absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is a "qualified individual with a disability." Consequently, such a plaintiff might be able to rebut this presumption if he were able to present credible, admissible evidence such as his social security disability benefits application, other sworn documentation, and his allegations relevant to his ADA claim sufficient to show that, even though he may be disabled for purposes of social security, he is otherwise qualified to perform the essential functions of his job with a reasonable accommodation and thus not estopped from asserting an ADA claim.[548]

545. *Id.* at 517.
546. *Id.* at 518.
547. *Id.*
548. *Id.*

While the Fifth Circuit was willing to allow SSDI claimants more leeway to show eligibility for ADA protection than the Third Circuit allowed, some courts went even further. These courts refused to employ estoppel or presumptions.

3. *Application for SSDI Benefits Relevant in ADA Case Without Estoppel or Presumptions*

The United States Court of Appeals for the D.C. Circuit was such a court. In *Swanks v. Washington Metropolitan Area Transit Authority*,[549] the D.C. Circuit asked whether an employee, "alleging he was fired because of his disability, is barred from seeking relief under the [ADA] because he receives Social Security disability benefits."[550] In response, the court wrote, "[b]ecause the [SSA] and the ADA employ quite different standards and objectives—the ADA requires employers reasonably to accommodate the needs of otherwise qualified disabled individuals, while the [SSA] awards benefits to persons who, because of their disability [sic], cannot perform 'work which exists in the national economy,' without regard to reasonable accommodation—we hold that the receipt of Social Security disability benefits does not preclude ADA relief."[551]

The district court had granted summary judgment to the employer after concluding the employee's application for and receipt of disability benefits under the SSA barred his ADA claim. The D.C. Circuit condemned the district court for simply barring the ADA claim without addressing whether the employee could perform the essential functions of his position with a reasonable accommodation.[552] The court characterized the district court's conclusion as "a misunderstanding of Social Security disability determinations; in assessing eligibility for disability benefits, the Social Security Administration gives no consideration to a claimant's ability to work with reasonable accommodation."[553] According to the D.C. Circuit, the SSA simply focuses on the "general availability of work," and does not address the effects an accommodation might have on a claimant's disability status.[554]

The court then discussed the Social Security Administration's five-step process for determining whether a claimant is disabled and

549. 116 F.3d 582 (D.C. Cir. 1997), *cert. denied*, 528 U.S. 1061 (1999).
550. Swanks v. Wash. Metro. Area Transit Auth., 116 F.3d 582, 583 (D.C. Cir. 1997).
551. *Id.* (citation omitted).
552. *Id.* at 584.
553. *Id.*
554. *Id.*

entitled to disability benefits under the SSA.[555] After describing the five-step process employed by the Social Security Administration, the court readily recognized that nowhere in this process is the possible effect of an accommodation considered as to the claimant's ability to work.[556] For example, the court recognized that, if a claimant is not working and has a listed disability, a claimant is automatically entitled to benefits, regardless of whether the individual could work with a reasonable accommodation.[557] Furthermore, the court noted the fourth question simply asks whether the claimant can do her past work, but does not ask whether the claimant can do her past work with a reasonable accommodation.[558] The court decided the fact an individual may be able to return to her past work with a reasonable accommodation is simply irrelevant to the Social Security Administration when it doles out benefits.[559] Finally, the court reiterated the fifth step requires the claimant to be qualified for "jobs that exist in significant numbers in the national economy," which does not include "isolated jobs that exist only in very limited numbers."[560] Thus, the court concluded possible accommodations by an employer are usually irrelevant, unless an accommodation would be "representative of a significant number of other such jobs in the national economy."[561]

The court bolstered its conclusion by noting both the Social Security Administration and the EEOC—the agencies that implement the SSA and the ADA, respectively—agree that application for and receipt of disability benefits do not automatically preclude an ADA claim.[562]

555. *Id.*; 42 U.S.C. § 405(a), 20 C.F.R. § 404.1520. As a reminder, the SSA asks five questions: First, is the claimant engaged in substantial gainful activity? *Swanks*, 116 F.3d at 585; 20 C.F.R. § 404.1520(b). Second, does the claimant have a severe impairment? *Swanks*, 116 F.3d at 585; 20 C.F.R. § 404.1520(c). Third, is the claimant's disability listed by the agency in its regulations? *Swanks*, 116 F.3d at 585; 20 C.F.R. § 404.1520(d); 20 C.F.R. Part 404, Subpart P, App. 1. If the claimant's disability is listed, she is entitled to benefits. If the disability is not listed, then the agency proceeds to the fourth step, which asks whether she can perform her past work. *Swanks*, 116 F.3d at 585; 20 C.F.R. § 404.1520(e). Finally, "considering the claimant's age, educational experience, past work experience, and residual functional capacity, [the agency] determines whether the claimant can do other work—jobs that exist in significant numbers in the national economy." *Swanks*, 116 F.3d at 585 (quotations omitted); 20 C.F.R. § 404.1520(f); 20 C.F.R. § 404.1560(c)).

556. *Swanks*, 116 F.3d at 585.

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*; 20 C.F.R. § 404.1560(c); 20 C.F.R. § 404.1566(b).

561. *Swanks*, 116 F.3d at 585 (quoting Daniel L. Skoler, Assoc. Comm'r, Soc. Sec. Admin., *Disabilities Act Info. Mem.* at 3 (June 2, 1993) (No. SG3P2)).

562. *Id.* at 586 (citing *Disabilities Act Info. Mem.* at 3; 20 C.F.R. § 404.1504; *EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" under the Americans with Disabilities Act of 1990* at 3 (Feb. 12, 1997)).

The court then quoted the EEOC at length: "[b]ecause of the fundamental differences in the definitions used in the ADA and the terms used in disability benefits programs, an individual can meet the eligibility requirements for receipt of disability benefits and still be a 'qualified individual with a disability' for ADA purposes. Thus, a person's representations that s/he is 'totally disabled' or 'unable to work' for purposes of disability benefits are never an absolute bar to an ADA claim."[563] Based on the two agencies' standards and procedures, the court stated it was clear the critical issue in ADA cases, that of a reasonable accommodation, is never even considered in SSDI determinations.[564] Thus, the court concluded disability benefit awards cannot bar ADA relief.[565]

Furthermore, the court noted a decision deciding that awarding such benefits precludes ADA protection:

> [w]ould force disabled individuals into an 'untenable' choice between receiving immediate subsistence benefits under the Social Security Act or pursuing discrimination remedies. Forcing such a choice would undermine the pro-employment and anti-discrimination purposes of the two statutes. Claimants choosing benefits would sacrifice an opportunity for reinstatement while simultaneously shielding their employers from liability for allegedly unlawful discrimination. Individuals choosing instead to seek ADA relief would, by doing so, forego their entitlement to Social Security disability benefits. Nothing in either statute requires disabled individuals to make this choice.[566]

The court cautioned that its conclusion "does not mean that claimants' statements in support of disability claims are never relevant in ADA suits."[567] For example, the court recognized that a claimant for disability benefits could not assert that he could not perform a job's essential functions even with an accommodation and then pursue an ADA claim.[568] Given the circuit split on how to resolve the apparent contradiction between applying for and receiving SSDI benefits and making an ADA claim, the Supreme Court was forced to resolve the conflict.

563. *Id.* (quoting *EEOC Enforcement Guidance* at i).
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.* at 587.
568. *Id.*

D. THE SUPREME COURT RESOLVES CIRCUIT SPLIT

In 1999, the Supreme Court confronted this perplexing issue. In *Cleveland v. Policy Management Systems Corp.*,[569] Carolyn Cleveland suffered a disabling stroke only four months after beginning employment with Policy Management Systems ("Policy Management").[570] Three weeks after her stroke, Cleveland filed an SSDI application, claiming she was "disabled" and "unable to work."[571] Nearly three months after filing for SSDI benefits, Cleveland returned to work with Policy Management and reported this fact to the Social Security Administration two weeks later.[572] Three months to the day after returning to work, the Social Security Administration denied her SSDI application because she had returned to work.[573] Four days later, Policy Management terminated Cleveland.

Two months later, Cleveland sought reconsideration of the denial of her SSDI benefits, claiming she was terminated by Policy Management "due to my condition and . . . have not been able to work since. I continue to be disabled."[574] She later claimed she had been terminated because she "could no longer do the job [in light of her] condition."[575] The Social Security Administration denied her reconsideration request, but Cleveland sought a Social Security Administration hearing, again claiming that she was "unable to work due to my disability."[576] Nearly a year later, the Social Security Administration awarded Cleveland her SSDI benefits and made them retroactive to her stroke date.[577] A week before this award, Cleveland sued Policy Management claiming it had violated the ADA by discharging her without reasonably accommodating her disability.[578] She alleged she requested accommodations such as training and additional time to complete her work, but such accommodations were denied.[579]

The district court granted summary judgment for Policy Management because Cleveland had conceded she was totally disabled by applying for and receiving SSDI benefits.[580] Thus, the court determined Cleveland was estopped from proving the essential element of her

569. 526 U.S. 795 (1999).
570. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).
571. *Cleveland*, 526 U.S. at 798.
572. *Id.*
573. *Id.*
574. *Id.* at 798-99.
575. *Id.* at 799.
576. *Id.*
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.*

ADA claim that she could perform the essential functions of her job with a reasonable accommodation.[581]

The United States Court of Appeals for the Fifth Circuit affirmed the district court, stating the "application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'"[582] After noting there was a "theoretically conceivable" chance under "some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive," the Court of Appeals stated that Cleveland was nonetheless judicially estopped from claiming she was a qualified individual with a disability under the ADA because she had "consistently represented to the SSA that she was totally disabled."[583]

The United States Supreme Court refused to adopt any type of presumption based on an application for SSDI benefits by neglecting to focus on the apparent conflict between the SSA and the ADA. Instead, the Court discussed how the SSA and the ADA assist individuals with disabilities in different ways. In this respect, the Court mostly followed the analysis provided in *Swanks*.

The Court recognized that, under the SSA, an individual receives monetary benefits if she "is under a disability," which means an "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[584] However, the individual's impairment must be "of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[585] The ADA, on the other hand, "seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity."[586]

The Court initially rejected a per se conclusion that a person who claims to be totally disabled under the SSA is also unqualified under the ADA. The Court explained that an "SSA representation of total disability differs from a purely factual statement in that it often im-

581. *Id.*
582. *Id.* at 800.
583. *Id.*
584. *Id.* at 801 (quoting 42 U.S.C. §§ 423(a)(1), 423(d)(1)(A)).
585. *Id.* (quoting 42 U.S.C. § 423(d)(2)(A)).
586. *Id.* (citing 42 U.S.C. § 12101(a)(8) & (9)).

plies a context-related legal conclusion, namely 'I am disabled for purposes of the Social Security Act.'"[587] The Court then stated that, "despite the appearance of a conflict arising from the language of the two statutes," SSA and ADA "claims do not inherently conflict to the point where courts should apply a special negative presumption . . . because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[588]

The Court recognized that, while the ADA focuses on whether an individual with a disability can perform the essential functions of a job, with or without a reasonable accommodation, the SSA simply does not take into account the possibility of an accommodation.[589] Thus, according to the Court, "the result is that an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it."[590]

Notwithstanding, the Court recognized some statements made in SSDI proceedings certainly can affect the claimant's ADA claim. Because "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation," the Court held "that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation."[591] Specifically, "[t]o defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.'"[592] The Court provided a brief summary of its holding:

> We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI conten-

587. *Id.* at 802.
588. *Id.* at 802-03.
589. *Id.* at 803.
590. *Id.*
591. *Id.* at 806.
592. *Id.* at 807.

tion is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."[593]

Given these marching orders, lower courts took up the task of making sense out of the Supreme Court's attempt to reconcile the ADA and the SSA.

E. POST-*CLEVELAND* CASES

In the wake of *Cleveland*, courts are still confronted with seemingly inconsistent statements in ADA suits when the individual with a disability applied for and received SSDI benefits. Congress has chosen to avoid reconciling the two competing national disability statutes. Therefore, based on *Cleveland*, courts must determine whether the ADA plaintiff has provided sufficient evidence to overcome statements made in the SSDI setting to overcome summary judgment. This is not an easy task for the judicial branch.

1. SSDI Statements Irreconcilable with ADA Claim

In *Holtzclaw v. DSC Communications Corp.*,[594] Holtzclaw's chronic idiopathic pancreatitis forced him to be hospitalized and take short-term disability leave from his employment with DSC.[595] Holtzclaw then applied for and received social security disability benefits. In obtaining disability benefits, he told his insurance carrier and the Social Security Administration that his conditions "play havoc on [his] thinking and memory skills," "make it impossible to have a clear and normal mind," and "keep [him] from being able to think and concentrate."[596] He also told the Social Security Administration that his "mental and physical abilities had decreased to a level where [he is] no longer self-supportive" and that he is "unable to function in the real world" for a couple days a week.[597] He also told his insurance carrier that it was not possible to return to work, even with an accommodation, and that he was "too sick" for retraining and "unable to work at all."[598] Finally, he stated that he never expected to return to work and was "doing good [sic] to be alive."[599]

Notwithstanding these comments, Holtzclaw reapplied for employment with DSC. When DSC did not rehire Holtzclaw, he filed suit alleging he was discriminated against in violation of the ADA. The

593. *Id.* at 797-98.
594. 255 F.3d 254 (5th Cir. 2001).
595. Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 254 (5th Cir. 2001).
596. *Holtzclaw*, 255 F.3d at 258.
597. *Id.*
598. *Id.*
599. *Id.*

district court granted summary judgment to DSC because Holtzclaw was unable to perform the job with or without an accommodation.

Noting the statements Holtzclaw made to the insurance carrier and the Social Security Administration indicated he was unable to work at all regardless of an accommodation, the Fifth Circuit stated that Holtzclaw "must produce an explanation of this apparent inconsistency that is sufficient to defeat summary judgment on the issue of whether the plaintiff is a qualified individual with a disability."[600] Thus, the court considered Holtzclaw's only evidence of his ability to work, which was his belief that he was "physically able to return to work" and his presentation of a medical release form that merely said he could return to work, which was based on his assertion that he could work. The court rejected this evidence, noting Holtzclaw could not manufacture a genuine issue of fact to survive summary judgment simply by contradicting his previous sworn statement:

> *Cleveland* teaches that a plaintiff cannot change his story during litigation without a sufficient explanation for his inconsistent assertions. Holtzclaw has offered no sufficient explanation for the contradiction between his disability applications and his claim that, when he re-applied for the job, he could have worked even without reasonable accommodation. He therefore has failed to create a material issue of fact whether he is qualified for the position he sought. Because he cannot establish that element of his *prima facie* claim, summary judgment was appropriate on the ADA claim.[601]

In *Detz v. Greiner Industries, Inc.*,[602] the Third Circuit Court of Appeals confronted an age-discrimination plaintiff who had received SSDI benefits. The court was confronted with the issue of whether an employee's statements to obtain SSDI benefits preclude his subsequent age-discrimination claim.[603] The employee had worked for years as a millwright, but, after an injury, was limited to light duty work as a tool room helper.[604] When the employer downsized and laid the employee off, the employee sought SSDI benefits from the Social Security Administration.[605] In the application, the employee stated he became unable to work due to his disability on the date of his layoff and was still unable to work on the date of he filed for benefits.[606] The

600. *Id.* (citing *Cleveland*, 526 U.S. at 807).
601. *Id.* at 259.
602. 346 F.3d 109 (3d Cir. 2003).
603. Detz v. Greiner Indus., Inc., 346 F.3d 109, 111 (3d Cir. 2003).
604. *Detz*, 346 F.3d at 111-12.
605. *Id.* at 112.
606. *Id.*

Social Security Administration denied his claim, recognizing the employee was still able to work in his tool room job.[607]

The employee sought a hearing from an administrative law judge after he was twice denied SSDI benefits.[608] He again swore he was "disabled and unable to work."[609] Finding he had been disabled since his layoff date, the Social Security Administration granted his application for SSDI benefits.[610] Following its five-step analysis, the Social Security Administration determined the employee had no past relevant work or was unable to perform his past relevant work, and was unable to perform any jobs that existed in significant numbers.[611]

After gaining his right to receive SSDI benefits, the employee filed an age discrimination complaint with the EEOC.[612] The employee swore he could perform his tool room position with restrictions.[613] Eventually, the employee brought an age discrimination lawsuit in federal court against his employer.[614] The employee alleged he was fully qualified to perform his position, but was replaced by a younger employee.[615] The employer moved for summary judgment, contending the employee was precluded from showing he was qualified to perform his position because that statement was irreconcilably inconsistent with his earlier statements made to obtain SSDI benefits.[616] Defending the summary judgment motion, the employee alleged he had become disabled, for SSDI purposes, because the employer discharged him.[617] The employee contended he was not disabled before the employer discharged him, arguing he was able to perform his tool room job.[618] The employee, in essence, argued his tool room job with the limitations was the only job in the economy he could perform.[619] According to the employee, once the employer took that job away from him, the employee was unable to perform any other work.[620] Based on this explanation, the employee argued that, for purposes of his age discrimination claim, he was still qualified to perform the tool room position.[621] The district court rejected the em-

607. *Id.*
608. *Id.* at 113.
609. *Id.*
610. *Id.*
611. *Id.* (citing 20 C.F.R. §§ 404.1520(e)-(f), 404.1560(b)-(c)).
612. *Id.*
613. *Id.*
614. *Id.* at 114.
615. *Id.*
616. *Id.*
617. *Id.*
618. *Id.*
619. *Id.*
620. *Id.*
621. *Id.*

ployee's attempt to explain his seemingly inconsistent statements, and granted summary judgment to the employer.[622] The employee appealed.[623]

The Third Circuit decided that the *Cleveland* analysis applies with equal force to an age discrimination case, as the employee could not maintain an age discrimination action if he was not qualified for his position.[624] Following *Cleveland*, the court evaluated whether the employee's "assertions [before the Social Security Administration and before the court] are genuinely in conflict, and then evaluate[d] that [employee]'s attempt to explain away the inconsistency."[625] Borrowing from a disability discrimination case from the Seventh Circuit, the court laid out its analytical framework:

> *Cleveland*'s analysis suggests that an ADA plaintiff may not, simply by disavowing a prior claim of total disability, perform an about-face and assert that he is a 'qualified individual' who is capable of working. Rather, . . . the plaintiff must proceed from the premise that his previous assertion of an inability to work was true, or that he in good faith believed it to be true, and he must demonstrate that the assertion was nonetheless consistent with his ability to perform the essential functions of his job. . . . Explanations of the sort *Cleveland* requires are, in short, contextual—they resolve the seeming discrepancy between a claim of disability and a later claim of entitlement to work not by contradicting what the plaintiff told the Social Security Administration, but by demonstrating that those representations, understood in light of the unique focus and requirements of the SSA, leave room for the possibility that the plaintiff is able to meet the essential demands of the job to which he claims a right under the ADA.[626]

Given this background, the court began its analysis by asking the first question, i.e., "whether the position taken by [the employee] in his SSDI Application and his [age discrimination] claim genuinely conflict."[627] It took little effort for the court to conclude the two positions taken by the employee "are truly inconsistent with one another."[628] Recognizing that the employee told the Social Security Administration he was unable to work while maintaining before a federal court that he was able to work, the court stated the employee

622. *Id.*
623. *Id.* at 115.
624. *Id.* at 118.
625. *Id.*
626. *Id.* (quoting Lee v. City of Salem, 259 F.3d 667, 674-75 (7th Cir. 2001)).
627. *Id.*
628. *Id.* at 118-19.

"appear[ed] to be making facially incompatible assertions, as the second seems to be an 'about face' from, or 'disavowal' of, the first."[629] The court recognized the Social Security Administration initially denied the employee's request for SSDI benefits, stating the employee's restrictions did not prevent him from performing his past work in the tool room.[630] Undeterred, the employee twice more asserted to the Social Security Administration that he was unable to work.[631]

The Third Circuit was not impressed with the employee's attempt to explain away his statements to the Social Security Administration. Recognizing the employee swore to the Social Security Administration he was physically incapable of performing his job, and then brought a federal lawsuit alleging he was discharged from a job he was physically capable of performing, the court concluded the employee's "second position 'crashes face first against' his prior claim."[632] Finding the employee's assertions "patently inconsistent," the court proceeded to ask *Cleveland*'s second question of "whether [the employee] has adequately reconciled the two positions."[633]

The court flatly refused to believe the employee was able to reconcile his position before the Social Security Administration and his position before the court.[634] The court noted the employee never informed the Social Security Administration that he was physically capable of performing his tool room work, but asserted he was able to perform that position in support of his age discrimination claim.[635] The court reasoned the result may have been different had the employee indicated in his application for disability benefits that he could still perform the tool room position, but his disability prevented him from performing any other jobs.[636] Instead, the court stated the employee "appears to have manipulated the facts and perhaps the system, to obtain SSDI benefits."[637] Because the employee succeeded in convincing the Social Security Administration to render benefits based on his assertion he was unable to work, the court held his newest assertion in his age discrimination lawsuit was doomed.[638] Thus,

629. *Id.* at 119.
630. *Id.*
631. *Id.*
632. *Id.* at 119-20 (quoting Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 791 (7th Cir. 1999)).
633. *Id.* at 120 (quoting Motley v. N.J. State Police, 196 F.3d 160, 167 (3d Cir. 1999)).
634. *Id.*
635. *Id.*
636. *Id.* at 120-21.
637. *Id.* at 121.
638. *Id.*

the court affirmed the district court's grant of summary judgment in the employer's favor.[639]

Although numerous courts have forbidden individuals receiving disability benefits from asserting the right to work under the ADA,[640] other courts have reconciled an individual's statement he is unable to work when requesting disability benefits with the individual's contention in the ADA setting that he is indeed qualified to work.

2. *SSDI Statements Reconcilable with ADA Claim*

Although a logical application of the test enunciated in *Cleveland* almost presupposes most individuals who inform the Social Security Administration they cannot work at all will fail when suing employers based on a contention they actually can work, some courts have contorted the standard to allow individuals receiving SSDI benefits to have their cake and eat it too. These courts have been willing to allow the SSA and the ADA to coexist, as though they are not part of some unified policy towards individuals with disabilities.

In *EEOC v. Stowe-Pharr Mills, Inc.*,[641] the EEOC brought an ADA discrimination suit on behalf of Catherine Treece, a Stowe-Pharr employee with osteoarthritis, against Stowe-Pharr.[642] After Stowe-Pharr terminated Treece's employment, Treece sought SSDI benefits.[643] Although Treece initially told the Social Security Administration intake officer that she was able to work with an accommodation, Treece's SSDI application said, "I became unable to work because of my disabling condition."[644] The Social Security Administration awarded SSDI benefits to Treece.[645] During the course of discovery in the ADA case, Treece admitted her health had deteriorated so badly she was probably unable to work in her past field anymore, but as-

639. *Id.*

640. *See Holtzclaw*, 255 F.3d at 259 (affirming summary judgment to an employer in an ADA case brought by an employee who recovered SSDI and long-term disability benefits, because the employee was unable to "change his story during litigation without a sufficient explanation for his inconsistent assertions"); Lane v. BFI Waste Sys. of N. Am., 257 F.3d 766, 770 (8th Cir. 2001) (holding individual who received SSDI benefits was unable to harmonize statements made to the Social Security Administration with his statements in his ADA lawsuit alleging he was qualified to perform the essential functions of his job); Lee v. City of Salem, Ind., 259 F.3d 667, 675-78 (7th Cir. 2001); DiSanto v. McGraw-Hill, Inc., 220 F.3d 661, 664-65 (2d Cir. 2000); Reed v. Petroleum Helicopters, Inc., 218 F.3d 477 (5th Cir. 2000); Lloyd v. Hardin County, 207 F.3d 1080 (8th Cir. 2000); Townley v. Blue Cross & Blue Shield of Mich., 254 F. Supp. 2d 661, 667 (E.D. Mich. 2003); Varga v. Clark Foodservice of Ind., 240 F. Supp. 2d 851, 857-58 (N.D. Ind. 2003).

641. 216 F.3d 373 (4th Cir. 2000).

642. EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 375-76 (4th Cir. 2000).

643. *Id.* at 376.

644. *Id.*

645. *Id.*

serted she was able to work at Stowe-Pharr had the company provided a reasonable accommodation.[646]

The district court granted summary judgment in Stowe-Pharr's favor, concluding Treece was not a qualified individual with a disability under the ADA "because [Treece had] previously taken the position [in her SSDI application] that she was not."[647] The Fourth Circuit Court of Appeals reversed the district court, holding Treece sufficiently explained the inconsistency between her SSDI statements and the ADA claim that she was a qualified individual with a disability.[648] The court concluded Treece, when applying for SSDI benefits, "was not required to refer to the possibility of reasonable accommodation."[649] Thus, the court decided the EEOC could pursue an ADA claim against Stowe-Pharr because Treece could show she would have been able to continue working for Stowe-Pharr had it offered reasonable accommodations.[650]

In *Kiely v. Heartland Rehabilitation Services, Inc.*,[651] an individual with a degenerative eye disease, which caused him to be legally blind, had a checkered employment past. When the individual's employer decided the individual's poor vision created a safety concern, the employer discharged the employee.[652] The individual sought and received unemployment compensation benefits for one year, and then applied for SSDI benefits.[653] In his application for SSDI benefits, the blind individual stated he was "unable to work because of [his] disabling condition" and was currently still disabled.[654] Despite his receipt of unemployment and SSDI benefits, the blind individual sued his employer for disability discrimination.[655] Given these circumstances, the Sixth Circuit Court of Appeals asked "whether, notwithstanding the plaintiff's attempt to reconcile what looked like inconsistent positions, the fact that the plaintiff had signed a social security disability application in which he swore that he was 'disabled' and 'unable to work' precluded him as a matter of law from showing that he was capable of performing the essential functions of his job."[656] The court concluded, "the statements made by the plaintiff in his application for social security disability benefits were not necessa-

646. *Id.* at 376-77.
647. *Id.* at 377.
648. *Id.* at 380.
649. *Id.* at 379 (citation omitted).
650. *Id.*
651. 359 F.3d 386, 387-88 (6th Cir. 2004).
652. *Id.* at 388.
653. *Id.*
654. *Id.* (alterations in original).
655. *Id.*
656. *Id.* at 387.

rily inconsistent with the claim that he could do his job, and also concluded "the plaintiff proffered an adequate explanation of the seeming inconsistency."[657]

To reach this conclusion, the court needed to reconcile the plaintiff's statements he was disabled and unable to work with his litigation position in his disability case that he was able to work. The plaintiff attempted to reconcile the seemingly contradictory positions by stating he never claimed to be totally disabled, but simply blind.[658] The court accepted this contention, deciding the "thrust" of the plaintiff's "explanation is reasonably clear: he applied for SSDI benefits on the basis of his legal blindness—a listed impairment—and not on the basis of an inability to work."[659] Thus, the court determined the plaintiff's SSDI statements were consistent with his claim that he could actually still work and perform his required job duties.[660] In making this determination, the court recognized "a reasonable juror could conclude that when [the plaintiff] stated in his application that he was 'disabled' and 'unable to work,' he meant only 'I am entitled to SSDI benefits.'"[661] Thus, deciding the plaintiff did not obtain SSDI benefits by actually claiming he could not work, the court decided the plaintiff's disability discrimination claim could proceed against his employer because the plaintiff could show he was still qualified to perform the essential functions his old job required.[662]

F. The Need for a Uniform National Policy on Disability

The *Cleveland* "test" to determine whether an SSDI applicant's statements conflict with her allegations in unrelated litigation that she is physically qualified to work relies on the whim of the particular court confronted with the question. Painfully aware of the precarious bind some individuals with disabilities find themselves in when they seek SSDI benefits while continuing to work, or, alternatively, when they assert a disability-discrimination claim after successfully obtaining SSDI benefits for being unable to work, courts have used the *Cleveland* test as a malleable tool to allow individuals to get paid by the federal government for being totally unable to work, while pursuing federal lawsuits against employers by alleging an ability to work.

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657. *Id.*
658. *Id.* at 389-91.
659. *Id.* at 390.
660. *Id.*
661. *Id.*
662. *Id.* at 391; *see also* Giles v. Gen. Elec. Co., 245 F.3d 474, 484-85 (5th Cir. 2001) (holding plaintiff's SSDI statements did not preclude an ADA discrimination claim); Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); Voisin v. Ga. Gulf Corp., 245 F. Supp. 2d 853, 857, 861 (M.D. La. 2002).

Such painful application of a confusing standard does not lead to a consistent application of a national disability policy. Instead, this "case-by-case" approach will certainly lead to increased cynicism and inconsistent results, with individuals with disabilities suffering the most.

Recognizing an individual's statement that he cannot perform jobs in the national economy or past relevant work—while excluding all reasonable accommodations from the analysis—unintentionally guts the ADA's purpose to change attitudes about individuals with disabilities. This unfocused logic guarantees the ADA's goal to mainstream individuals with disabilities will go unfulfilled until our Nation unifies its disability policy. The ADA's dream of focusing on what individuals with disabilities can do is significantly hamstrung by the SSA's focus on what individuals with disabilities cannot do. Unfortunately, some individuals with disabilities who can work may choose SSDI benefits over work. This thirst for federal disability benefits for being unable to work while maintaining the ability to work should never be acceptable.

Therefore, the ADA and the SSA should not be treated as two ships passing in the night. Instead, they should be reworked to achieve a unified, rational and compassionate national disability policy. Some could argue courts are best equipped to harmonize the two statutes. However, courts do not consistently decide these cases. Besides, a consistent disability policy is a policy decision of enormous magnitude. Congress should wade back into the disability waters and speak loudly with a clear policy toward individuals with disabilities.

Senator James Jeffords has called America's national disability policy "schizophrenic."[663] While introducing the Work Incentive and Self-Sufficiency Act of 1996, Senator Jeffords said, "I believe that few people are returning to work after becoming eligible for Social Security disability income (SSDI) not because they can no longer find gainful employment, but because of a greater systemic problem we face as a nation. What I am referring to is this country's current schizophrenic national disability policy." Other Congressional leaders have acknowledged the same systemic problem. Senator Edward Kennedy recently said, "We are spending billions of dollars today in the Federal budget on programs that make disabled citizens dependent, not independent."[664] Senator Don Riegle has stated, "One of the prime goals of legislation affecting disabled Americans has been the effort to incorporate them into the mainstream. While the Americans With Disabilities Act would remove the barriers to participation in the workforce,

663. 142 CONG. REC. S. 8472 (Sen. James Jeffords July 22, 1996).
664. 135 CONG. REC. S. 4993 (Sen. Edward Kennedy May 9, 1998).

efforts must also be made to ensure that participation is possible. The present system of disability insurance encourages retirement from the workforce. This approach is wrong. Americans with disabilities should have every encouragement to take advantage of the options opened up by the Americans With Disabilities Act."[665] As impliedly recognized by these congressional leaders, courts are ill-equipped to apply legal principles to effectuate these policy goals.

Three possibilities exist as to what our national policy should be as reflected in the SSA and the ADA. First, our national policy could be that, if an individual with a disability can work, that individual should be protected under the ADA but should not be eligible to receive SSDI benefits under the SSA. Second, our policy could be that an individual with a disability who cannot work can receive SSDI benefits under the SSA, but cannot also seek protection under the ADA. Third, our national disability policy could fall somewhere in between the first two possibilities. Specifically, our national policy could allow individuals with disabilities to work and be protected against disability discrimination by the ADA, while at the same time provide SSA protection in the form of SSDI benefits, whether partial or total.[666]

Before the Supreme Court decided *Cleveland*, the EEOC had addressed the effects of contradictory statements made by individuals with disabilities before courts and the Social Security Administration.[667] In arguing the ADA and the SSA seek to achieve totally different purposes, the EEOC posited that the ADA's definition of disability "requires an individualized assessment of a particular individual's capabilities; focuses on the essential functions of a particular position; looks at particular positions, not work in general; and considers whether a person can work with reasonable accommodations."[668] The EEOC considered the SSA to serve a different purpose—"to provide income to individuals with disabilities who *generally* are unable

665. 135 CONG. REC. S. 4997 (Sen. Don Riegle May 9, 1989).

666. As recently recognized by the Eighth Circuit, a disability insurance policy which allows individuals with disabilities to work without losing all disability benefits is completely consistent with the ADA's policy seeking to allow individuals with disabilities to work without fear of discrimination. *See, e.g.*, Murphey v. City of Minneapolis, 358 F.3d 1074, 1079 (8th Cir. 2004) (recognizing that, unlike the SSA requirements, an individual with a disability can work and still receive disability benefits in Minnesota, because "a person receiving [Public Employees Retirement Association] disability benefits based on total and permanent disability is allowed to return to work without losing his benefits").

667. *See EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990*, EEOC Notice 915.002 (Feb. 12, 1997).

668. *Id.* at 3.

to work."[669] The EEOC determined the SSA's definition of disability "permits general presumptions about an individual's ability to work; considers all tasks as jobs are customarily performed without focusing on the essential functions of a particular position; looks generally at whether an individual can do work which exists in the national economy rather than whether s/he can perform the essential functions of particular position; and does not consider whether a person can work with reasonable accommodation."[670] This analysis renders one of the statutes impotent—and that statute regrettably is the ADA.

One of the ADA's stated purposes is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[671] With the SSA continuing to permit Americans to view individuals with disabilities as generally unable to work—and thus allow financial dependence on federal aid—the ADA's dream of full integration cannot and will not be fulfilled. Society's views of individuals with disabilities can be gleaned from the SSA and the ADA. The SSA reflects an outdated myth that individuals with disabilities are somehow dependant on government aid. The ADA attempted to shatter this myth by announcing individuals with disabilities have been kept from the job market for far too long. Indeed, when an individual with a disability is unable to perform a job's essential functions, the ADA requires affirmative action on an employer's part to reasonably accommodate the individual's disability so the individual can work.[672] For the SSA to effectively relegate this noble accommodation aspect of the ADA nearly meaningless when examining an individual's disability benefits application forces the ADA to take a backseat to the SSA's outdated policy of viewing individuals with disabilities as needing a government hand-out to survive. Surely, a middle ground can be found for Congress to achieve a consistent national policy for individuals with disabilities when it comes to choosing work versus government aid.

America "ought not to measure people by what they cannot do but, rather we ought to measure them by what they can do."[673] Indeed, it can be powerfully argued that all individuals are "dignified by work; the community is enriched by work. . . . Without meaningful work, crushing poverty of both material and spiritual life is inevita-

669. *Id.* (emphasis added).

670. *Id.* at 3-4.

671. 42 U.S.C. § 12101(b)(1).

672. 42 U.S.C. § 12112(b)(5)(A) (unlawful for an employer not to make "reasonable accommodations to the known physical or mental limitations of a qualified individual").

673. 136 CONG. REC. S. 9690 (Sen. George Mitchell July 13, 1990).

ble."[674] Because work can be "a powerful force in shaping a person's sense of identity,"[675] the SSA, implementing a national anti-work policy for individuals with disabilities, should not trump the ADA, implementing a national pro-work policy for individuals with disabilities.

Senate arguments that eradicating "discrimination in employment against persons with disabilities will result in a stronger work force and lessen dependency on the welfare system"[676] can be proven true only if the SSA and the ADA are interpreted consistently. To accomplish this solemn task, the Social Security Administration cannot discount reasonable accommodations when analyzing whether jobs exist in the national economy. The bottom line is the ADA's reasonable accommodation requirement must be included in determining whether an SSDI claimant can work. Congress must recommit itself to the ADA's promise; thus setting a uniform national policy so individuals with disabilities get fair, consistent and equal treatment by employers, the Social Security Administration and courts.

The Social Security Administration reports that approximately $62 billion in total disability benefit payments was paid in 2002.[677] These disability payments were made to almost 6.5 million individuals, with 91% of the payments made to workers with disabilities.[678] America can no longer afford to view individuals with disabilities as unable to work under the SSA, increasing government aid and dependence, while trying to adhere to the ADA's vision of viewing individuals with disabilities as able to work, with or without a reasonable accommodation. As one author has argued, the SSDI program "should be redesigned in light of the work-encouraging philosophy of the ADA so that we have a consistent disability policy instead of our current schizophrenic policy that simultaneously encourages and discourages work."[679] When Congress steps in to reconcile the ADA and the SSA,

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674. David L. Gregory, *Catholic Labor Theory & The Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129-30 (1988).

675. *Work in America: Report of a Special Task Force to the Secretary of Heath, Education and* Welfare 3-7 (1973).

676. 135 CONG. REC. S. 10791 (Sen. Bob Dole Sept. 6, 1989). An old Chinese proverb may correlate with the current policy toward individuals with disabilities as it relates to work: "Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime." This age-old saying applies to the current discussion of our Nation's national disability policy as either it favors or it disfavors work.

677. *Annual Statistical Report on Social Security Disability Insurance Program, 2002* (Aug. 2003), *available at* http://www.ssa.gov/policy/docs/statcomps/di_asr/2002/di_asr02.pdf, p.2.

678. *Id.*

679. Matheny, 21 HAMLINE J. PUB. L. & POL'Y at 286; *see also* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employ-*

the courts will be able to avoid legislating a consistent national policy toward individuals with disabilities. Courts will also be able to end the charade that the ADA, passed decades after the SSA, did not intend to affect the SSA's viewpoints toward individuals with disabilities.

G. CONCLUSION

The SSA and the ADA cannot be reconciled through judicial intervention. To interpret the SSA as not including jobs that can be performed with reasonable accommodations guts the full impact of the ADA on the American workplace. Such a strained interpretation of the SSA also reinforces negative—and outdated—societal myths about individuals with disabilities. Individuals with disabilities should be viewed for what they can do, not what they cannot do. We should focus on the individual; not the disability. Courts should stop interpreting the SSA and the ADA in such a way as to diminish individuals with disabilities by allowing them to make inconsistent statements depending on what federal benefit they seek. This unfortunate attempt to harmonize the two federal disability statutes puts America's policy towards individuals with disabilities in the hands of our federal courts, and not our elected policy leaders in the Congress. A judicial case-by-case approach to this national issue assures individuals with disabilities will receive dissimilar treatment depending on which court views a particular case.

For courts to somehow usurp Congress's role by legislating a national policy towards individuals with disabilities is wholly inappropriate. Congress must act to set America on the proper course with a consistent pro-work, anti-discrimination policy toward individuals with disabilities. Forcing individuals with disabilities to choose between complete dependence on government aid versus no aid from government whatsoever is the epitome of a Hobson's Choice. The ADA tried mightily to reduce governmental dependence from those individuals with disabilities in our society. With the SSA acting as either a carrot or a stick to those courageous individuals with disabilities who would rather be working than receiving a federal hand-out, the ADA cannot reach its true potential. When the ADA does not reach its true potential, Americans with disabilities cannot reach their true potential. When Americans with disabilities do not reach their true poten-

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ment Policy for People with Disabilities, 46 BUFF. L. REV. 123 (1998); Jorge M. Leon, *Two Hats, One Head: Reconciling Disability Benefits and the Americans with Disabilities Act of 1990*, 1997 U. ILL. L. REV. 1139; Dana S. Connell, *The Plaintiff's Two-Sided Mouth: Defeating ADA Claims Based on Inconsistent Positions Taken by the Plaintiff in Other Claims*, 22 EMPLOYEE REL. L. J. 5 (1996).

tial, America as a nation will not reach its true potential. The time for a consistent national disability policy is past due. Congress must speak with one clear voice so courts can avoid superlegislating when confronted with ADA cases involving SSA benefits.

V. "EXCUSE ME, BUT IS THAT POSITION VACANT?" THE FALSE CONFLICT BETWEEN THE ADA'S REASONABLE ACCOMMODATION REQUIREMENT AND NATIONAL LABOR POLICY

A. INTRODUCTION

The ADA's goal of providing reasonable accommodations to individuals with disabilities to allow those individuals employment opportunities may conflict with the national labor policy supporting collective bargaining and seniority systems. When an employee with a disability seeks reassignment to another position to accommodate the employee's disability, reassigning the employee may satisfy the ADA's reasonable accommodation requirement. However, if the position the employee with a disability seeks is covered by a seniority system, courts are faced with a potential conflict between the ADA and national labor policy supporting seniority systems. This section discusses that potential conflict, but concludes courts have labored under a false conflict.

Based on the ADA's plain language, when an employee with a disability seeks reassignment to a position that is legally vacant, the employer must accommodate the employee by reassigning her to the vacant position.[680] Of course, if reassignment would work an undue hardship on the employer, then the employer can refuse to reassign the employee.[681] On the other hand, when an employee with a disability seeks reassignment to a position that is not vacant, such an accommodation request is unreasonable on its face, and the employee must show special circumstances to make the reassignment request reasonable. This simple application of straightforward principles would resolve any potential conflict between the ADA and national labor policy. Unfortunately, the judicial application of accommodation principles involving reassignment to vacant positions is neither simple nor straightforward.

680. 42 U.S.C. § 12111(9)(B).
681. 42 U.S.C. § 12112(b)(5)(A).

B. ADA'S REASONABLE ACCOMMODATION REQUIREMENT

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual."[682] An employer discriminates against an individual with a disability when it does not make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[683] A reasonable accommodation under the ADA includes "reassignment to a *vacant* position."[684] Does the ADA's reasonable accommodation requirement force an employer to reassign an employee with a disability to an unfilled position covered by a seniority system? Does it make a difference whether the seniority system finds its genesis in a collective bargaining agreement or an employer's unilateral policy decision? This straightforward issue has split the federal circuit courts and even the Supreme Court. Unfortunately, courts' analysis of this seemingly simple issue has been frustratingly complex.

C. LOWER COURTS UNNECESSARILY PIT NATIONAL LABOR POLICY AGAINST THE ADA

Given the ADA's clear and simple language stating reassignments to vacant positions are reasonable, the issue seems exceedingly vulnerable to a quick and easy resolution. This is not the case. Courts have not been content to base their opinions on the ADA's plain language. Instead, courts have created a firestorm of litigation—and frustration—by pitting collective bargaining agreements and national labor policy against the ADA. This unfortunate confrontation has been based on a false conflict. The resolution of this issue has nothing to do with national labor policy—of which the ADA is an equal partner —but should be decided based on the ADA's plain language. A fair and reasonable interpretation of the ADA resolves all conflicts without allowing an appearance that national labor policy trumps the ADA's formidable and just-as-worthy goals. When an apparently vacant position is legally covered by a seniority system, there simply is no conflict between national labor policy and the ADA worthy of the lengthy treatment given the issue by many courts.

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682. 42 U.S.C. § 12112(a).
683. 42 U.S.C. § 12112(b)(5)(A).
684. 42 U.S.C. § 12111(9)(B) (emphasis added).

1. Reassignment in the Collective Bargaining Context

When an individual with a disability seeks reassignment to a position covered by a collectively bargained seniority system, the circuit courts have focused on the apparent conflict between the national labor policy favoring collective bargaining and the ADA's reasonable accommodation requirement. Thus, federal circuit courts have unanimously agreed the ADA does not require an employer to transfer an employee with a disability to a position covered by the seniority provisions of a collective bargaining agreement.[685] The reasoning has been that such a reassignment would be unreasonable because it would implicate union members' rights under the National Labor Relations Act ("NLRA").[686]

It is elemental that national labor policy supports collective bargaining. When passing the NLRA, Congress declared our national policy encourages "the practice and procedure of collective bargaining . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[687] The Supreme Court has consistently recognized a national policy supporting collective bargaining agreements.[688]

If the ADA and the NLRA truly squared off against each other in the face of an actual conflict, which part of our national labor policy should prevail? As discussed above, the EEOC has promulgated regulations to address situations in which the ADA conflicts with other federal laws: "It may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable

685. Willis v. Pac. Maritime Assoc., 244 F.3d 675 (9th Cir. 2001); Boersig v. Union Elec. Co., 219 F.3d 816 (8th Cir. 2000); Burns v. Coca-Cola Enterprises, 222 F.3d 247, 257 (6th Cir. 2000); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113 (9th Cir. 1999); Pond v. Michelin N. Am., Inc., 183 F.3d 592 (7th Cir. 1999); Aldrich v. Boeing Co., 146 F.3d 1265 (10th Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995).

686. *See, e.g.*, *Willis*, 244 F.3d at 680-81 (citations omitted).

687. 29 U.S.C. § 151.

688. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265 (1964); N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332, 342 (1939); Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, 236 (1938).

accommodation) that would otherwise be required by this part."[689] According to the EEOC and some federal courts, this conflict would result in the NLRA trumping the ADA's accommodation requirement.[690] Notwithstanding this conflict provision, the ADA's accommodation requirement does not pit the ADA against the NLRA or national labor policy. Briefly, a position covered by a legally enforceable collective bargaining agreement does not become vacant because another employee has a legal right to the position once it becomes available. As no vacant position exists, such a reassignment to the position would not be per se reasonable under the ADA's plain language. Thus, in the run of the mill cases, an employee's request to be reassigned to a position covered by a collective bargaining agreement will be unreasonable, absent special circumstances that would show the reassignment would indeed be reasonable.

Focusing on the apparent conflict between the ADA and the national labor policy supporting seniority systems also provides complex inconsistencies in federal labor law. The ADA does not provide an exception to its accommodation requirements for seniority systems—whether in the collective bargaining context or by an employer's unilateral decision to provide them to employees. Congress's decision not to protect seniority systems from its reach varies from its approach under Title VII of the Civil Rights Act of 1964[691] and the Age Discrimination in Employment Act of 1967.[692] To allow seniority systems to trump the ADA's reasonable accommodation requirement – in the face of Congress's decision not to explicitly codify this conflict resolution mechanism—would render the ADA a second-class labor statute. One can surmise Congress's failure to use language it has used in other labor statutes was not a scrivener error.

689. 29 C.F.R. § 1630.15(e).

690. *See id.*; *Willis*, 244 F.3d at 680-81.

691. "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h).

692. "It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under [previous] subsections . . . to take any action otherwise prohibited . . . to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter . . . ." 29 U.S.C. § 623(f)(2)(A); *see Barnett*, 535 U.S. at 420-21 ("Because Congress modeled several of the ADA's provisions on Title VII, its failure to replicate Title VII's exemption for seniority systems leaves the statute ambiguous, albeit with more than a hint that seniority rules do not inevitably carry the day") (Souter, J., dissenting).

2. *Courts Address Seniority Systems Outside the Collective Bargaining Context*

When confronted with seniority systems outside the collective bargaining context, such as seniority systems unilaterally implemented by employers, the federal circuit courts have not found common ground. Because no national policy explicitly favors seniority systems outside the collective bargaining arena, and because the NLRA would not be implicated, the EEOC's conflict provision would not control. Thus, for the EEOC's conflict provision to spring into effect, the focus lies in whether a seniority system is the result of collective bargaining. Under this analytical approach, the enforcement of seniority systems in the wake of a reassignment request under the ADA would depend on whether the seniority system arises from a collective bargaining agreement or an employer's unilateral policy. Unfortunately, focusing on this distinction is a myopic view of the ADA's plain language. Instead of focusing on the genesis of the seniority system, the initial focus should be on the word "vacant" in the ADA's reassignment mandate. The outcome of such an analysis with this starting point would hardly focus on where and how the seniority system was born.

In *Barnett v. U.S. Air, Inc.*,[693] the Ninth Circuit Court of Appeals, sitting *en banc*, addressed a question of first impression for the circuit.[694] Specifically, the court asked "whether reassignment is a reasonable accommodation in the context of a seniority system" not mandated by a collective bargaining agreement.[695] Robert Barnett injured his back while working for U.S. Air.[696] When he returned from disability leave, Barnett was unable to perform his cargo job, so he asserted his seniority rights to transfer to another position in the mailroom.[697] Barnett later learned that two employees with greater seniority rights sought to transfer to the mailroom, which would have required him to transfer back to the cargo area.[698] Barnett sought a reasonable accommodation under the ADA to allow him to remain in the mailroom.[699] Taking five months to respond to Barnett's request, U.S. Air finally removed Barnett from the mailroom and placed him on injury leave.[700] Barnett then requested U.S. Air accommodate him

693. 228 F.3d 1105 (9th Cir. 2000) (en banc).
694. *Id.* at 1108.
695. *Id.*
696. *Id.*
697. *Id.*
698. *Id.* at 1108-09.
699. *Id.* at 1109.
700. *Id.*

by providing special lifting equipment for the cargo area or by restructuring his cargo job so he would perform only office work.[701]

In the interim, Barnett filed discrimination charges with the EEOC.[702] U.S. Air then formally denied Barnett's requests for accommodations, informing him he could bid for jobs within his work restrictions.[703] Barnett sued U.S. Air for disability discrimination in violation of the ADA, and the district court granted U.S. Air's summary judgment motion.[704] Barnett then appealed to the Ninth Circuit, claiming U.S. Air violated the ADA when it failed to grant his accommodation request for reassignment to the mailroom.[705] Barnett argued U.S. Air should have made an exception to its seniority policy by allowing him to remain in the mailroom.[706] The Ninth Circuit recognized "[t]he question of whether an employer's unilaterally imposed seniority system trumps a disabled employee's right to reassignment has not been answered directly by any other circuit."[707]

The court asserted the ADA's legislative history belies "any per se rule barring reassignment in the context of seniority systems," even though the ADA contains no legislative history outside of the collective bargaining context.[708] The court then recognized the ADA contains legislative history suggesting a collective bargaining agreement can be a factor in determining whether a reasonable accommodation exists, but that no per se bar is referenced.[709] The court further recognized Congressional reports foresaw future collective bargaining agreements that would permit employers to take all actions necessary to comply with the ADA.[710]

The court also pointed out the EEOC rejected any per se rule allowing collective bargaining agreements to trump reasonable accommodation rights.[711] The court posited that, according to the EEOC, the ADA requires a fact-specific analysis when deciding accommodation issues, and the presence of a collective bargaining agreement is just another factor in the undue hardship analysis.[712] The court then displayed an extremely awkward and counterintuitive style of analysis. The court concluded "[b]oth the legislative history and the EEOC

701. *Id.*
702. *Id.*
703. *Id.*
704. *Id.*
705. *Id.*
706. *Id.* at 1117.
707. *Id.* at 1118-19.
708. *Id.* at 1119.
709. *Id.* (citing H.R. Rep. No. 101-485, pt. 2, at 63 (1990), U.S. Code Cong. & Admin. News at 345).
710. *Id.*
711. *Id.*
712. *Id.* (citing EEOC Compliance Manual at 5463).

reject any per se rule barring reasonable accommodation even when reassignment would conflict with a collective bargaining agreement."[713] Nonetheless, the court recognized that most courts have rejected such an interpretation, including the Ninth Circuit itself.[714] Apparently, the court simply drove down the collective bargaining path to switch lanes, pointing out this case does not involve bargained-for rights.[715] The court stated the ADA's goals would be frustrated if an employer with a seniority system were not required to reassign employees with disabilities: "Any per se rule barring reassignment because of conflicts with a seniority system would sharply limit the range of available accommodations without any required showing of undue burden on the employer. In many cases this would eliminate the most effective or the only effective reasonable accommodation."[716]

The court then asserted the ADA's basic premise is accommodations should be based on the individualized needs of the employee with a disability and the specific burdens faced by an employer.[717] In the court's collective mind, a seniority system would preclude an accommodation only when it constitutes an undue hardship.[718] Recognizing reassignment may constitute an undue burden in some circumstances, the court propounded that "courts cannot assume that which is the employer's burden to prove."[719]

The court held "reassignment is a reasonable accommodation and that a seniority system is not a per se bar to reassignment."[720] However, the court allowed the existence of a seniority system to be a factor in the employer's undue hardship analysis, which would allow "[a] case-by-case fact intensive analysis . . . to determine whether any particular assignment would constitute an undue hardship to the employer."[721] The court concluded that, if an employer with a seniority system cannot show that reassignment would cause an undue hardship, an employee with a disability is entitled to the requested reassignment.[722] Finally, the court held a triable fact issue existed as to whether permanently reassigning Barnett to the mailroom, in viola-

713. *Id.*
714. *Id.* n.4.
715. *Id.*
716. *Id.* at 1120.
717. *Id.*
718. *Id.* (citing 42 U.S.C. § 12112(b)(5)(A)).
719. *Id.*
720. *Id.*
721. *Id.*
722. *Id.*

tion of the seniority system, would force an undue hardship on U.S. Air.[723]

The *en banc* court was not unanimous. The dissent argued the court's decision put employers, employees and attorneys in a regrettable position when dealing with important and costly decisions concerning reassignment.[724] The dissent contended the majority's allotting the existence of seniority systems single-factor status provided no guidance at all.[725] The dissent foresaw litigation every time a seniority system blocks a reassignment request.[726] The dissent asserted this issue—how to deal with seniority systems when a reassignment is requested—is a policy question left for Congress, and the courts should not resolve the issue.[727] The dissent then contended the majority "left [us] with legislation by litigation, and we become a nation not of laws, but of lawyers."[728]

As opposed to the majority, the dissent found little guidance in the ADA's legislative history, noting Congress considered seniority rights to be merely a factor—and not a dispositive one—for employers and courts to consider when conducting a reasonable accommodation analysis.[729] However, the dissent recognized the House and Senate Reports clearly state that bumping senior employees is not a required accommodation.[730] Faced with the ADA's ambiguous legislative history, the dissent agreed with other circuits "that the ADA does not require an employer to give disabled employees preference over nondisabled employees in hiring and reassignment decisions."[731]

The dissent pointed out U.S. Air's decades-old seniority system covers 14,000 employees and controls assignments, shifts, transfers and holidays.[732] The dissent recognized many courts have held employers do not need to violate collective bargaining agreements containing seniority systems by providing accommodations to employees with disabilities.[733] The dissent rejected Barnett's argument, and the majority's conclusion, that U.S. Air's seniority system is not covered

723. *Id.* at 1120-21.
724. *Id.* at 1125 (Trott, J., dissenting).
725. *Id.* (Trott, J., dissenting).
726. *Id.* (Trott, J., dissenting).
727. *Id.* (Trott, J., dissenting).
728. *Id.* (Trott, J., dissenting).
729. *Id.* (Trott, J., dissenting) (citing S. Rep. No. 101-116, at 32 (1989)).
730. *Id.* (Trott, J., dissenting) (citing S. Rep. No. 101-116, at 32 (1989), H.R. Rep. No. 101-485, pt. 2, at 63 (1990)).
731. *Id.* (Trott, J., dissenting).
732. *Id.* (Trott, J., dissenting).
733. *Id.* at 1125-26 (Trott, J., dissenting) (citing Foreman v. Babcock & Wilcox, Co., 117 F.3d 800, 810 (5th Cir. 1997); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912-13 (7th Cir. 1996); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995)).

by the collective bargaining agreement cases because U.S. Air's system was unilaterally implemented.[734] The dissent concluded the ADA only requires employers to treat equally employees with disabilities and employees without disabilities when hiring and reassigning employees.[735] The dissent concluded U.S. Air's seniority system trumped the ADA's reassignment requirement: "[b]ecause Barnett's proposed accommodation would violate U.S. Air's legitimate seniority policy, I find that the proposed accommodation is unreasonable under the ADA."[736]

The Ninth Circuit was unable to convince any other circuit to follow its lead. In *EEOC v. Sara Lee Corp.*,[737] the Fourth Circuit disagreed with the Ninth Circuit by holding "the ADA does not require an employer to deviate from its nondiscriminatory seniority policy in order to accommodate a worker."[738] Vanessa Turpin had worked for Sara Lee Corporation for eight years before she was confronted with being bumped by a senior employee.[739] When another facility closed, the displaced workers at the closed facility had the option of asserting their seniority rights to displace workers at another Sara Lee facility.[740] The seniority policy was part of Sara Lee's internal policy and not part of a collective bargaining agreement.[741] An employee from the closed facility, with twenty years more seniority than Turpin, asserted seniority rights in order to take Turpin's position on the first shift.[742] Turpin, who had epilepsy, requested Sara Lee allow her to remain on the first shift.[743] To support this request, Turpin provided a doctor's letter stating that changing shifts would affect Turpin's sleep patterns, making her epileptic seizures worse.[744] However, the doctor also stated Turpin could work either the first, second or third shift, as long her shifts did not rotate.[745] Sara Lee chose not to bypass its seniority policy to accommodate Turpin, but offered to move Turpin to the second or third shift, lay Turpin off with twelve months of recall rights, or pay Turpin a severance package.[746] After taking the sever-

734. *Id.* at 1126 (Trott, J., dissenting).
735. *Id.* (Trott, J., dissenting).
736. *Id.* (Trott, J., dissenting).
737. 237 F.3d 349 (4th Cir. 2001).
738. EEOC v. Sara Lee Corp., 237 F.3d 349, 350 (4th Cir. 2001); *see also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999) (en banc) (holding employer has no duty to reassign an employee to a position covered by a seniority system).
739. *Id.* at 350-51.
740. *Id.* at 351.
741. *Id.*
742. *Id.*
743. *Id.*
744. *Id.*
745. *Id.*
746. *Id.*

ance package, Turpin filed a discrimination charge with the EEOC, which then sued Sara Lee for disability discrimination in violation of the ADA.[747]

The district court determined Sara Lee did not violate its duty to provide a reasonable accommodation by following its seniority policy.[748] On appeal, the EEOC argued the ADA required Sara Lee to violate its seniority policy to accommodate Turpin.[749] Rejecting this argument, the Fourth Circuit decided that, "[f]or those who are disabled under the statute, the ADA operates as a shield against discrimination; the statute is not a sword used to punish non-disabled workers."[750] The court's fundamental rationale in rejecting the EEOC's argument to disregard the seniority system was "the ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy" to accommodate the wishes of an employee with a disability.[751] The court believed this principle would allow employers to set general policies without the fear of uncertainty and litigation over requests for exceptions to the general policy.[752] The court cited seniority systems as prime examples of policies employers are entitled to respect.[753]

Confronting the ADA's requirement that Sara Lee allow transfers to vacant positions, the court determined this requirement provides no statutory right to supersede a seniority system.[754] Although this case involved Turpin's wish to remain in the same position as opposed to a transfer, the court classified this as a distinction without a difference.[755] The court refused to allow Turpin to vault over workers with decades more experience by requiring Sara Lee to suspend its seniority policy.[756]

The EEOC also attacked Sara Lee's seniority policy itself, claiming it was not well-entrenched or uniform.[757] In response, the court

747. *Id.*
748. *Id.* at 353.
749. *Id.*
750. *Id.* at 356.
751. *Id.* at 353-54 (citing Burns v. Coca-Cola Enter., 222 F.3d 247, 257 (6th Cir. 2000); Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1020 (8th Cir. 2000); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999) (en banc); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 678 (7th Cir. 1998); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1305 (D.C. Cir.1998) (en banc); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (per curiam); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995)). *But see* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000) (en banc).
752. *Id.* at 353.
753. *Id.* at 354.
754. *Id.*
755. *Id.*
756. *Id.*
757. *Id.*

recognized the seniority policy had existed for thirty years (fifteen in its current form); company workers knew about the policy; the policy applied to filling vacant positions, priorities for shift assignments, and interplant transfers; and the policy determined layoff and recall rights.[758] The court concluded this "neutral and non-arbitrary method of resolving sensitive questions in the workplace . . . allows all workers to know the rules of the game before [an employment] decision is made."[759] The court refused to force an exemption to Sara Lee's long-standing application of seniority rights to interplant transfers, noting such an exception would disrupt long-time employees' legitimate expectations and expose the company to lawsuits by those who were denied their rights under the seniority policy.[760]

The court noted the EEOC acknowledged Sara Lee would not have been required to make an exception to the seniority system if it had been part of a collective bargaining agreement.[761] The court found no reason to create different rules for legitimate and non-discriminatory workplace policies depending on whether they are part of collective bargaining agreements: "[a]ll workers—not just those covered by collective bargaining agreements—rely upon established company policies. The ADA does not require employers to disrupt the operation of a defensible and non-discriminatory company policy in order to provide a reasonable accommodation."[762]

Finally, the Fourth Circuit addressed how forcing an employer to make exceptions to their seniority policies to accommodate workers with disabilities would affect other workers.[763] The court recognized that "requiring an employer to break a legitimate and non-discriminatory policy tramples on the rights of other employees."[764] The court readily rejected this requirement by deciding the "ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers."[765] In doing so, the court appropriately focused on Congress's use of the word "vacant": "Congress recognized the importance of honoring the rights of non-disabled employees when it defined 'reasonable accommodation' to include 'reassignment' only when a position is 'vacant.'"[766] The court decided the ADA simply does not mandate an employer bump other employees to

758. *Id.*
759. *Id.* at 354-55.
760. *Id.* at 355.
761. *Id.*
762. *Id.*
763. *Id.*
764. *Id.*
765. *Id.*
766. *Id.* (citing 42 U.S.C. § 12111(9)(B)).

accommodate an employee with a disability.[767] Instead, the Fourth Circuit interpreted the ADA as allowing an employer to treat an employee with a disability as it would other employees under a legitimate, nondiscriminatory policy.[768] The court observed a contrary decision "would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[769] Given the circuit split over the impact seniority systems have on the ADA's reasonable accommodation requirement, the Supreme Court was forced to wade into the debate to resolve the circuit split.

D. A Splintered Supreme Court Enters Fray

In 2002, the Supreme Court entered the fray to decide an employer's duty to reassign an individual with a disability to a position covered by a seniority system. Unfortunately, the Court focused on the wrong issue at the wrong point in the analysis. Justice Stephen Breyer, writing for the Court in *U.S. Airways, Inc. v. Barnett*, propounded that the issue before the Court was how the ADA "resolves a potential conflict between: (1) the interests of a disabled worker who seeks assignment to a particular position as a 'reasonable accommodation,' and (2) the interests of other workers with superior rights to bid for the job under an employer's seniority system. In such a case, does the accommodation demand trump the seniority system?"[770] As will be flushed out below, the initial focus of the issue should not be on which policy trumps the other, but whether a seniority system forecloses a position from ever becoming vacant under the ADA. Justice Antonin Scalia, who lodged a dissent with Justice Clarence Thomas, correctly stated "[t]he question presented asks whether the 'reasonable accommodation' mandate of the [ADA] requires reassignment of a disabled employee to a position that 'another employee is entitled to hold . . . under the employer's bona fide and established seniority system.'"[771] When the issue is presented in this manner, the answer naturally follows that reassignment is not reasonable because no vacant position exists. Instead of focusing in the first instance on whether a position is vacant when subject to a seniority system, the Court dove headfirst into the apparent conflict between the ADA and seniority systems.

767. *Id.* (citing Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996)).
768. *Id.*
769. *Id.* (quoting *Dalton*, 141 F.3d at 679).
770. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393-94 (2002).
771. *Barnett*, 535 U.S. at 411-12 (Scalia, J., dissenting).

Before conducting an analysis of the issue, the Court announced that a "seniority system will prevail in the run of cases," as a conflict between a seniority system and a requested accommodation ordinarily deems the accommodation unreasonable.[772] However, the Court declared a plaintiff will always be allowed to show special circumstances make the requested accommodation reasonable.[773]

The Court then addressed the parties' arguments.[774] U.S. Air[775] argued that, when a requested accommodation violates a seniority system, the accommodation is always unreasonable.[776] Barnett's "polar opposite view" was that violating a seniority system does not make the requested accommodation unreasonable.[777] Instead, Barnett argued employers must show the requested accommodation constitutes an undue hardship on a case-by-case basis.[778] U.S. Air's core argument was the ADA does not require employers to give preferential treatment to individuals with disabilities.[779] Thus, U.S. Air argued it was not required to provide a preference to Barnett, because such a preference would violate a disability-neutral workplace rule.[780] The Court acknowledged U.S. Air's argument was "linguistically logical," but easily recognized the ADA sometimes allows preferences be given to individuals with disabilities to achieve its goals.[781] Specifically, the ADA requires preferences in the form of reasonable accommodations to allow individuals with disabilities to have the same opportunities as those without disabilities.[782]

The Court made clear an employer's disability-neutral rule does not insulate the employer's rule from the ADA's requirement to provide preferential treatment when reasonable accommodations are required.[783] If that were the case, numerous accommodations would be placed outside the ADA's reach.[784] For example, the Court noted neutral office assignment rules would not allow an accommodation for an individual with a disability to work on the ground floor, neutral work

772. *Id.* at 394.
773. *Id.*
774. *Id.* at 396-402.
775. The Supreme Court referred to the defendant as U.S. Airways, while the Ninth Circuit used U.S. Air to refer to the defendant. Because the defendant in this case has already been referred to as U.S. Air in the discussion above, this article will continue to refer to the defendant as U.S. Air.
776. *Id.* at 396.
777. *Id.*
778. *Id.* at 396-97.
779. *Id.* at 397.
780. *Id.*
781. *Id.*
782. *Id.*
783. *Id.*
784. *Id.*

break rules would not allow an individual who needs additional breaks to receive them, and a neutral furniture budget would not allow accommodations such as different kinds of chairs or desks.[785] Thus, the Court concluded that, because of the nature of reasonable accommodations, the examples listed in the ADA, and the ADA's "silence about the exempting of neutral rules together convince us that the Act does not create an automatic exemption" from preferences.[786]

U.S. Air also argued that, whenever an established seniority system would automatically assign a position to another worker, no "vacant position" would ever arise.[787] The Court decided Congress did not intend to provide the word vacant any specialized meaning.[788] The Court noted seniority systems could allow employees to bid for the vacant position.[789] In this case, Barnett occupied the mailroom position, even though the seniority system allowed the position to become open.[790] Furthermore, U.S. Air reserved the right to unilaterally change the seniority system at any time.[791] Thus, the Court rejected the argument that the position was not vacant or that the ADA would deny an accommodation based on that argument.[792]

The Court then turned to Barnett's arguments.[793] Barnett argued a reasonable accommodation simply means an effective accommodation, as any other meaning would make reasonable accommodation and undue hardship "virtual mirror images."[794] This interpretation would create a burden of proof dilemma, Barnett urged, because the employee must show reasonable accommodation, while the employer must show undue hardship.[795] The Court rejected Barnett's arguments. First, the Court noted ordinary English dictates the terms reasonable and effective are not synonymous, because the term accommodation conveys the need for effectiveness, not the term reasonable.[796] Second, the Court concluded the ADA's primary purpose does not require Barnett's interpretation.[797] The ADA seeks to eliminate stereotypical behavior that hinders those with disabilities from

785. *Id.* at 397-98.
786. *Id.* at 398.
787. *Id.* at 399. As seen by the discussion below, this compelling argument should prevail in most cases.
788. *Id.*
789. *Id.*
790. *Id.*
791. *Id.*
792. *Id.*
793. *Id.* at 399-402.
794. *Id.* at 399-400.
795. *Id.* at 400.
796. *Id.*
797. *Id.* at 401.

participating fully in the workplace.[798] Although affirmative conduct is required to meet this purpose, only reasonable behavior is required.[799] Third, the Court rejected the burden of proof dilemma, noting lower courts had already successfully reconciled reasonable accommodation and undue hardship.[800] The Court noted the employee "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[801] If the employee meets this burden, the "employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.[802] Thus, according to the Court, Barnett's case focused "on the relationship between seniority systems and the plaintiff's need to show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[803]

The Court assumed Barnett's request for reassignment to the mailroom would ordinarily be reasonable, but stated this assumption changes when the reassignment would violate the rules of a seniority system.[804] The Court asked whether that circumstance—the presence of a seniority system—would make the accommodation unreasonable.[805] The Court held the answer is ordinarily yes: "the statute does not require proof on a case-by-case basis that a seniority system should prevail[, because] it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail."[806]

The Court focused on several factors to support its holding. The Court highlighted "the importance of seniority to employee-management relations."[807] For support, the Court cited its decision in *Trans World Airlines, Inc. v. Hardison*,[808] which held, in the Title VII context, that an employer need not accommodate an employee's worship needs when it would conflict with the seniority rights of other employees.[809] The Court also recognized lower courts unanimously determined that "collectively bargained seniority trumps the need for reasonable accommodation in the context of the linguistically similar

798. *Id.* (citing 42 U.S.C. § 12101(a), (b)).
799. *Id.*
800. *Id.*
801. *Id.*
802. *Id.* at 402.
803. *Id.*
804. *Id.* at 402-03.
805. *Id.* at 403.
806. *Id.*
807. *Id.*
808. 432 U.S. 63, 79-80 (1977).
809. *Barnett*, 535 U.S. at 403.

Rehabilitation Act."[810] The Court refused to distinguish between collectively bargained seniority rights and seniority rights unilaterally imposed by management, because the advantages are the same, as are the difficulties resulting from violations of either system.[811] The Court recognized seniority systems benefit employees by fulfilling expectations of fair and uniform treatment, job security, loyalty, and due process in personnel decisions.[812] The Court refused to require employers to show more than the existence of a seniority system, because this would "substitute a complex case-specific 'accommodation' decision made by management for the more uniform, impersonal operation of seniority rules . . . . We can find nothing in the [ADA] that suggests Congress intended to undermine seniority systems in this way."[813]

The Court was not finished, explaining that an employee could show "special circumstances [which] warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts."[814] According to the Court, such an example might be when an employer, which retains the right to change the seniority system, changes the system frequently.[815] This act would reduce employee expectations that the system will be followed, which may necessitate a finding that another departure from the system would make little difference.[816] Another example, according to the Court, would be where the seniority system already contains exceptions, such that another exception would not matter.[817] Thus, the Court declared, "the plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case.[818] To meet this burden, "the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot."[819]

To sum up, the Court explained the ADA does not ordinarily require reassignments that would violate established seniority systems.[820] Thus, summary judgment is usually warranted when a

810. *Id.* (citations omitted).
811. *Id.* at 404.
812. *Id.*
813. *Id.* at 404-05.
814. *Id.* at 405.
815. *Id.*
816. *Id.*
817. *Id.*
818. *Id.* at 405-06.
819. *Id.* at 406.
820. *Id.*

showing is made that an assignment would violate a seniority system, "unless there is more."[821] The burden is on the plaintiff to provide "more," which means "special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable."[822] Although five justices concurred in the Court's decision, Justice Sandra Day O'Connor, who cast a critical fifth vote, wrote a convincing concurring opinion.

E. Justice O'Connor Creates Majority, But Court Rejected Her Sharp Analysis

Justice O'Connor used precision analysis to focus on the critical issue facing the Court without being detracted by an apparent—but false— conflict.[823] Justice O'Connor properly focused on whether a vacant position exists. This focus controls the rest of the accommodation analysis. If a position is not vacant, then a requested reassignment is not reasonable, on its face, under the ADA. A legally enforceable seniority system will prevent a position from becoming vacant. Thus, in those circumstances, the employee would be required to show special circumstances why the reassignment is still nonetheless reasonable. When a position actually becomes vacant—with no individual having a legal entitlement to that position—then the requested accommodation will be per se reasonable under the ADA's plain meaning. In those circumstances, the employer bears the burden to show the reassignment would constitute an undue hardship.

Justice O'Connor recognized the ADA's plain language specifically lists reassignment to a vacant position as a reasonable accommodation.[824] Thus, when confronted with "deciding whether an otherwise reasonable accommodation involving a reassignment is unreasonable because it would require an exception to a seniority system," Justice O'Connor declared, "the relevant issue is whether the seniority system prevents the position in question from being vacant."[825] As vacant means "not filled or occupied by an incumbent [or] possessor,"[826] Justice O'Connor concluded a vacant position, in the workplace context, means "a position in which no employee currently works and to which no individual has a legal entitlement."[827] Thus, when an employee occupying a position quits and that position is subject to a legally en-

821. *Id.*
822. *Id.*
823. *Id.* at 408-11 (O'Connor, J., concurring).
824. *Id.* at 408-09 (O'Connor, J., concurring) (citing 42 U.S.C. § 12111(9)(B)).
825. *Id.* at 409 (O'Connor, J., concurring).
826. *Id.* (O'Connor, J., concurring) (quoting *Webster's Third New Int'l Dictionary* 2527 (1976)).
827. *Id.* (O'Connor, J., concurring).

forceable seniority system, the position never becomes vacant because an employee entitled to the position under a seniority system is the possessor of that position.[828] However, when a seniority policy is unenforceable, an employee expecting the position under the unenforceable policy would not have a contractual right to the position and would not be considered a possessor.[829] Thus, with this understanding, Justice O'Connor easily declared that, "[i]f a position is not vacant [because a seniority system creates a legal entitlement to another employee], then reassignment to it is not a reasonable accommodation."[830]

Justice O'Connor recognized that the ADA's plain meaning[831] is supported by comments in the legislative history that the ADA was not meant to bump other employees in order to provide an accommodation.[832] Because Justice O'Connor's eminently reasonable analysis faithfully follows the ADA's clear and unmistakable language, her analysis is unassailable and should have preceded the Court's analysis.

Justice O'Connor accepted the Court's conclusion that the plaintiff must show the method of accommodation "is reasonable in the run of cases."[833] Justice O'Connor also agreed that, once this showing has been made, the employer "must show special [ ] circumstances that demonstrate undue hardship."[834] Thus, Justice O'Connor agreed with the analytical path to determine whether an employee has set forth a reasonable accommodation request and whether the employer has shown an undue hardship, "preventing the concepts from overlapping by making reasonableness a general inquiry and undue hardship a specific inquiry."[835] However, Justice O'Connor took offense with the Court's "blend[ing] the two inquiries by suggesting that the plaintiff should have the opportunity to prove that there are special circumstances in the context of that particular seniority system that would cause an exception to the system to be reasonable despite the fact that such exceptions are unreasonable in the run of cases."[836]

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828. *Id.* (O'Connor, J., concurring).

829. *Id.* (O'Connor, J., concurring).

830. *Id.* (O'Connor, J., concurring).

831. *Id.* at 410 (O'Connor, J., concurring) (quoting 42 U.S.C. § 12111(9)(B) ("reassignment to a *vacant* position") (emphasis added)).

832. *Id.* (O'Connor, J., concurring) (citing H.R. Rep. No. 101-485, pt. 2, p. 63 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 345 ("The Committee also wishes to make clear that reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required"); S. Rep. No. 101-116, p. 32 (1989) (same)).

833. *Id.* at 410 (O'Connor, J., concurring).

834. *Id.* (O'Connor, J., concurring) (quoting *Barnett*, 535 U.S. at 402).

835. *Id.* at 410-11 (O'Connor, J., concurring).

836. *Id.* at 411 (O'Connor, J., concurring).

Although troubled by the Court's reasoning, Justice O'Connor nobly concluded the Court's analysis would often lead to the correct outcome had her reasoning been adopted.[837] Thus, in order to forge a majority, Justice O'Connor concurred in the Court's opinion, providing the crucial fifth vote to avoid stalemate and to establish a majority rule in this case.[838] In allowing a majority to be forged with her vote, Justice O'Connor made the following concession: "in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns."[839]

Unfortunately, the Court failed to adopt Justice O'Connor's analysis, which would have provided the same end-result with a better rationale. To be unduly dramatic, Sir Winston Churchill's admonition about perseverance may have persuaded Justice O'Connor to hold steadfast: "Never give in, never give in, never, never, never, never—in nothing, great or small, large or petty—never give in except to convictions of honor and good sense."[840] Had Justice O'Connor's rationale been adopted, the Court would have avoided the false conflict between the ADA and national labor policy supporting seniority systems. Instead, the Court would have properly focused on the ADA's plain language.

F. Correct Application of *Barnett*

The United States Court of Appeals for the Tenth Circuit recently confronted a post-*Barnett* case involving a reassignment request by an individual with a disability subject to a seniority system. In *Dilley v. SuperValu, Inc.*,[841] Donald Dilley worked as a truck driver for SuperValu for eighteen years before developing back problems, which limited him to a sixty-pound lifting restriction.[842] Dilley requested SuperValu accommodate him by assigning him to truck routes that did not require heavy lifting.[843] SuperValu claimed such an accommodation was unreasonable because it would require SuperValu to violate a collective bargaining agreement to make such an accommodation.[844] SuperValu argued that, because the driving positions were subject to a collective bargaining agreement, Dilley could

837. *Id.* (O'Connor, J., concurring).
838. *Id.* at 408, 411 (O'Connor, J., concurring).
839. *Id.* (O'Connor, J., concurring) (citing *Bragdon v. Abbott*, 524 U.S. 624, 655-56 (1998) (Stevens, J., concurring), and *Olmstead v. L.C.*, 527 U.S. 581, 607-08 (1999) (Stevens, J., concurring in part and concurring in judgment)).
840. Sir Winston Spencer Churchill, *Address at Harrow School* (Oct. 29, 1941).
841. 296 F.3d 958 (10th Cir. 2002).
842. Dilley v. SuperValu, Inc., 296 F.3d 958, 961 (10th Cir. 2002).
843. *Id.*
844. *Id.* at 963.

have been bumped from any position, and keeping him in the position would violate the collective bargaining agreement.[845] SuperValu refused to accommodate Dilley; instead, it discharged him.[846] Dilley sued SuperValu under the ADA, and a jury found SuperValu had failed to accommodate Dilley.[847] SuperValu appealed.

The Tenth Circuit recognized the ADA "does not require an employer to provide an accommodation that would violate a bona fide seniority system under the terms of a collective bargaining agreement."[848] However, the court clarified this principle by noting "it is the *direct* violation of a seniority system that has been held unreasonable under the governing case law."[849] Applying this rule to the facts, the court noted Dilley's requested accommodation presented "only a potential violation of the seniority system."[850] Specifically, the court noted only four out of forty-two drivers had more seniority than Dilley.[851] In addition, SuperValu relied on the possibility that someone with greater seniority might, in the future, seek to bump Dilley.[852] Thus, the court allowed a jury to determine whether this was a remote possibility: "[e]ven if a more senior driver did request Dilley's new position, there is no reason why SuperValu would have to violate the seniority system by refusing to remove Dilley from the bumped job until other routes or positions would become available."[853] Because SuperValu's reason for not providing an accommodation to Dilley was speculative, i.e., based on a "concern regarding potential violations of the seniority system," the court held the jury was able to determine Dilley's requested accommodation was reasonable.[854]

If the Supreme Court had adopted Justice O'Connor's rationale, the *Dilley* case would have been vulnerable to a simple resolution, and, quite possibly, would not have been appealed to the Tenth Circuit. Dilley sought reassignment to a position to which no one else had a right to occupy under the collective bargaining agreement. Thus, the position was vacant. Dilley's accommodation request was per se reasonable under the ADA's plain language. Thus, SuperValu had the burden to show reassigning Dilley would have worked an un-

845. *Id.*
846. *Id.* at 961.
847. *Id.* at 961-62.
848. *Id.* at 963.
849. *Id.* (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002)).
850. *Id.*
851. *Id.*
852. *Id.*
853. *Id.* at 963-64.
854. *Id.* at 964; *see also* Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 1254 (9th Cir. 2001) (pre-*Barnett* case recognizing reassignment can be reasonable under a collectively bargained seniority system when reassignment does not conflict with the seniority system).

due hardship. Regardless of the proof issue confronting SuperValu's undue hardship defense, Dilley's case would have followed a much clearer analytical path to resolution had the Tenth Circuit been able to follow Justice O'Connor's reasoning, which would have focused, in the first instance, on whether the position Dilley sought was actually vacant.

Focusing on whether the ADA's reasonable accommodation requirement conflicts with national labor policy is misplaced. Similarly, focusing on whether a seniority system is based on a collectively bargained seniority system or one unilaterally imposed by an employer is also misplaced. Finally, failing to focus on whether a position to which an individual with a disability seeks reassignment is vacant clouds the entire issue of whether the requested reassignment is reasonable. An example will demonstrate why. On Wednesday, MJ, Inc. hires Warren B. for a financial analyst position. The parties sign an employment agreement, which states Warren begins his new job as a financial analyst the following Monday. On Friday, Wally, a current MJ employee, seeks reassignment to the financial analyst position as an accommodation for his disability. The financial analyst position is not subject to a collective bargaining agreement and MJ does not have a seniority system in place. Under the ADA's plain language, Wally's accommodation request is unreasonable on its face because the position is not vacant. Wally will need to show special circumstances why reassignment to the filled analyst position would still constitute a reasonable accommodation under the ADA. Thus, the proper focus is whether the position is vacant. Whether this example occurs in an employment environment controlled by a seniority system or not, the results will be the same if courts, employers, employees and attorneys were free to follow Justice O'Connor's sound analysis.

G. Conclusion

The ADA's reasonable accommodation requirement does not conflict with national labor policy supporting collective bargaining agreements or seniority systems. When courts confront cases involving an employee with a disability seeking reassignment to a position covered by a seniority system, the Supreme Court in *Barnett* held the employee will be unable, in the run of the cases, to show the accommodation request is reasonable. Although this holding reaches the correct result, the Court in *Barnett* appeared to get ahead of itself by failing to focus, in the first instance, on the issue of whether a position is even vacant. Justice O'Connor properly focused the inquiry, in the first instance, on whether a position is vacant. Once a court asks whether the position is vacant—and determines the position is not vacant—

then the Court's analysis applies. If a position is vacant, then an employee's accommodation request is reasonable under the ADA. If the position is vacant, an employer still has the undue hardship defense. If the position is not vacant, then the employee's request is not reasonable on its face. To gain an accommodation in those circumstances, the employee would need to show special circumstances why the accommodation is reasonable.

VI. ERADICATING THE DISABLING COMPLEXITY OF AMERICA'S DISABILITY POLICY

It seems the law becomes excessively complicated with each passing year. As established by the list of federal labor and employment statutes contained in footnote one above, the federal government extensively regulates the employment arena. Against an astounding backdrop of complex federal legislation, the ADA joined other vital federal labor and employment laws in 1990. In the fourteen years since the ADA was enacted, the ADA's noble policies have interacted with the policies of other federal labor and employment statutes. Needless to say, an already complex ADA became even more complex when analyzed alongside other federal labor and employment laws.

This article addressed some of the most noteworthy interactions between the ADA and other federal laws. Whether the ADA's policies confront the national policies announced by the FMLA, OSHA, Title VII, the SSA or the NLRA, the result should be the same—a consistently applied national policy toward individuals with disabilities. The grand aspirations of the ADA—to mainstream individuals with disabilities, to decrease their federal independence, to empower them, and to guarantee their equal treatment—can be accomplished only if the ADA's purposes stand on their own.[855] Relegating the ADA to a sec-

855. An independent federal agency, the National Council on Disability ("NCD"), contends judicial decisions have thwarted the ADA's purposes. Congress created the NCD as an independent federal agency designed to "promote policies, programs, practices, and procedures that (A) guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and (B) empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society." 29 U.S.C. § 780(a)(2)(A)-(B). On December 1, 2004, the NCD published a 152-page document entitled *Righting the ADA*, *available at*, http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf. The paper argues recent Supreme Court decisions have negatively impacted the ADA and relegated individuals with disabilities to "second-class citizen status." *Id.* at 11. The paper sets forth a legislative proposal entitled "The ADA Restoration Act of 2004," see *id.* at 12-27, "designed to get the ADA back on track." *Id.* at 11. The NCD states its proposed legislation is "designed to reinstate the scope of protection the [ADA] affords, to restore previously available remedies to successful ADA claimants, and to repudiate or curtail inappropriate or harmful defenses that have been grafted onto the carefully crafted standards of the ADA." *Id.* at 123. The NCD maintains the ADA Restoration Act is not intended "to proffer some new, different rendition of the ADA, but,

ond-class employment statute is as bad as relegating individuals with disabilities to second-class citizens, which occurred for far too long. Hopefully, when courts, attorneys, employers and individuals with disabilities fully recognize how the ADA interacts with other federal employment laws, they will be well-equipped to assure the ADA is consistently and compassionately interpreted to effectuate its goals. When that happens, the ADA's dream will be fulfilled.

rather, to return the [ADA] to the track that Congress understood it would follow when it enacted the statute in 1990." *Id.* Neither Congress nor the President has acted upon the NCD's legislative proposal.