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Something Borrowed, Something Blue: Why Disability Law Claims Are Different

S. ELIZABETH WILBORN MALLOY*

I. INTRODUCTION

Described as one of the century's most significant pieces of civil rights legislation, the Americans with Disabilities Act of 1990[1] has been widely hailed as establishing a new foundation for disability policy.[2] Senator Harkin, the primary sponsor of the law, called it "the 20th century Emancipation Proclamation for all persons with disabilities."[3] President Bush pre-

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1. Officially known as the Equal Opportunity for Individuals with Disabilities Act, but popularly referred to as the Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12113 (1994)). Before the passage of the ADA, Congress had enacted the Rehabilitation Act, which prohibits discrimination against disabled individuals by federal agencies, private employers with federal contracts, and recipients of federal funds. Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793, 794 (1994 & Supp. III 1997). Although the Rehabilitation Act made some strides in reducing disability discrimination, Congress found that disability discrimination still persisted in such critical areas as employment in the private sector. *See* S. REP. NO. 101-116, at 6 (1989). The ADA therefore extended the Rehabilitation Act's non-discrimination provisions to cover most of private sector employment. *See* 42 U.S.C. § 12111(5)(A). Because the ADA was viewed in some ways as an extension of the Rehabilitation Act, relevant case law developed under the Rehabilitation Act has been deemed generally applicable in interpreting analogous sections of the ADA and has had many of the same difficulties with interpretation. *See* 29 C.F.R. app. § 1630.2(g) (1999). This Article therefore cites to Rehabilitation Act cases where helpful to analyze these comparable difficulties under the ADA.

2. *E.g.*, 136 CONG. REC. 17,376-77 (1990) (statement of Sen. Dole) (discussing the final passage of the ADA); 135 CONG. REC. 19,807 (1989) (statement of Sen. Kennedy) (asserting that the ADA "has the potential to become one of the great civil rights laws of our generation"); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 52, 144 (1993) (discussing the ADA's role in a broader struggle for the civil rights of people with disabilities).

3. 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin, chief sponsor of the ADA) (describing the ADA as the "Emancipation Proclamation" for the disabled). Senator Harkin also stated "history is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities gained freedom, dignity and opportunity—their civil rights." *Id.* at 17,366.

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dicted that the Act would "open up all aspects of American life to individuals with disabilities" and end the "unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[4]

Congress enacted the ADA to ensure "equality of opportunity, full participation, independent living and economic self-sufficiency" for disabled individuals.[5] To achieve these goals, Title I of the ADA provides a "comprehensive national mandate" to end discrimination against individuals with disabilities in the workplace.[6] Title I is intended to "remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[7] The ADA was not conceived as an affirmative action statute,[8]

4. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070-71 (July 26, 1990). Senator McCain proclaimed "This landmark legislation will mark a new era for the disabled in our Nation." 136 CONG. REC. 17,364 (1990) (statement of Sen. McCain). Senator Hatch stated that "America will be a better place, a far better place because of the actions we are about to take today." *Id.* at 17,365 (statement Sen. Hatch); *see also id.* at 17,730 (statement of Sen. Metzenbaum) ("The ADA ensures that the great civil rights advances of this century no longer exclude Americans with disabilities. And that . . . signals an important turning point in our history."); *id.* at 17,371 (statement of Sen. Simon) (stating that the ADA represents a "'declaration of independence' for the citizens with disabilities of this Nation."); *id.* at 17,374 (statement of Sen. Jeffords) ("This legislation will bring fundamental changes to American society.").

5. 42 U.S.C. § 12101(a)(8). *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 801 (1999) ("The ADA 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."); S. REP. NO. 101-116, at 10 (1989) (describing the ADA's "critical goal" of "allow[ing] individuals with disabilities to be part of the economic mainstream of our society"); 135 CONG. REC. 19,892 (1989) (statement of Sen. Biden) (emphasizing the goals of participation, integration, independence, self-determination, and self-sufficiency). *See also* U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 5 (1983) [hereinafter SPECTRUM] (contrasting the difference between one who is truly "handicapped" versus one who simply suffers from a disability).

6. 42 U.S.C. § 12101(b)(1). The findings further explain 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' [ability] to participate in, and contribute to, society.

Id. § 12101(a)(7).

7. 29 C.F.R. app. § 1630 (2000). For excellent discussions of the ADA and its impact, see RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY (2000) (providing a general overview and analysis of the ADA and relevant case law); LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 18-30 (1992) (giving an overview of the ADA provisions relating to employment and public accommodations); Peter David Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853 (1994) (presenting the results of the ADA's effect on 4000 adults and children with mental retardation); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991) (analyzing the anticipated effect of the ADA on future civil rights litigation); Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13 (1992) (analyzing each section of the ADA); *The Americans with Disabilities Act Symposium: A View from the Inside*, 64 TEMP. L. REV. 371 (1991) (providing historical background to the passage of the ADA by individuals who helped ensure its enactment).

8. *See infra* notes 105-112 and accompanying text.

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but rather as one of equal opportunity, set forth "to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled."[9]

These laudable goals have yet to be realized. Ten years after the enactment of the ADA, studies have shown that people with disabilities continue to see virtually the same disadvantages in the labor market that they experienced prior to the enactment of the ADA.[10] The disabled have not seen a decrease in their unemployment rate since 1990.[11] Aggravating the problem, studies show that employers win an astonishingly high percentage of Title I cases under the ADA.[12] Indeed, some commentators have stated

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9. 29 C.F.R. § 1630 app. (2000).

10. For discussions of the disability and the labor market, see IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT (Jane West ed., 1996) [hereinafter IMPLEMENTING THE ADA] (assessing the effects of the ADA from the perspective of business, government, and people with disabilities; and concluding that while fears of high costs and massive litigation have not materialized, neither have many of the hoped-for benefits); 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); 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. & LAB. L. 271 (2000) (stating that the ADA has not led to increased employment for the disabled and citing recent studies to show the disabled individual's lack of progress in gaining access to employment).

11. Press Release, National Organization on Disability, Americans with Disabilities Still Face Sharp Gaps in Securing Jobs, Education, Transportation and In Many Areas of Daily Life, (July 23, 1998), *available at* http://www.nor.org/presssurvey.html [hereinafter N.O.D./Harris Survey] (survey commissioned by the National Organization on Disability finding that unemployment rates for the disabled remain much higher than for the population as a whole with only sixty-five to seventy-one percent of the disabled working). This same survey found that thirty-four percent of adults with disabilities lived in a household with an income of less than $15,000 a year compared to twelve percent of those without disabilities. *Id.*; *see generally* Laura Turpin et al., *Trends in Labor Force Participation Among People with Disabilities, 1983–1994*, DISABILITY STATS. REPT. (June 1997) (Disability Stats. Ctr., San Francisco, CA). Findings from the 1998 National Organization on Disability/Harris Survey of Americans with Disabilities indicate that twenty-nine percent of individuals with disabilities surveyed in 1998 were employed. N.O.D./Harris Survey, *supra*. This figure compares with thirty-one percent employed in 1994, and with thirty-four percent employed in 1986. *Id. See generally* Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 861-99 (1975) (documenting widespread social discrimination against individuals with disabilities).

12. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999) (noting that in the first eight years of the ADA, businesses overwhelmingly prevailed in ADA employment cases at both the trial and appellate court levels); John W. Parry, *ABA Survey of Employment Discrimination Cases Brought Under the Americans with Disabilities Act*, DAILY LAB. REP., June 22, 2000, at E1 (stating that of the 434 Title I cases decided in 1999, 95.7% resulted in employer wins and 4.3% in employee wins, and noting that in some circuits, no employee wins occurred); Darryl Van Duch, *Employers Win in Most ADA Suits*, NAT'L L.J., June 29, 1998, at B1 (reporting the results of the ABA's Commission on Mental and Physical Disability Law study that showed that in over 1200 ADA cases filed since 1992, employers had won ninety-two percent of cases decided by a judge); *see also* NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT (2000) (arguing that courts have been "ill-informed, if not outright hostile" to the ADA, and that this hostility has led to "problematic federal court interpretations of key ADA principles" that have narrowed the scope of the law's protections).

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that "the ADA's track record in improving employment opportunities for individuals with disabilities appears dismal."[13] These findings have led many disability advocates to question whether the ADA can lead to an improvement in employment opportunities for disabled persons.[14]

Commentators have begun to seek an explanation for the ADA's failure to increase employment opportunities for the disabled.[15] Some blame Congress for what they see as a poorly worded statute with so many vague terms as to render the legislation unworkable.[16] Others argue that the Act stimulates so many frivolous claims that the effectiveness of the ADA against real cases of discrimination is undermined.[17] Finally, some fault the courts for overly narrow interpretations of the ADA[18] and for a failure

13. Schwochau & Blanck, *supra* note 10, at 272. For a general overview of attitudes concerning the implementation and effectiveness of the ADA's Title I, see Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997).

14. *See* Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?* 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 52 (1997) (concluding that the ADA is "least likely to help those workers with disabilities who are most disadvantaged in the labor market"); Oi, *supra* note 10, at 103 (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, 66 (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 at 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 A22.

15. This is not to state that the ADA has not had a dramatic impact on raising the level of awareness about disability discrimination as well as promoting an enhanced view of capabilities of the disabled. *See generally* Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. L. REV. 147 (2000) (noting the courts problematic interpretations of the ADA but stating that there has been dramatic improvement in America's disability policy and in the general awareness of the disabled).

16. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 625 (1999) (noting that the ADA's definition of disability is "notoriously, albeit intentionally vague and thus subject to varying interpretations"); Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the 'Disability' Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1423 (1999) (the ADA's "compromising, unworkable definition [of disability] too often has prevented legitimate lawsuits from going forward"); Stephen W. Jones, *The Supreme Court Reins in the Americans with Disabilities Act*, 22 U. ARK. L. REV. 183 (2000) (discussing how the courts' narrow definition of disability has dramatically limited the scope and application of the ADA); Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. LAB. L. 53, 79 (2000) (reviewing the courts' interpretation of Congressional intent).

17. *See, e.g.*, Richard V. Burkhauser, *Post-ADA: Are People With Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71, 80-81 (1997); James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22, 1995, at A16 (describing suit arising from mental disabilities); George F. Will, *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31 (discussing the inclusion of mental impairment as disability under the ADA).

18. *See, e.g.*, Robert L. Burgdorf, Jr., *"Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42

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to fully comprehend the nature of discrimination faced by disabled individuals.[19]

This Article agrees that the interpretation of the ADA by the courts has had a profound influence on the ability of the disabled to gain access to the workplace and focuses on one aspect of the courts' interpretative strategy—the reliance on Title VII precedent.[20] The frequent use of Title VII case law and its burden-shifting scheme suggests that the courts have often failed to understand that the ADA is fundamentally a very different type of statute than other anti-discrimination laws.[21]

In most courtrooms, Title VII employment discrimination cases have comprised the bulk of the caseload regarding workplace discrimination. Title VII had been around for twenty-five years when Congress enacted the ADA, and it was so well established that Congress borrowed some statu-

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VILL. L. REV. 409, 415 (1997) (stating that legal analysis under the ADA has proceeded quite a long way "down the wrong road"); Ruth Colker, *supra* note 12, at 160 (speculating that "conservative judges may simply be hostile to the ADA"); Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587, 612 (1997) (discussing "disturbing trend" in the case law and criticizing the "[h]ypertechnical, often illogical, interpretations of the ADA" in recent decisions). *See generally* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997) (critiquing decisions interpreting the ADA's definition of disability); Luther Sutter, *The Americans with Disabilities Act of 1990: A Road Now Too Narrow*, 22 U. ARK. L. REV. 161 (2000) (describing the "unmitigated hostility many courts hold toward the ADA"); Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907 (1997) (analyzing decisions rejecting ADA challenges on threshold issues).

19. *See* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning*, 21 BERKELEY J. EMP. & LAB. L. 166, 166-67 (2000) (discussing the "lack of understanding" between nondisabled and disabled and the "failure to reach a consensus about the meaning of concepts and terms that are crucial to an interpretation of the [ADA]"). High unemployment rates for the disabled continue despite the fact that studies show the disabled are excellent employees. The United States Civil Service Commission studied appointments of severely handicapped workers in federal agency jobs over a ten year period. It found the employment records of the disabled employees to be "excellent." *See* SPECTRUM, *supra* note 5, at 30. For example, E.I. DuPont de Nemours & Co. is a private employer who recruits and monitors handicapped employees and reports many successful case stories. *See id.*

20. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, national origin, sex and religion. 42 U.S.C. § 2000e-2(a) (1994).

21. Other commentators have also recognized the potentially significant problems in drawing analogies between different forms of discrimination. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397, 398-410 (1991) (explaining in particular how comparing sex discrimination to race discrimination inadvertently may marginalize and obscure the role of race and the unique history of racism); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996) (contrasting the ADA, especially its duty to make reasonable accommodations, with other non-discrimination schemes and affirmative action). Yet analogies and comparisons are "necessary tools to teach and explain," to "deepen our consciousness," and to "permit us to progress in our thinking." Grillo & Wildman, *supra*, at 398, 400. Using analogies thus "provid[es] both the key to greater comprehension and the danger of false understanding." *Id.* at 398. *See generally* SPECTRUM, *supra* note 5, at 147-58 (discussing the difficulty of importing Title VII discrimination concepts into the area of discrimination on the basis of disability).

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tory language from Title VII when drafting the ADA.[22] The judiciary's familiarity with Title VII's employment discrimination doctrine and the similarity in wording between the two statutes inevitably led to importation of some of the concepts developed under Title VII to ADA cases. This is neither surprising nor inappropriate in some instances because Congress intended both statutes to address employment discrimination against relatively large protected classes. Unfortunately, an over-application of Title VII precedent has frequently frustrated the claims of ADA plaintiffs.

The ADA relies on a different vision of equality to address workplace discrimination. Disabilities, unlike race, often have a direct impact on a person's ability to perform certain jobs.[23] Therefore, unlike race, disability is frequently a legitimate consideration in employment decisions.[24] For this reason, the ADA relies on the mandate of reasonable accommodation to enjoin employers to alter job requirements in response to an individual's disability.[25] Under the reasonable accommodation principle, the employer is not just required to treat a person with a disability like a non-disabled person. Rather, the statute requires the employer to take the disability into

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22. *See infra* notes 70-74 and accompanying text.

23. The ADA does not rely solely on this different treatment conception of equality. In situations in which a disability does not impact an individual's ability to perform the job in question, the ADA's prohibition on discrimination requires that people with disabilities be treated the same as others. *See* Karlan & Rutherglen, *supra* note 21, at 10 (stating that similar treatment is not equal treatment in the case of the disabled); *see also* Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1435 (1991) ("Whereas the non-discrimination mandate under Title VII may be implemented through equal treatment, the orientation of the workplace toward individuals who are not disabled means that mere equal treatment will leave in place substantial barriers to equal opportunity."); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 958 n.236 (1999) ("[D]ifferential treatment is often necessary to eliminate such discrimination.").

24. *See* Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 514 (1997) (noting that "the traditional civil rights model of treating people 'exactly the same' does not apply to disability discrimination"). The core of Title VII's non-discrimination mandate has always been understood as the idea that similarly situated persons should be treated similarly. *See generally* Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (discussing the principle disfavoring classifications and other decisions based on race or ethnic origin).

25. *See* 42 U.S.C. § 12112(b)(5)(A) (defining discrimination to include the failure to make reasonable accommodations). Title VII contains a very limited version of an accommodation right for religious-based discrimination. *See id.* § 2000e(j) (prohibiting employment decisions based on religion "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"). Because religion raises constitutional questions under the Establishment Clause that are not raised in the disability context, courts have interpreted Title VII's religious accommodations provision extremely narrowly. *See* Karlan & Rutherglen, *supra* note 21, at 6-7. Because the religious accommodations provision in Title VII places employers "under only a very slight legal obligation," that provision is not comparable to the unique, broad accommodations rule in the ADA. *Id.* at 7; *see also* H.R. REP. NO. 101-485, pt. 3, at 40 (1989) (distinguishing the ADA's "significant" accommodation duty from Title VII's "insignificant" duty to accommodate religious beliefs).

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consideration and modify the workplace accordingly.[26] Moreover, because every disability is unique, the ADA relies on a highly individualized and contextual vision of equality. The reasonable accommodation requirement does not simply mandate that a group be treated differently; it requires that each person within a group be treated differently.[27] Accordingly, the ADA expressly contemplates that employers will take affirmative steps on behalf of employees and applicants with disabilities that they do not take for employees without disabilities.[28] Therefore, the reasonable accommodation requirement is based upon a more complex conception of equality than the simple notion that the disabled and non-disabled should be treated the same.[29]

Current case law fails to appreciate the differences between the ADA and Title VII, and thus it does not promote Congress' goal of remedying workplace discrimination against the disabled. The reasonable accommodation language in the ADA is one of the provisions that uses language borrowed from Title VII. However, under Title VII, this language has been given an extremely narrow interpretation by the Supreme Court. Recognizing that this narrow interpretation might thwart the legislative intent behind the ADA, Congress explicitly stated that the ADA's reasonable accommodations requirement should be interpreted without regard to the Title VII provision. However, this intent was not codified in the statute. Therefore, if the courts ignore this legislative history and apply Title VII's more restrictive view of reasonable accommodation to the ADA, disabled plaintiffs face a much higher obstacle in gaining reasonable accommodation than Congress intended.

The borrowing of other Title VII provisions, such as the requirement that discrimination be intentional, has also been detrimental to plaintiffs bringing cases under the ADA. Most discrimination against the disabled

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26. *See* S. REP. NO. 101-116, at 6 (1989) (explaining that disability discrimination "includes harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference"); 136 CONG. REC. 10,870 (1990) (statement of Rep. Fish) (asserting that "it is not disability which limits one's ability to participate in life, but it is societal barriers"); 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin) (asserting that it is often not the disability that is limiting, but "the obstacles placed in the way by an indifferent society").

27. Miller, *supra* note 24, at 520 (noting that the "individualized, person-by-person approach of the ADA is a departure from the traditional civil rights approach embodied in Title VII, which lays down broad and general rules that apply to all employees and employers across the board.").

28. 42 U.S.C. § 12112(b)(5)(A) (1994). Among the numerous objectives of the ADA, one is to eliminate such discrimination by forcing employers to be more flexible with respect to the employment of disabled persons through a process known as "reasonable accommodation." *Id.* § 12111(9). Unfortunately when employers have resisted this mandate, the ADA has been an alarmingly ineffective weapon in courts for the disabled plaintiff. Colker, *supra* note 12, at 101-02.

29. *See infra* notes 84-87 and accompanying text; *see also* Karlan & Rutherglen, *supra* note 21, at 10-11 (1996) (discussing how the "difference model" of discrimination differs from the "sameness model" in that it requires employers to treat some disabled persons differently than other individuals); Miller, *supra* note 24, at 514.

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has been described as "benign neglect," in contrast to the animus directed at some of those groups protected under Title VII. In other words, employers do not necessarily disfavor disabled persons, but simply fail to consider their needs when designing the workplace. For example, an employer might have an unwritten policy preventing the hiring of minorities. This demonstrates an intent to discriminate. However, if the same employer has a building that requires climbing a stairway to gain entrance, it is likely that the employer never considered the impact of those steps on physically disabled individuals. Thus, it is rare for intentional discrimination to play a role in ADA cases. Because most of the discrimination experienced by disabled individuals results from this indirect discrimination, applying Title VII intent requirements can have a disastrous impact on a disabled plaintiff's ability to recover for discrimination.

Courts have not fully appreciated the differences in discrimination that occur when dealing with the disabled and have often mechanically applied Title VII case law. Because of this failure, court decisions often demonstrate an unfocused and unprincipled examination of both the nature of disability discrimination and the corresponding duty of accommodation. Moreover, the court decisions relying on various aspects of Title VII precedent appear inconsistent, and contain no guiding principles about when it is appropriate to borrow from Title VII. Without these guidelines, decisions often appear to be result-oriented and hostile to the claims of the disabled.[30]

This Article argues that if the courts are to fully implement Congress' expressed intent to provide equal employment opportunities for individuals with disabilities, they must not apply Title VII precedent to the ADA uncritically; but instead they must recognize the subtle ways in which the statutes differ. Part II of this Article traces the statutory sources of the ADA in Title VII, revealing a continuity of language but a discontinuity of underlying policy between the two statutes. Part II also examines the issues raised by the different conceptions of discrimination in the two statutory schemes and the difficulties the courts face when evaluating the different methods the statutes use to achieve equal employment opportunity.

Part III examines three areas of employment discrimination case law in which the courts have borrowed mechanically from Title VII to interpret the ADA and have significantly reduced the effectiveness of the statute. Specifically, this Article examines the use of Title VII's reasonable accommodation provisions, the application of Title VII's constructive discharge standard, and the use of the *McDonnell Douglas* burden-shifting

30. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (suggesting that the division between minorities and Critical Legal Studies scholars results from a fundamental difference between the goals of the two groups); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) (seeking to analyze the role of politics in an area that is not simply an intellectual movement).

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test applied to reasonable accommodation inquiries in ADA cases. In each instance, the application of the Title VII standard undermines the basic goal of Title I of the ADA. The Article concludes by providing a theoretical framework for devising new anti-discrimination concepts under the ADA in a way that recognizes the inevitable influence of Title VII doctrine. In lieu of the hit-or-miss borrowing from Title VII that occurs today, this Article offers a blueprint for developing a more coherent approach to addressing employment discrimination under the ADA.

II. THE CONCEPT OF NON-DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT

A. *Responding to Disability Discrimination in Employment: The Statutory Origins and Structure of the ADA*

Title I of the ADA prohibits most private employers from engaging in disability-based employment discrimination.[31] Specifically, the ADA broadly prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual," with regard to all terms and conditions of employment, including hiring, training, compensation, advancement, and termination.[32] This general prohibition translates into three specific requirements for stating a disability discrimination claim.[33] First, the plaintiff must have a "disability."[34] Second, the plaintiff must be an "otherwise qualified individual with or without reasonable accommodation" for the job. Third, the employer must take an adverse employment action against the plaintiff because of the plaintiff's disability.

An individual may establish that he has a "disability" by showing that

31. 42 U.S.C. §§ 12101-12117 (1994 & Supp. III 1997). Since July 26, 1992, Title I of the ADA has applied to all private employers that are "engaged in an industry affecting commerce" and that employ "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* § 12111(5)(A); *see also* 29 C.F.R. § 1630.2(e)(1) (2000) (defining which employers are covered by the ADA).

32. 42 U.S.C. § 12112(a); *see also* 29 C.F.R. § 1630.4 (providing specific examples of the types of employment decisions that may not be influenced by an individual's disability status).

33. *See, e.g.*, Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997) (defining the requirements of a prima facie case under the ADA).

34. *Marshall*, 130 F.3d at 1099; *see* 42 U.S.C. § 12102(2) (1994); Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of Disability*, 73 WASH. L. REV. 575, 584 (1998) ("While class membership is essentially assumed under other anti-discrimination schemes such as Title VII, one must actually establish class membership to sue under the ADA."); *see also* Crossley, *supra* note 16, at 623-24 (describing the "rash of litigation over who has a disability").

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he has a physical or mental impairment[35] that substantially limits[36] one or more major life activities.[37] The ADA's disability definition also includes individuals who have "a record of" or are "regarded as having such an impairment,"[38] as well as those who actually have such an impairment.[39] The inclusion of individuals who have "a record of" or are "regarded" as having a disability reflects Congress' recognition that social practices and structures result in many people being classified as disabled even though they have no physical or mental limitations.[40]

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35. 42 U.S.C. § 12202(a); *see, e.g.*, Sutton v. United Airlines, Inc., 527 U.S. 471, 478-79 (1999); Bragdon v. Abbott, 524 U.S. 624, 630 (1998). The Equal Employment Opportunity Commission's regulations define three of the terms in this statutory definition of disability:

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

29 C.F.R. § 1630.2(h).

36. EEOC regulations define a substantial limitation as one that significantly restricts an individual's ability to perform one or more "major life activities" as compared with an "average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). The legislative history of the Act suggests that Congress intended the requirement of a "substantial" limitation as a way of eliminating claims based on de minimis or trivial impairments. *See* Sch. Bd. v. Arline, 480 U.S. 273, 281 (1987) (holding that, under the Rehabilitation Act of 1973, an impairment "serious enough to require hospitalization" was "more than sufficient to establish that one or more of [the plaintiff's] major life activities were substantially limited"); H.R. REP. NO. 101-485, pt. 2, at 52 (1990) (explaining that "[a] person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity"). *See generally* Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83 (2000).

37. 42 U.S.C. § 12102(2)(A) (1994). Major life activities include the "basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. app. § 1630.2(i) (adding sitting, standing, lifting, and reaching to the list of major life activities set forth in the statute); *see, e.g.*, *Bragdon*, 524 U.S. at 638 (holding that reproduction is a major life activity).

38. 42 U.S.C. § 12102(2)(B)-(C); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (noting that many physical or mental impairments "are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence," and that "[s]uch people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic"); *see* Locke, *supra* note 18, at 109 (arguing that judicial efforts to determine whether an individual has a disability under the ADA are inconsistent with the statute's purpose).

39. 42 U.S.C. § 12102(2)(C). The definition of disability also prohibits discrimination against an individual who associates with a person with a disability. *Id.* § 12112(b)(4).

40. In *Sch. Bd. v. Arline*, a case interpreting the Rehabilitation Act, the Supreme Court explained that the definition of disability reflects:

> Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of,

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After satisfying the first requirement of having a "disability," the plaintiff must fulfill the second ADA requirement: that the plaintiff is a "qualified individual" for the job.[41] The determination that an individual with a disability is "qualified" requires a finding that the individual can, "with or without reasonable accommodation, . . . perform the essential functions of the employment position that such individual holds or desires."[42]

For a task to be an "essential function" or a "fundamental job dut[y] of the employment position,"[43] the employer must actually require the employee to perform the duty. Removing the duty must alter the position fundamentally.[44] Thus, a particular task may be essential "if the reason that the position exists is to perform that function," if the work is highly specialized and the applicant is hired specifically to perform the task or if a

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> or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."

480 U.S. at 279 (alteration in original) (citations omitted) (quoting S. REP. NO. 93-1297, at 50 (1974)). More recently, the Supreme Court has limited the definition of disability such that the ADA's scope has been narrowed. *See, e.g., Sutton*, 527 U.S. at 475 (holding that an individual's disability must be considered with reference to any mitigating measures).

41. 42 U.S.C. § 12112(a) (1994). These requirements have received some criticism. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1023-24 (1998). Diller states,

> [t]o satisfy the first inquiry, an ADA plaintiff must argue that medical impairments either impose, or are perceived as imposing, substantial limitations on the ability to perform basic life activities. However, to satisfy the second statutory requirement, the plaintiff must argue that despite these actual or perceived limitations, he or she is capable of performing the job in question. A plaintiff who appears only slightly impaired risks failure to satisfy the definition of disability, while a plaintiff who appears too impaired may be found "not qualified" to perform the job.

Id.

42. 42 U.S.C. § 12111(8). If a reasonable accommodation cannot enable the disabled employee to perform of the essential functions of the job, then the employee is not "otherwise qualified" and is not covered under the statute. *Id.* § 12113(a).

43. 29 C.F.R. § 1630.2(n)(1) (2000). *See, e.g.*, Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140-41 (2d Cir. 1995) (discussing the question whether "classroom management—the ability to maintain appropriate behavior among the students—[is] an essential function of a tenured library teacher's job" and setting out a framework for answering questions regarding the essential functions of particular jobs).

44. "Essential functions" are defined as "the fundamental job duties of the employment position" and do not include "the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1). Courts must give consideration to the employer's judgment about which job functions are essential and treat prior written job descriptions as evidence in making that assessment. *Id.* § 1630.2(n)(3)(i)-(ii). In addition, employers are not required to accommodate disabled individuals by eliminating essential functions from the job. *See* Strathie v. Dep't of Transp., 716 F.2d 227, 230 (3d Cir. 1983) (stating that an accommodation is unreasonable "if it would necessitate modification of the essential nature of the program" or if it would subject the employer to "undue burdens, such as extensive costs"); *see also* Milton v. Scrivner, Inc., 53 F.3d 1118, 1123-24 (10th Cir. 1995) (holding that grocery warehouse stockers were not qualified when they could not perform essential function of job, where reduced production standards or designation of lighter work load was not a reasonable accommodation); 29 C.F.R. app. § 1630 background (explaining that, although the ADA "focuses on eradicating barriers," employers still may apply the "same performance standards and requirements that employers expect of persons who are not disabled").

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limited number of employees exist to whom the employer could redistribute the task.[45] Duties that fall outside the essential job functions are considered "marginal,"[46] and disabled employees are still considered "qualified" even if they cannot perform marginal job tasks.[47] Because the ADA affirmatively obligates employers to provide reasonable accommodations to allow disabled employees to perform essential job functions, the failure to do so is considered a form of disability discrimination.[48] For example, employers have been required to provide different equipment and furniture for disabled employees, as well as to allow disabled employees to maintain more flexible work schedules and break times.[49]

In general, reasonable accommodation includes any type of modification or adjustment to the operational work environment,[50] including the manner or circumstances in which the position is customarily performed, to allow a disabled employee to do the job.[51] The obligation to provide rea-

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45. 29 C.F.R. § 1630.2(n)(2)(i)-(iii). The EEOC also instructs courts to consider:

> (iii) [t]he amount of time spent on the job performing the function; (iv) [t]he consequences of not requiring the incumbent to perform the function; (v) [t]he terms of a collective bargaining agreement; (vi) [t]he work experience of past incumbents in the job; and/or (vii) [t]he current work experience of incumbents in similar jobs.

Id. § 1630.2(n)(3)(iii)-(vii); *see id.* app. § 1630.2(n) (providing examples of these criteria).

46. *See supra* note 38.

47. *See, e.g.*, EEOC v. AIC Sec. Investigations, Ltd., 820 F. Supp. 1060, 1065 (N.D. Ill. 1993) (finding a disputed issue of fact as to whether plaintiff, who could not drive, could perform the essential functions of his job because defendant failed to establish that driving was an essential function). The House Judiciary Committee stated: "In the event there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement, as long as the selected accommodation provides meaningful equal employment opportunity for the applicant or employee." H.R. REP. NO. 101-485, pt. 3, at 40 (1990). Employers are not required to lower quality or quantity standards. Moreover, employers are not required to create new jobs, displace other employees, or promote disabled employees. *See* 29 C.F.R. § 1630.2(o).

48. *See* 42 U.S.C. § 12112(b)(5)(A) (1994); 29 C.F.R. app. § 1630.9 ("The obligation to make reasonable accommodation is a form of non-discrimination."); *see also* Karlan & Rutherglen, *supra* note 21, at 8, 9 (explaining that the concept of reasonable accommodation is not only "integral to defining the class of protected individuals," but also "constitutes a separate species of discrimination").

49. *See, e.g.*, Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1136 (7th Cir. 1996) (concluding that a wrist rest rather than adjustable keyboard was a reasonable accommodation for employee with osteoarthritis); Perez v. Phila. Hous. Auth., 677 F. Supp. 357, 359 (E.D. Pa. 1987) (holding that the employer was required to provide a straight back chair, use of elevator and regular breaks for a receptionist with back problems).

50. The term "reasonable accommodation" may include—

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

42 U.S.C. § 12111(9).

51. The ADA defines a reasonable accommodation as "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii) (2000). The ADA requires an employer who is aware of an

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sonable accommodation compels employers to change the requirements and working conditions of a job to provide individuals with disabilities an equal opportunity for participation. Typically, reasonable accommodation involves "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[52] These accommodations are intended to mitigate or eliminate any performance impact resulting from the employee's disabilities. Individuals who receive this reasonable accommodation do not gain an "advantage" over other employees—they are simply provided the same opportunity to succeed.[53] Thus, the ADA protects disabled persons whose physical or mental impairments prevent them from performing the job in its current form, but who could perform the job if the employer reconfigured it to some degree.[54]

Once a disabled employee submits a request for accommodation, the employer must determine whether the request is reasonable.[55] Although

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employee's disability to take reasonable measures to accommodate that disability. *See id.* § 12112(b)(5)(A). The ADA requires the employer to identify possible accommodations and evaluate the reasonableness of the accommodation, including any possible negative effects on the employer. *See* 29 C.F.R. app. § 1630.9 (discussing steps an employer would undertake in making a reasonable accommodation).

52. 42 U.S.C. § 12111(9)(B); *see* 29 C.F.R. § 1630.2(o)(2)(i)-(ii) (identifying typical accommodations, including facility modification, job restructuring and "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment," "[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips," or "making employer provided transportation accessible, and providing reserved parking spaces"); EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, § 3.10, at 111-16 to 111-33 (1990) (providing detailed examples of reasonable accommodations). The legislative history reveals that Congress intended this language to be as illustrative as the "other similar accommodations" formulation would indicate: "[The list of illustrations] is not meant to be exhaustive; rather it is intended to provide general guidance about the nature of the obligation. . . . [T]he decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case." S. REP. NO. 116, at 32 (1990).

53. *See* Karlan & Rutherglen, *supra* note 21, at 4 (drawing distinctions between the ADA's reasonable accommodations rule and traditional forms of non-discrimination protection, but concluding that the distinctions do not show "that disabled individuals are somehow receiving unwarranted benefit or even an unfair advantage over other groups that have experienced exclusion from full economic participation"). Courts consistently have interpreted the ADA's reasonable accommodation requirement to include a non-discrimination mandate. ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 38 (1995). For a discussion of the ADA as requiring affirmative accommodation rather than simply preventing discrimination, see Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Discrimination*, 52 STAN. L. REV. 171, 173 (1999) (quoting BLACK'S LAW DICTIONARY to define discrimination as "a failure to treat all persons equally where no rational distinction can be found between those favored and those not favored").

54. *See* 42 U.S.C. §§ 12111(5)(b)(8), (9), 12112(b)(4), (5) (1994).

55. *See id.* § 12111(9); 29 C.F.R. app. § 1630.9 (Interpretive Guidance on Title I of the Americans with Disabilities Act). The Interpretative Regulations are important in explaining how the EEOC construes the substantive regulations and the ADA itself. Although the regulations are not binding on the

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the employer is required to consider each request, the duty to accommodate is not limitless. The employer does not have to accommodate an employee who poses a direct threat to others.[56] In addition, accommodation is not required if the requested accommodation would pose an "undue hardship" for the employer.[57] The undue hardship defense protects employers from being forced to undertake accommodations that may result in a materially detrimental economic impact on business operations.[58] Although the ADA treats "reasonable accommodation" and "undue hardship" as distinct concepts,[59] courts that find a requested accommodation "reasonable" are unlikely to exempt employers from undertaking it; and correspondingly, courts that find a requested accommodation to pose an "undue hardship" are unlikely to demand that an employer provide it.[60]

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agency or on the courts, they are entitled to some deference. *See* Christenson v. Harris County, 120 S. Ct. 1655, 1662 (2000). In this case the guidelines suggest the following step by step process: (1) the employer in conjunction with the employee must identify and distinguish the essential aspects of the job; identify the abilities and limitation of the employee as well as barriers to performing the essential job functions, (2) the employer must identify, again in conjunction with the employee, possible accommodations, (3) the reasonableness of the identified accommodations must be weighed, and (4) the selected accommodation is implemented. *See* 29 C.F.R. app. § 1630.9 Interpretive Guidance.

56. The ADA does not require employers to hire an individual if the applicant poses a direct threat to the health or safety of others. *See* 42 U.S.C. § 12113(b). The EEOC regulations expand the definition of direct threat to include threat to one's self. 29 C.F.R. § 1630.2(r) (defining "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").

57. *See* 42 U.S.C. § 12111(10) (defining undue hardship as "an action requiring significant difficulty or expense" and requiring the court to consider factors such as the nature and cost of the accommodation needed and the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation). The legislative history makes clear that Congress did not intend to impose definite rules about what constitutes undue hardship—for instance, percentage of pay for the position in question. 136 CONG. REC. H2470, H2475 (daily ed. May 17, 1990) (rejecting an amendment that would have established a presumption of undue hardship at ten percent of annual salary); H.R. REP. NO. 101-485, pt. 3, at 41 (1990) (rejecting per se rule of undue hardship).

58. *See* H.R. REP. No. 101-485, pt. 3 at 41; 29 C.F.R. app. § 1630.15(d) (2000). The legislative history indicates that Congress intended to define the term "undue hardship" narrowly, stating that [the term] refers to an action that is "unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program." H.R. REP. NO. 101-485, pt. 2, at 67 (1990). The House Report expressly disavows Title VII's view of undue hardship which permits allowing a cost defense to a claim of religious accommodation. H.R. REP. NO. 101-485, pt. 3, at 40 (distinguishing duties under the ADA from those under Title VII as set forth in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)).

59. *See* 42 U.S.C. § 12111(9), (10). Most courts construe the inquiry into whether an accommodation is "reasonable" to be essentially the same as the question of whether it imposes an undue hardship. *See* Karlan & Rutherglen, *supra* note 21, at 11-12. Chai Feldblum, one of the drafters of the ADA, however, has explained that the determination of "reasonableness" was intended to focus on the effectiveness of an accommodation, while consideration of the costs imposed on the employer would be taken into account as part of the "undue hardship" test. Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613, 619-20 (1996); *see* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 144-48 (2d Cir. 1995) (Newman, C.J., concurring) (discussing this view of reasonable accommodation).

60. *See, e.g.*, Sch. Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987) (containing dictum that accommodation is unreasonable if it imposes undue hardship). The distinction between reasonable accommoda-

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Thus, although critics of the ADA have argued that the reasonable accommodation requirement of the statute unfairly requires employers to "subsidize" employees with disabilities,[61] the costs that would be borne by employers are substantially limited by the requirement that those accommodations not impose an "undue hardship."[62] In addition, the burdens imposed on employers are akin to other statutory obligations, such as duties to provide fair and safe workplaces (e.g., the requirements of the Family Medical Leave Act and Occupational Safety and Health Act).[63] The ADA,

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tion and undue hardship survives mainly in the procedural form of allocating the burden of proof between the disabled individual and the employer. The federal courts of appeals are split over the relationship between the two concepts and the extent of the plaintiff's burden of proof. *Compare Borkowski*, 63 F.3d at 135-40, 144-48 (explaining allocation of the burden of proof on undue hardship by the fact that "the employer has far greater access to information than the typical plaintiff, both about its own organization and, equally importantly, about the practices and structure of the industry as a whole") *and* Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (when a federal administrative agency invokes the affirmative defense of undue hardship, it must bear the burden of persuasion on that issue) *with* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) ("The employee must show that the accommodation is reasonable . . .") *and* Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991) ("Once the plaintiff has made a prima facie case that she or he is otherwise qualified by showing the ability to perform the essential functions of the job with some reasonable accommodation, the burden shifts to the employer to show that no reasonable accommodation is possible.").

61. The claim that the ADA represents an unfunded mandate was made from the time of the adoption of the ADA in 1991. Conservative critics of the ADA voice this view with some frequency. For example, Professor Jerry Mashaw immediately noted that the ADA uses "potentially unfair taxation to provide in-kind benefits, which a deficit-happy Congress does not want to fund through the budget process." Jerry L. Mashaw, *In Search of the Disabled*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS AND OPPORTUNITIES 70 (Carolyn L. Weaver ed., 1991) [hereinafter DISABILITY AND WORK]. Carolyn Weaver has referred to the reasonable accommodation requirement of the ADA as a feature that "distorts a civil rights measure into what is essentially a mandated benefits program for the disabled." Carolyn Weaver, *Incentives Versus Controls in Federal Disability Policy*, *in* DISABILITY AND WORK, *supra*, 1, 3-17 (arguing for incentives rather than rights-based policies toward disability). Likewise, Professor Richard Epstein argued,

> Under the ADA, Congress mandates a set of off-budget subsidies not explicitly taken into account in setting federal policy. The expenditures are borne by private businesses and by state and local governments, which are left to scramble for resources as best they can. By working through the regulatory mode, Congress ensures the fatal separation of the right to order changes from the duty to pay for them.

RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW 493 (1992) (concluding that a system of federal grants should replace the ADA so that Congress pays for the accommodations that it wants employers to make).

62. *See* 42 U.S.C. § 12111(10)(A). Empirical evidence suggests that the cost of providing accommodations has not, in fact, been high. *See* Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278 (1996) (noting that the overall average cost of the accommodations made by Sears was $45); Lisa A. Lavelle, Note, *The Duty To Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only To Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135, 1194 (1991) (arguing that limitations on the duty to provide accommodations will protect business).

63. *See* Blanck & Marti, *supra* note 13, at 377-78 (reporting that the average cost of a reasonable accommodation was less than $500 with many accommodations costing nothing); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 222 (1994) (claiming that early assumptions that employing disabled individuals does not generate efficiency gains may be unfounded and that employ-

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like Title VII, acknowledges that an employer's prejudice or ignorance may predispose him to make economically unsound judgments about certain individuals. Studies have shown that in many instances the economic productivity of employees with disabilities will offset the costs of providing accommodations to those workers.[64]

B. *The Difference Between Title VII and the ADA: The Causes and Definition of Discrimination Against Individuals with Disabilities*

Courts have adopted some of Title VII's precedent in deciding ADA cases due to practical and perceived similarities between the statutes.[65] The ADA shares the same goal: helping to provide a protected class with equal opportunity for employment.[66] The legislative history of the ADA contains multiple references to the success achieved by Title VII.[67] The legislative

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ers who have hired such individuals often report economic gains from their efforts to reconceptualize jobs and tasks in a way that enables disabled individuals to perform); J. HOULTE VERKERKE, AN ECONOMIC DEFENSE OF DISABILITY DISCRIMINATION LAW 24, (University of Virginia School of Law, Legal Studies, Working Paper No. 99-14, 1999), *available at* http://papers.ssrn.com (arguing that the social benefits of ADA-required accommodations outweigh the private costs to an individual employer in two ways (1) by avoiding the costs of dependency and (2) by protecting against inefficient labor-market churning of people with hidden disabilities).

64. Disabled employees, in fact, have proven to be good employees. *See* S. REP. NO. 101-116, at 28-29 (1990) (citing a study of 1452 physically impaired employees at E.I. du Pont de Nemours and Company finding that "the disabled worker performed as well as or better than their non-disabled co-workers," with ninety-one percent of disabled workers rated average or better in performance, ninety-three percent rated average or better for turnover rate, seventy-nine percent rated average or better in attendance, and more than fifty percent rated above average in safety); EEOC Technical Assistance Manual, *supra* note 52, § 3.2, at III-2 (explaining the enabling role played by reasonable accommodations); *see also* 136 CONG. REC. 11,460 (1990) (statement of Rep. Owens) (citing the du Pont study as "the first of many to show that disabled employees . . . have equal or better attendance, performance, and safety records than average"); 136 CONG. REC. 10,874 (1990) (statement of Rep. Kleczka) (stating that employers report that workers with disabilities "usually work harder and longer than able-bodied counterparts").

65. *Compare* 42 U.S.C. § 12112(b)(1) (1984) *with* Title VII of the Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1994) (prohibiting an employer from "limit[ing], segregat[ing], or classify[ing] his employees . . . because of such individual's race, color, religion, sex, or national origin").

66. *See* 42 U.S.C. § 12101(a)(8) (1994) (listing "equality of opportunity" as one of the ADA's goals); *id.* § 12101(a)(9) (stating that the ADA's goal is to combat discrimination that "denies people with disabilities the opportunity to compete on an equal basis"); *id.* § 2000e-2 (equal employment opportunity underlies Title VII); 29 C.F.R. app. § 1630 background (1994) (stating that the ADA's purpose is to allow the disabled "to receive equal opportunities to compete"); Karlan & Rutherglen, *supra* note 21, at 25 (describing "equal opportunity" as "the fundamental goal of the ADA" and analyzing the appropriate conception of that phrase); George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1465 (1992) (noting that employment discrimination laws were "designed to open jobs to groups excluded from them") (book review).

67. *See, e.g.*, The ADA Conference Report, 136 CONG. REC. 17,378 (1990) (statement of Senator Kennedy). Senator Ted Kennedy stated:

> In the 1960s, Martin Luther King, Jr. spoke of a time when people would be judged by the content of their character and not the color of their skin. The Americans with Disabilities Act ensures that millions of men, women and children can look forward to a day when they will be judged by the strength of their abilities and not misconceptions about their disabili-

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findings section of the preamble to the ADA identifies individuals with disabilities as 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."[68] Persons with disabilities face obstacles similar to those seen in race and gender discrimination, such as inaccurate assumptions and stereotypes.[69]

Because of these perceived similarities in the nature of the discrimination experienced by Title VII's protected classes and the disabled, Congress borrowed substantially from Title VII's list of prohibited behaviors in drafting the ADA's definition of "discriminate."[70] Indeed, all but one of

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ties .... But this journey has not been easy or quick. It was only in the past 2 years, as the Nation approached the 25th anniversary of the Civil Rights Act of 1964—that it became clear that the time has finally come to address the unfinished business of civil rights for those with disabilities.

Id. (statement of Sen. Kennedy). Senator Bob Dole commented:

[L]ast month, we celebrated the 25th anniversary of the Civil Rights Act of 1964. The passage of the Civil Rights Act was one of Congress'—and America's—shining moments. And it was one of the great milestones in American's long journey toward civil rights justice. So I am pleased today to join with President Bush in endorsing the Americans with Disabilities Act—the next major step in the civil rights struggle—and a bill that will finally expand civil rights protections for people with disabilities.

135 CONG. REC. 18,879 (1989) (statement of Sen. Dole).

68. 42 U.S.C. § 12101(a)(7). The statute states:

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.

Id.

69. Some psychologists have attempted to categorize the most common stereotypes nondisabled persons assign to people with disabilities. These stereotypes include: "(a) the Subhuman Organism, (b) the Menace, (c) the Unspeakable Object of Dread, (c) [sic] the Object of Pity, (d) the Holy Innocent, (e) the Diseased Organism, (f) the Object of Ridicule, and (g) the Eternal Child." SPECTRUM, *supra* note 5, at 25 (quoting WOLF WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICE 16-24 (1972)). Such inaccurate assumptions make it difficult for nondisabled people to see the individual through the disability and recognize their full potential to work. *Id.* at 93. In this way, discrimination against persons with disabilities is similar to discrimination against people of color or women. For discussions of responses to individuals with disabilities, see SHAPIRO, *supra* note 2, at 30-40 (observing depictions of people with disabilities in contemporary culture); Myron G. Eisenberg, *Disability as Stigma*, *in* DISABLED PEOPLE AS SECOND-CLASS CITIZENS 3, 6-7 (Myron G. Eisenberg et al. eds., 1982) (describing a common perception of people with disabilities as being "not quite human").

70. *See* Karlan & Rutherglen, *supra* note 21, at 5-6 nn.18-21 (explaining in detail the parallel discrimination provisions in the ADA and Title VII). Although individuals with disabilities have long faced discrimination in the workplace, they never received protection under Title VII. During the late 1970s and early 1980s, proposals existed to bring discrimination on the basis of disability under the umbrella of Title VII. *See, e.g.*, H.R. 1200, 98th Cong., 129 CONG. REC. H289-90 (daily ed. Feb. 2, 1978); S. REP. NO. 316, at 1 (1979). These proposals were ultimately rejected, however, in favor of an approach that addresses the unique difficulties faced by individuals with disabilities. Thus, before 1990, the Rehabilitation Act of 1973 was the only statutory protection for the disabled. *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS (1984) (chronicling the history of the Rehabilitation

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the ADA's list of prohibited actions are also seen in Title VII.[71] Finally, the language of Title VII[72] is the source of the powers, remedies and procedures to be used in employment discrimination cases brought under the ADA.[73]

Despite these similarities, Congress recognized that discrimination against persons with disabilities has a cause distinct from discrimination against other protected classes. Frequently, discrimination against people of color and women is deliberate and based on stereotypes or even malevolence.[74] Discrimination against individuals with disabilities, however, is often unintentional.[75] For example, when the Tennessee Valley Authority (TVA) provided only written exams for promotions to upper-level positions within the company, they discriminated against those employees who were dyslexic or had other learning disabilities.[76] TVA did not create its

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Act of 1973); Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 427-28 (1991).

71. *See supra* notes 50-61 and accompanying text. For a discussion of the limited reasonable accommodation duty found under the religious discrimination provision of Title VII, see *id.*

72. *See* 42 U.S.C. § 2000e (1994).

73. *See id.* §§ 12101, 12117(a). The regulations for enforcement of the ADA are found in 29 C.F.R. § 1630 (2000). For a discussion comparing the procedural aspects of bringing suit under ADA with those under Title VII, see Lianne C. Kynch, Note, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims brought under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515 (1995). Title VII enforcement of employment discrimination claims under the ADA falls under the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

74. *See* Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 429 (1984). Wegner argues that malevolence motivates people to deny people of color equal opportunity, while ill will does not motivate people to deny persons with disabilities equal opportunity. *Id.* Instead, society denies disabled individuals equal opportunity by failing to consider how policies might affect them or by feeling awkward around persons with disabilities. *Id.* As the Supreme Court recognized in *Sch. Bd. v. Arline*, 480 U.S. 273 (1987), "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284. Indeed, according to the House Report,

> the social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk[—]it has meant being excluded from public schools, being denied employment opportunities, and being deemed an "unfit parent."

H.R. REP. NO. 101-485, pt. 2, at 41 (1990) (quoting Arlene Mayerson of the Disability Rights Education and Defense Fund).

75. *See* Alexander v. Choate, 469 U.S. 287, 295-96 (1985) (discussing society's neglect of persons with disabilities); *see, e.g.*, Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) (discussing evil intent). According to the Tenth Circuit:

> It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.

Id.

76. *See* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (holding that employer's failure to offer an oral exam violated the Rehabilitation Act).

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exam with the purpose of excluding disabled employees, but failed to be sensitive to the fact that some employees had learning disabilities. Thus, benign neglect or ignorance of the skills and needs of persons with disabilities is a primary cause of discrimination against the disabled.

In passing Title VII, Congress stated that race, sex, religion, and national origin were usually unrelated to an individual's ability to perform a job.[77] Under Title VII's definition of discrimination, employers cannot be motivated by race or gender when they make employment decisions.[78] In contrast, the ADA recognizes that disability is frequently a legitimate consideration in employment decisions.[79] The ADA's definition of discrimination allows employers to consider an individual's disability when making employment decisions.[80] The ADA would not, of course, require a bus company to hire a blind driver. Instead, the ADA prohibits an employer from relying on stereotypes that a disability makes a person unqualified for a job.[81] For example, a bus company generally may not refuse to hire a deaf bus driver. Deafness does not necessarily prevent an individual from driving a bus,[82] nor does it pose a threat to passenger safety.[83] Recognizing that disabilities are unique for each person, the ADA permits employers to

77. *See* Wegner, *supra* note 74, at 441-42. Wegner argues that disability discrimination differs from race discrimination because, while race is irrelevant to ability, disability is not. *See id.* at 442. As a result, a finely tuned inquiry is necessary to develop an anti-discrimination scheme directed at eliminating discrimination against persons with disabilities. *Id.*

78. Congress amended Title VII in 1991 to clearly state that any consideration of these protected traits is illegal. Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (Supp. V 1993). The act now contains a provision that states, "[e]xcept as otherwise provided . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.* Title VII allows employers to defend discrimination claims based on classifications of sex, religion, or national origin if the employer can prove that such a classification is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* § 2000e-2(e). As implied by the language of Title VII, race will never be considered a bona fide occupational qualification ("BFOQ").

79. *See* Wegner, *supra* note 74, at 433 n.95 (arguing that the lack of non-intentional discrimination case law under the Rehabilitation Act may reflect the fact that defendants often readily admit that the individual's handicap gives grounds for exclusion or other discriminatory conduct, thus clearly evidencing intent).

80. The ADA prevents employers from discriminating against a "qualified individual with a disability." *See supra* notes 31-43 and accompanying text (explaining the ADA's definition of these terms).

81. Additionally, an employer must assess whether alternative methods exist to do the job such that a disabled employee could perform these duties. *See supra* notes 50-54 and accompanying text (describing the duty to reasonably accommodate persons with disabilities). The entire process of reasonable accommodation requires that an employer recognize a disability and treat that person differently because of her disability.

82. *See* Rizzo v. Children's World Learning Ctrs., Inc., 213 F.3d 209, 211 (5th Cir. 2000) (affirming the district's decision that a deaf bus driver had been discriminated against in violation of the ADA).

83. *Id.* at 214 (finding that the deaf bus driver did not pose a direct threat to safety and possessed all skills and abilities necessary to ensure passenger safety).

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consider the specific nature of a person's disability in making employment decisions.

Professors Karlan and Rutherglen have noted that the ADA embraces both a "sameness" and a "difference" model of discrimination.[84] Under the sameness model, discrimination occurs when individuals who are fundamentally the same are treated differently for illegitimate reasons. In the context of disabilities, the sameness model would condemn decisions made on the basis of stereotypes that assume that individuals with physical or mental impairments are not equally capable of doing a particular job.[85] In contrast, a difference model requires employers to take the relevant trait into account, rather than ignoring it, to eliminate its impact on employment opportunity.[86] In this way, a difference model of non-discrimination recognizes that "in order to treat some persons equally, we must treat them differently."[87]

Because of the unique nature of disability discrimination, Congress defined discrimination against the disabled differently than discrimination against other minorities.[88] This is the primary reason that the ADA's definition of discrimination includes the requirement of reasonable accommodation; employers may be required to alter certain characteristics of the job

84. For a brief and lucid description of sameness and difference models, see Daniel R. Ortiz, *Feminisms and the Family*, 18 HARV. J.L. & PUB. POL'Y 523, 524-25 (1995). The ADA does not rely solely on this different treatment conception of equality. In situations in which a disability does not impact an individual's ability to perform the job in question, the ADA's prohibition on discrimination requires that people with disabilities be treated the same as others. *See supra* note 53 and accompanying text.

85. *See* Samuel R. Bagenstos, *Subordination, Stigma and "Disability,"* 86 VA. L. REV. 397, 422 (2000) (noting that non-disabled individuals often overstate the limiting effects of and safety risks attendant to disabled individuals' impairments).

86. *See* Karlan & Rutherglen, *supra* note 21, at 14; *see also* E. Gary Spitko, *He Said, He Said, Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 81-82 (1997) (noting that applying the allegedly "neutral" reasonable person standard subordinates sexual minorities who do not conform to the majority's norms); R. George Wright, *Persons with Disabilities and the Meaning of Constitutional Equal Protection*, 60 OHIO ST. L. J. 145, 162-73 (1999) (arguing that equality for people with severe disabilities requires treatment that takes these disabilities into account).

87. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.); *see* H.R. REP. NO. 101-485, pt. 3, at 39 (1990) ("This reasonable accommodation requirement is central to the non-discrimination mandate of the ADA."); S. REP. NO. 101-116, at 31 (1989) (describing the accommodations duty as "a form of non-discrimination"); 29 C.F.R. app. § 1630.9 (1999) ("The obligation to make reasonable accommodation is a form of non-discrimination."); Karlan & Rutherglen, *supra* note 21, at 10 (citing *Bakke* to describe the difference model of non-discrimination); Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 211-12 (1993) ("The ADA requires that employers reasonably accommodate their disabled employees as part of its non-discrimination scheme, rather than merely mandating equal treatment or viewing accommodation to be affirmative action.").

88. *See* Miller, *supra* note 24, at 514 (noting that "the traditional civil rights model of treating people 'exactly the same' does not apply to disability discrimination"); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1064 (1999) (noting that at least in some circumstances, treating individuals equally means requiring different treatment).

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in response to an individual's disability.[89] Failure to provide this reasonable accommodation constitutes unlawful employment discrimination.[90]

The first effect of the reasonable accommodation mandate is to force employers to recognize subtle ways in which the workplace is biased against the disabled.[91] Because employers are often not consciously aware of their own biases with respect to disability, a statute that simply prohibits intentional discrimination would likely have little effect on their conduct.[92] The reasonable accommodation requirement helps employers focus on this unintentional discrimination[93] and whether an employee with a disability can be enabled to perform the essential elements of the job. An employer may realize that the person would in fact be able to perform the job after certain adjustments are made.[94] If, however, an employer is unwilling to

89. *See supra* notes 47-54 and accompanying text.

90. 42 U.S.C. § 12112(b) (1994 & Supp. III 1997) (defining discrimination to include the failure to make reasonable accommodations); 29 C.F.R. § 1630.9(a)-(b) (1999); *see* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 541-42 (7th Cir. 1995) (explaining that employment decisions based on "a vocationally relevant disability" are not analogous to other forms of employment discrimination, but are nevertheless protected under the ADA's expanded definition of "discrimination"); Karlan & Rutherglen, *supra* note 21, at 8-9 (explaining that the concept of reasonable accommodation is not only "integral to defining the class of protected individuals" but also that failure to make reasonable accommodations "constitutes a separate species of discrimination").

91. *See* H.R. REP. NO. 101-485, pt. 2, at 65 (1990) ("[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed."); S. REP. NO. 101-116, at 34 (1989) (same).

92. *See* Alexander v. Choate, 469 U.S. 287, 295 (1985) (noting that discrimination against the handicapped is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference").

93. *See* 42 U.S.C. § 12112(b)(5); *see also* S. REP. NO. 101-116, at 6 (1989) (explaining that disability discrimination "includes harms resulting from the construction of . . . architectural[] and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference—of benign neglect"); 136 CONG. REC. 19,800 (1990) (statement of Rep. Fish) (asserting that "it is not disability which limits one's ability to participate in life, but it is societal barriers"); 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin) (asserting that it is often not the disability that is limiting, but "the obstacles placed in the way by an indifferent society").

94. Some commentators have described the discrimination faced by disabled individuals as "structural discrimination" or "dynamic discrimination" which occurs when physical structures and social practices that are designed for a single group effectively exclude the member of another group. *See* David Wasserman, *Distributive Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 147, 176-79 (1998); *see also* H.R. REP. NO. 101-485, pt. 2, at 29 (1990) (describing structural forms of discrimination); S. REP. NO. 101-116, at 6 (1989) (same); H.R. REP. NO. 101-485, pt. 2, at 29 (describing dynamic forms of discrimination that result from "the adoption or application of standards, criteria, practices, or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect"); S. REP. NO. 101-116, at 6 (describing discrimination as including "harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference—of benign neglect"); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1160-61, 1170-83 (1991) (describing forms of dynamic discrimination in general-ability job tests). Because of the structural discrimination faced by those with disabilities, a simple non-discrimination mandate is insufficient to achieve equal employment opportunity for some disabled individuals.

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make such adjustments, it is appropriate to treat the employer as biased.[95]

A second, and more important effect of the reasonable accommodation requirement is that it forces employers to recognize that workplaces are not structured neutrally—they are shaped by and for a non-disabled majority.[96] Employers that do not accommodate the needs of people with disabilities unwittingly give a competitive edge to individuals who are not disabled.[97] Again, the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of leveling the playing field so that people with disabilities can compete on an equal basis.[98] Once this "leveling" is assured through reasonable ac-

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95. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 943-44 (1993) (viewing the reasonable accommodation requirement as a prohibition on discrimination through negligence). The ADA does, however, require the provision of reasonable accommodations even when the employer has a legitimate business reason for not wanting to do so, as long as they do not impose an undue burden on the employer. Because a person with a disability differs from the physical or mental norm, people often make a value judgment that the difference is significant and very negative. "Far from being a response to an inflexible fact about biology, our perception of a handicap nearly always reflects an arbitrary, unconscious decision to treat normal social function and the possession of any handicap as mutually exclusive attributes." SPECTRUM, *supra* note 5, at 27 (quoting JOHN GLIEDMAN & WILLIAM ROTH, THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA 24, 30 (1980)).

96. *See* FRANK G. BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE viii, (1978) (explaining that "[f]or two hundred years, we have designed a nation for the average, normal, able-bodied majority, little realizing that millions cannot enter many of our buildings, ride our subways and buses, enjoy our educational and recreational programs and facilities, and use our communication systems."); Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 35, 36-37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); *see also* Burgdorf, *supra* note 18, at 533 (describing the reasonable accommodation requirement as "a method for eliminating discrimination that inheres in the planning and organization of societal opportunities based on expectations of certain physical and mental characteristics"); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1438 (1986). Rebell argues that unlike other protected classes, persons with disabilities do not share common physical, psychological, or cultural characteristics. Rather,

> "the handicapped" include persons from all racial, sexual, age, and class categories, who exhibit disabilities as diverse as blindness, cerebral palsy, and emotional disturbances. Within each disability category is a wide diversity of conditions and needs. These range, for example, from the severely mentally retarded to the mildly learning disabled and from wheelchair-bound paraplegics to clubfoot sufferers with mild mobility impairments.

Id.

97. *Cf.* Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1613 (arguing society often constructs limitations on a disabled person's ability to work). "Jobs and buildings are designed around the norm of average, able-bodied adults, to the detriment of those who do not fit this description." *Id.*; *see also* Spitko, *supra* note 88, at 1064 (arguing that the social construction of society always privileges the dominant cultural group).

98. *See* 29 C.F.R. app. § 1630.1(a) (explaining that the ADA "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given"); *see also* Sch. Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987) (describing an employer's duty under section 504 not as affirmative action, but as "an affirmative obligation to make a reasonable accommodation for a handicapped employee"); Karlan and Rutherglen, *supra* note 21 (stating that the fact that reasonable accommodation does not require employers to modify qualification standards or to give preference to the protected class is an important distinction between affirmative action and reason-

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commodations, the disabled must meet the same employment standards as all other employees.[99]

The ADA stipulates that employers who fail to reasonably accommodate existing or potentially disabled employees can be found liable for discrimination.[100] This is a far different definition of "discrimination" than that embraced under Title VII. Title VII proscribes differential treatment of employees for any reason.[101] In fact, the Supreme Court has rejected the notion that Title VII requires employers to treat workers differently or more favorably because they are a member of a protected class.[102] Title VII does not require the employer to take any steps to revamp the workplace environment. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it.[103] Accommodations were viewed as unnec-

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able accommodation); Travis, *supra* note 23, at 901 (same). The distinction between affirmative action and reasonable accommodation uniformly is not recognized by either courts or commentators, however. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999) ("Although the dissent would prefer to view the reasonable accommodation of reassignment as 'affirmative action,' Congress chose to consider it otherwise when it defined the failure reasonably to accommodate (including reassignment) as a prohibited act of discrimination. It is the Congressional definition, of course, that must govern our analysis"); Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) ("[U]se of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."); Americans With Disabilities Act, 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 42-44 (1989) (statement of Lawrence Z. Lorber) (arguing that reasonable accommodation requires more than non-discrimination and amounts to affirmative action). *But see* S. REP. NO. 101-116, at 26-27 (1989) ("[T]he employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability."); 136 CONG. REC. 10,868 (1990) (statement of Rep. Edwards) (stating that the ADA does not "require employers to give preference to persons with disabilities").

99. *See* 136 CONG. REC. 10,856 (1990) (statement of Rep. Hoyer) ("[The ADA] does not guarantee a job—or anything else. It guarantees a level playing field."); Bruce A. Miller, *The Americans with Disabilities Act and the Unionized Workplace*, 74 MICH. B.J. 1180, 1180 (1995) ("[The] ADA requires that disabled individuals, otherwise qualified for a job, be allowed to compete on a level playing field by means of reasonable accommodation provided by their employers."); *see also* Locke, *supra* note 18, at 107 ("The ADA was not conceived as an affirmative action statute, but rather as one of equal opportunity." (footnote omitted)).

100. *See supra* note 48 and accompanying text.

101. *See* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 564-68 (1998) (discussing the ability of the law to provide equal treatment).

102. *E.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977) (stating Title VII does not require differential or preferential treatment of people because of their protected traits).

103. Of course, the use of selection criteria that disproportionately exclude members of a protected class is actionable. 42 U.S.C. § 2000e-2(k)(1) (1994 & Supp. III 1997); *see also* UAW. v. Johnson Controls, Inc., 499 U.S. 187, 199, 208 (1991) (determining the employer's policy of barring all fertile women from jobs involving lead exposure exceeding OSHA standards was forbidden under Title VII). But an underlying assumption of the disparate impact case law is that it is the selection procedures, rather than the elements of the job itself as currently configured, that have caused the disparate impact. Thus, courts have focused on the tightness of the fit between the challenged employment practice and the job itself, rather than on the nature of the job, in considering whether the challenged practice is sufficiently job related to permit the disparate impact.

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essary to equalize opportunity for members of Title VII's protected categories, who were expected to compete in the workplace once employers were prohibited from acting on stereotypical assumptions, mistaken perceptions, and erroneous beliefs.[104]

Although much of the language of the ADA is superficially similar to that of Title VII, the similarities mask a conceptual shift in the meaning of discrimination and the methods used to remedy it. If courts are to apply the ADA in a manner consistent with Congress' intent, they must appreciate the difference between other forms of discrimination and discrimination on the basis of disability, as well as the different means that Congress has chosen to address the latter.[105] Unfortunately, the courts have seized on the ADA's superficial similarity to Title VII and have applied Title VII precedent, thereby erecting a formidable barrier to disabled plaintiffs in ADA cases.

III. PROBLEMS WITH APPLICATION OF TITLE VII PRECEDENT TO THE ADA

A great deal of scholarly energy has been devoted to pointing out the shortcomings of the ADA and the federal courts' interpretations of its provisions. Surprisingly, however, contemporary scholarship about the ADA has not heavily criticized the courts' reliance on Title VII precedent. Because Title VII does not include the same duty of reasonable accommodation as the ADA, its precedent is often of limited value. This section examines three areas in which borrowing from Title VII has been detrimental to ADA plaintiffs. First, courts have applied Title VII's reasonable accommodation precedent to ADA claims. Title VII's reasonable accommodation provision is extremely limited, and thus its application to the ADA necessarily restricts a disabled employee's ability to obtain any accommodation. Second, courts have applied the *McDonnell Douglas* burden-

104. This Article does not argue that Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and other employment discrimination laws were correct in their assumption that equal employment opportunity may be achieved without reasonable accommodations in the conventional workplace. History has shown that more may be required if equal opportunity is to be achieved. For a persuasive discussion of the potential benefits of extending the reasonable accommodations concept to anti-discrimination and civil rights laws more generally, see Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 25-49 (1995) (analyzing how current laws might be used to support accommodations for pregnant women); Karlan & Rutherglen, *supra* note 21, at 2-5, 38-41; Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*, 18 LAW & INEQ. 85 (2000); Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J.L. & PUB. POL'Y 753, 755-56 (1996) (noting that an employer is not required to develop flexible work hours even though a rigid work schedule may disproportionately eliminate female workers who have child-care responsibilities).

105. *See* W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295, 351 (1992) (noting that only in disability discrimination does the protected trait pertain to normal job performance); *see also* Carlos A. Ball, *Autonomy, Justice and Disability*, 47 UCLA L. REV. 599 (2000).

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shifting test for proving disparate treatment under Title VII to ADA reasonable accommodation claims. This test does not work with ADA claims because it does not place the burden on the employer to prove that a requested accommodation would cause undue hardship. Requiring the plaintiff to bear this burden significantly undermines a disabled plaintiff's chance of success. Finally, under the current constructive discharge test applied in some circuits, an employee who resigns due to discriminatory treatment must not only prove that the work environment was intolerable, but also that the employer *intended* for the employee to resign. Considering much of the discrimination against disabled individuals is non-intentional and results from insensitivity on the part of the employer, intent is usually difficult to demonstrate.

All of this statutory borrowing occurs without much discussion or explanation on the part of the courts as to when such borrowing is appropriate. As some courts do not even acknowledge that they are borrowing from Title VII, they may be assuming that employment discrimination statutes are all the same. Because no standard exists for when borrowing from Title VII should take place, splits in the circuits have occurred in the three areas mentioned here and are discussed more fully below. Unfortunately, the Supreme Court has yet to provide any clear guidance on these interpretative issues.

Examining this faulty borrowing from Title VII through the prism of concrete examples can help identify the particular shortcomings of the process and suggest a solution. The next section will propose a revised framework for making ADA reasonable accommodation determinations that might overcome, or at least reduce, the shortcomings associated with the indiscriminate and mechanical borrowing of concepts developed in Title VII case law.

A. *Reasonable Accommodation Under Title VII and ADA*

As noted above, one of the most important protections provided by the ADA is the duty imposed on employers to "reasonably accommodate" the known physical and/or mental limitations of an otherwise qualified disabled employee.[106] Congress adopted the term "reasonable accommodation" from Title VII's religious accommodation provision.

Title VII provides that an employer must offer a reasonable accommodation only to those individuals whose religious beliefs create a conflict with the employer's legitimate expectations, unless doing so would impose an undue hardship on the employer.[107] Because a legal regime that compels accommodation of religious practices raises First Amendment prob-

106. *See* 42 U.S.C. § 12111(9) (1994); *see supra* notes 42-54 and accompanying text.

107. *See* 42 U.S.C. § 2000e(j). The text setting forth these requirements in Title VII is similar to the parallel text in the ADA. *See id.* § 12112(b)(5)(A).

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lems,[108] the Supreme Court has interpreted Title VII's requirement of reasonable accommodation of religious practices narrowly, stating that anything more than a *de minimis* cost would impose an undue hardship on employers.[109]

By contrast, there is no constitutional principle that restricts government benefits for the disabled.[110] Congress unambiguously intended for the duty of reasonable accommodation to receive a broader interpretation, and the exemption for undue hardship to receive a correspondingly narrower interpretation, when it enacted the ADA.[111] Congress specifically stated that the two reasonable accommodation provisions were not the same, and that the ADA's reasonable accommodation should not be interpreted in the same manner as Title VII. [112] Despite this, some courts have refused to look at reasonable accommodation afresh and have defaulted to Title VII reasonable accommodation case law to interpret the ADA standard.[113] The conflict between reasonable accommodations and seniority rights of union members represents one area in which this borrowing from Title VII's reasonable accommodation case law has occurred. Under the National Labor Relations Act (NLRA),[114] when a binding collective bargaining agreement[115] is in existence, an employer may not, without obtaining union con-

108. This is particularly true if nonreligious commitments did not entail similar obligations. *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 n.9 (1985) (holding unconstitutional a Connecticut statute that imposed an absolute duty on employers to allow workers to observe their Sabbath and stating that the law gives Sabbath observers the valuable right to designate off a weekend day while other employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute).

109. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

110. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

111. *See* 42 U.S.C. § 12111(8).

112. Congress specifically rejected the Title VII definition of reasonable accommodation under the ADA. *See* S. REP. NO. 101-116, at 36 (1989); H.R. REP. NO. 101-485, pt. 2, at 68 (1990). *Compare* 42 U.S.C. § 2000e(j) (setting forth Title VII definition of reasonable accommodation).

113. *See, e.g.*, Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1048-49 (7th Cir. 1996) (applying Title VII case law while noting that the legislative history of the ADA rejects the *Hardison* standard). Indeed, one court has stated, in dicta, that the standard for reasonable accommodation under Title VII and the ADA are identical. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) ("It is true that the ADA requires employers to make 'reasonable accommodations' for individuals with disabilities. However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion.") (citations omitted), *cert. denied*, 120 S. Ct. 56 (1999). *But see* Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 896 n.14 (D.C. Cir. 1997) (finding that *Hardison* was not relevant to the disposition of the ADA claim at issue).

114. 29 U.S.C. §§ 151-69 (1994). *See generally* Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1542-45 (1999) (discussing the failure of unions to represent views of minorities and women).

115. Collective bargaining was first recognized in the National Labor Relations Act of 1933. *See* 29 U.S.C. § 159. Collective bargaining permits employees to use their combined power in decisions made jointly with management to determine the rights, duties, and obligations of both parties. *See* ARCHIBALD COX ET AL., LABOR LAW § 2.1 (10th ed. 1986). Further, collective bargaining is an ongoing process of negotiation and interpretation of employment terms and conditions intended to reduce labor unrest and prevent interference with the flow of commerce. *Id.* at §§ 2.1-2.2.

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sent, materially or substantially alter any terms of employment contained in the agreement.[116] Many collectively bargained agreements contain seniority rights,[117] which constitute a term of employment that may not be altered by the employer absent the consent of the union. A conflict may arise when a disabled employee requests an accommodation, such as reassignment[118] to a position with better hours or lighter workloads (usually reserved for those with greater seniority), that violates the seniority rights of fellow employees under a collective bargaining agreement.

Courts have sought to resolve the issue of whether the ADA requires reassignment of a disabled employee in violation of a collectively bargained seniority system through an analysis of the ADA's reasonable accommodation requirement.[119] As the language of the ADA does not specifically address collective bargaining agreements and their effect on an employer's obligation to accommodate,[120] a majority of courts have relied on prior cases concerning reasonable accommodation duties under Title VII and the Rehabilitation Act. In the area of reassignment accommodation proposals, both statutes have been strictly construed to impose no such obligation on employers.[121] As a result of the application of a very narrow version of reasonable accommodation, disabled union employees have found it impossible to receive reasonable accommodations when a valid

116. *See* 29 U.S.C. § 158(d); *see also* Jerry M. Hunter, *Potential Conflicts Between Obligations Imposed on Employers and Unions By the National Labor Relations Act and the Americans with Disabilities Act*, 13 N. ILL. U. L. REV. 207, 214 n.33 (1993) (stating that if a proposed accommodation was the only reasonable accommodation available, the ADA might require the employer to reassign the employee even in the face of conflicting provisions of a collective bargaining agreement).

117. Under such systems, employees accrue seniority status based on their length of employment. This status is used to determine the distribution of benefits in the workplace. Seniority system provisions can be one of the most important provisions in a collective bargaining agreement. Robert W. Pritchard, *Avoiding the Inevitable: Resolving Conflicts Between the ADA and the NLRA*, 11 LAB. LAW. 375, 389 (1996). In addition to these changes, the ADA began an era of new challenges for labor and management as both parties adjusted to the legislative demands and ramifications of the Act. *See* Benjamin A. Kerner, *The Americans with Disabilities Act of 1990: New Challenges for Labor and Management*, 1991 DET. C. L. REV. 891, 892 (1991) ("highlight[ing] for representatives of labor and management the areas in which collective bargaining may be used to make a positive contribution in shaping the federal law which will impinge . . . on their collective bargaining contracts").

118. *See* 42 U.S.C. § 12111(9)(B) (including reassignment to a vacant position within the meaning of reasonable accommodation).

119. *See, e.g.*, Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 892-95 (D.C. Cir. 1997); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1043 (7th Cir. 1996); *see also* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 55-61 (1999) (discussing the split in the circuits concerning the employer's duty to reassign an employee to a vacant position).

120. *See generally* 42 U.S.C. §§ 12102-12117 (1994). *See also* Kymberly D. Hankinson, *Navigating Between a Rock and a Hard Place: An Employer's Obligation to Reasonably Accommodate the Disabled in the Unionized Workplace*, 15 J. CONTEMP. HEALTH L. & POL'Y 245, 255-56 (1998) (noting that the General Counsel of the NLRB addressed but did not resolve this issue in a published 1992 memorandum and that the EEOC published a technical assistance manual on ADA compliance without coming to a resolution on the issue).

121. *See Eckles*, 94 F.3d at 1047-48.

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collective bargaining agreement exists.[122]

The most comprehensive discussion of this cross-statute analogizing occurs in *Eckles v. Consolidated Rail Corp.*[123] In *Eckles*, the Seventh Circuit held that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.[124] The plaintiff, a union member who worked as a yardmaster in a rail yard, was diagnosed with epilepsy. On the advice of his doctor, Eckles sought an accommodation for his disability through reassignment to a groundwork day shift.[125] Although the union agreed initially to transfer Eckles to a new job,[126] it later changed its position, and Eckles was "bumped" by a more senior employee.[127] Eventually Eckles obtained another position, but because of the continued possibility that he would be bumped yet again,[128] he sued both his employer and the union under the ADA, alleging that they committed employment discrimination by refusing to reasonably accommodate his disability.[129]

On appeal from the district court's grant of summary judgment in favor of the employer and the union,[130] the Seventh Circuit held that the ADA did not require the employer to violate collectively bargained seniority rights, and upheld the lower court's judgment.[131] Therefore, any accommodation

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122. *See, e.g., id.* at 1051-52; Boersig v. Union Elec. Co., 219 F.3d 816, 822 (8th Cir. 2000); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Milton v. Scrivner, Inc. 53 F.3d 1118 (10th Cir. 1995). *See generally* Condon A. McGlothlen & Gary N. Savine, Eckles v. Consolidated Rail Corp.: *Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043 (1997) (discussing and critiquing the majority of courts' approach to the ADA and seniority provisions in collective bargaining agreements).

123. 94 F.3d 1041 (7th Cir. 1996).

124. *Id.* at 1051-52.

125. *Id.* at 1043-44. Eckles' doctor advised him not to work the night shift because his condition required that he maintain a consistent sleep schedule and recommended that he not work at heights because of the possibility of suffering a seizure and falling. *Id.* at 1043. Eckles informed his employer that he wished to invoke Rule 2-H-1 of the collective bargaining agreement. *Id.* at 1044 n.2 (providing the full text of Rule 2-H-1). Rule 2-H-1 in the collective bargaining agreement permitted disabled employees, on agreement by both Conrail and the UTU, to "bump" more senior employees to obtain a position meeting the disabled employee's recent restrictions. *Id.* at 1044.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Specifically, Eckles claimed that exercise of Rule 2-H-1 would have been a reasonable accommodation because it would have provided him protection from being bumped by a more senior employee. *See id.* at 1045. Eckles argued that the employer's obligations under the ADA trumped the employer's obligations under its collective bargaining agreement. *See id.* at 1045. The employer, joined by the union, presented the argument that the ADA did not require an infringement on seniority rights of other employees to accommodate the disability of one. *Id.*

130. *Id.* at 1043. The district court granted the employer summary judgment, holding that the ADA did not require the employer to violate the terms of the collective bargaining agreement ("CBA") to make an accommodation. *Id.* Therefore, the accommodation was not reasonable. *See id.*

131. *Id.* at 1051-52. Because neither defendant argued that the proposed accommodation would impose an undue hardship on its "business," the court narrowed the issue before it to whether the ADA

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that violated the terms of a seniority provision was *per se* unreasonable.[132] The Seventh Circuit, after a dismissive review of the ADA's text and legislative history of the ADA, based its decision primarily on case law interpreting the Rehabilitation Act[133] and Title VII.[134]

The *Eckles* court looked first to the text of the ADA to determine whether the plaintiff's request for reassignment was reasonable in light of the collectively bargained seniority rights. Although the court noted that the ADA expressly defines "reasonable accommodation" to include "reassignment to a vacant position,"[135] it asserted that this language weakened Eckles's claim as Eckles did not seek a "vacant" position, but rather an open position to which other, more senior employees would be entitled.[135]

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requires employers to reassign disabled employees in violation of a bona fide seniority system of a collective bargaining agreement when that reassignment is the only way the disabled employee can be reasonably accommodated. *Id.* at 1045-46.

132. *See id.* The court did not literally create a *per se* ruling, but this has been the position adopted by subsequent courts reading the case. The *Eckles* court explained, "We most certainly do not here decide that *all* provisions of collective bargaining agreements will preempt a covered entity's duty to reasonably accommodate a disabled employee under the ADA. We address only collectively-bargained seniority systems that establish rights in other employees." *Id.* at 1046 n.9. Thus, the *Eckles* holding was based entirely on seniority being some vested right that the coworkers should not be obligated to give up under the ADA. This rationale contains several flaws, most notably that the union's obligation under the ADA should require the co-workers to accommodate their disabled co-workers.

133. This Article will focus on the courts' use of Title VII precedent to decide the ADA claim. However, various commentators have likewise critiqued the courts' use of Rehabilitation Act precedent, not only in this factual setting, but in others as well. *See, e.g.*, Cooper, *supra* note 23, at 1426, 1436. Under the Rehabilitation Act, courts had adopted a virtual *per se* rule that the Act did not require the reassignment of a disabled employee in violation of a bona fide seniority system. This was due in part to some confusion over whether reassignment to a vacant position qualified as a reasonable accommodation. *See* Rose Daley-Rooney, *Reconciling Conflicts Between the Americans with Disabilities Act and the National Labor Relations Act to Accommodate People with Disabilities*, 6 DEPAUL BUS. L.J. 387, 395-96 (1994) (noting that several cases "are cited for the proposition that an accommodation is unreasonable if it conflicts with the collective bargaining agreement. These cases [actually] discuss whether reassignment is a contemplated alternative for accommodating the worker with a disability."). Congress avoided this ambiguity concerning the appropriateness of reassignment as a reasonable accommodation by explicitly including it in the ADA's list of possible "reasonable accommodations." *See* 42 U.S.C. § 12111(9)(B) (1994). Because of the differences between the two statutes, many commentators have questioned the wisdom of using Rehabilitation Act precedent to interpret the ADA's provisions. *See, e.g.*, Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 KY. L.J. 219, 234 (1994) (noting that since the ADA, unlike the Rehabilitation Act, requires reassignment, it is unclear whether the ADA provides the same deference to seniority rights as does the Rehabilitation Act). Although the *Eckles* court acknowledged this textual difference between the two acts, it still found the Rehabilitation Act cases relevant to its holding. *Eckles*, 94 F.3d at 1048-49.

134. *Eckles*, 94 F.3d at 1046-49.

135. *Id.* at 1047. The court noted that its conclusion was limited to collectively bargained seniority rights as they had a "pre-existing special status in the law" that Congress had shown no intent to alter in enacting the ADA. *Id.* at 1052.

136. *Id.* at 1047. Eckles argued that no employee would be fired as a result of his requested accommodation. Instead, a more senior employee would lose his current position and be forced to bid for another one, while the job taken by the disabled employee would be "taken off the market." The court responded to this argument by stating:

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In essence, the court took the view that a position is not vacant under the ADA if it must be filled pursuant to a seniority system.[137]

Next the court looked briefly to the legislative history of the ADA. Despite the explicit statements from members of both houses of Congress that a collective bargaining agreement was *only one factor* to be considered when judging the reasonableness of a request for an accommodation,[138] the court focused on other language in the House and Senate Reports noting that "bumping" is not required to accommodate.[139] Under the court's

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> What would be lost to the other employees, particularly more senior employees, would be some of the value of their seniority with the company, not their employment. . . . [U]nder a seniority system . . . few positions are ever truly "vacant," in the sense of being unfilled. Rather, positions held by less senior employees are open to be bid upon and acquired by more senior employees. . . . Within such a framework a "vacant position" would essentially be one that an employee could acquire with his seniority and for which he could meet the job requirements. Consequently, the accommodation demanded by Eckles does not constitute "reassignment to a vacant position," but goes further.

Id.

137. *See id.* It is clear from a reading of the statute, however, that the ADA does not explicitly exempt from coverage vacant positions that more senior employees under a collective bargaining agreement may expect to fill. The only detail the legislative history provides with respect to vacant positions is that employers are not required to "bump" other employees to create vacant positions in order to comply with the accommodation requirement. This alone does not support the court's conclusion that positions filled by seniority agreements are never truly vacant, and therefore exempt from coverage under the ADA.

138. *See id.* at 1049-50; 42 U.S.C. § 12112(b)(2). The legislative history and interpretative guidelines of the ADA specify that collective bargaining agreements are only a relevant factor in the determination of reasonableness, not a dispositive one. *See, e.g.*, H.R. REP. NO. 101-485 pt. 2, at 63 (1990). The relevant portion of the House Report states:

> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue. . . . Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.

Id.

139. *Eckles*, 94 F.3d at 1050 ("Both the Senate and House Reports explicitly state that 'bumping' is not required, which would seem to clear up any remaining doubt about whether the ADA required bumping in this particular case."). The court explained why it did not rely on the explicit language in the legislative history that states that the existence of a collective bargaining agreement is not determinative. *Id.*

> The language about collective bargaining agreements being "relevant but not determinative" appears in the context of . . . discussion about reassignment to a vacant position for which the disabled individual does not meet the pre-set job criteria. Thus a provision in the collective bargaining agreement that an employee could only be a second-shift welder after two years with the company would be relevant but not determinative to deciding whether the ADA requires, as a "reasonable accommodation," that the disabled one-year employee be reassigned to a second-shift welder position. The finding that "bumping is not required" is distinct and independent from this later discussion.

Id.

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analysis, it is equally egregious to bump an employee from the opportunity to accept or bid for a position as it is to bump the employee from the actual position.

After determining that the ADA's text and legislative history was of no help to the plaintiff,[140] the court examined Title VII case law to support its holding that the ADA's reasonable accommodation provision did not displace union seniority rights.[141] Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate the religious practices of employees; thus, the court's reasoning in *Eckles* relies on a religious accommodation analysis under Title VII as a guidepost for deciding what is a "reasonable accommodation" under the ADA.[142]

Specifically, the *Eckles* court relied on *Trans World Airlines, Inc. v. Hardison*.[143] In *Hardison*, the United States Supreme Court firmly rejected the notion that the duty to reasonably accommodate the religious practices of some employees superseded the seniority rights of others.[144] The *Hardison* Court held that, absent "a clear and express indication" from the legis-

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Commentators have critiqued the *Eckles* court's interpretation of legislative history. *See, e.g.*, Hankinson, *supra* note 120, at 262 (arguing that the *Eckles* court did not give sufficient weight to the legislative history indicating that the seniority system was to be a factor, not determinative, in the application of the reassignment provision of the ADA); Brian P. Kavanaugh, *Collective Bargaining Agreements and the Americans with Disabilities Act: A Problematic Limitation on "Reasonable Accommodation" for the Union Employee*, U. ILL. L. REV. 751, 765-67 (1999); William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After* Eckles, 9 ST. THOMAS L. REV. 359, 382-83 (1997).

140. *Eckles*, 94 F.3d at 1047. It is important to note that the court entirely refused to acknowledge the EEOC's Interpretative Guidance on this issue. The EEOC's Interpretative Guidance provides that the terms of a collective bargaining agreement "may be relevant" to the determination of whether a particular accommodation would "be unduly disruptive to its other employees or to the functioning of its business." 29 C.F.R. § 1630.15(d) (1994 & App. 1997). There exists some dispute over the level of deference that this type of agency statement should receive. *See, e.g.*, Christenson v. Harris County, 120 S. Ct. 1655, 1662-63 (2000) (noting the split over the level of deference to be given to non-legislative rules issued by agencies and resolving the issue by stating that *Skidmore* deference should apply). However, completely ignoring the existence of the guidance seems to be an abdication of the court's statutory interpretation responsibility. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that administrative interpretations are "entitled to respect" from the reviewing court and providing a multi-factor test to be applied); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 996-1013 (1998) (advocating *Skidmore's* "persuasive authority approach to agency regulatory interpretations in SEC no-action letters").

141. *Eckles*, 94 F.3d at 1047-48.

142. *See id.* at 1048.

143. 432 U.S. 63 (1977).

144. *Id.* at 79. In *Hardison*, an employee argued that his employer was required to accommodate his religious practice not to work Saturdays, even if the accommodation required displacing employees protected by a seniority agreement. *Id.* at 66-69. The employee's claim was based on the 1972 amendments to Title VII, which required an employer "to make reasonable accommodations to the religious needs of employees." *Id.* at 66 (quoting 29 C.F.R. § 1605.1 (1968)). In justifying its preference for seniority rights over the rights of an employee protected by Title VII, the Court relied on the Title VII provisions that allow for seniority programs that are not part of illegal discriminatory conduct. *See id.* at 81-82.

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lature, seniority rights under a collective bargaining agreement are not to be forsaken.[145] Based on the *Hardison* Court's refusal to find that Title VII's religious accommodation obligation necessarily superseded the collectively bargained seniority rights of other employees, the *Eckles* court asserted that "[t]he language of the ADA, like that of Title VII, falls far short of providing a[n] '. . . indication from Congress' that it intended 'reasonable accommodation' to include infringing upon the seniority rights of other employees."[146]

The *Eckles* court acknowledged in a footnote that the legislative history of the ADA contained a statement that the ADA's reasonable accommodation standard be held to a higher standard than the *de minimus* test the Court applied in *Hardison*.[147] But the court concluded that Congress did not reject the *Hardison* Court's overall holding indicating the importance of seniority rights when threatened by a requested accommodation, stating, "[I]t is clear from the context of this statement . . . that Congress intended to reject the *de minimus* rule of *Hardison*, rather than the overall holding of the case."[148] Nevertheless, the court gave considerable weight to Title VII caselaw, finding these precedents to be useful guideposts in determining what Congress intended by using the term "reasonable accommodation" in the ADA.[149] Based on its reading of the ADA, as informed by the Title VII case law, the *Eckles* court upheld the collective bargaining agreement's seniority provisions as an absolute bar to a disabled employee's claimed entitlement to a reasonable accommodation.[150]

The court's rejection of the ADA's language and legislative history is important as that is precisely where Congress manifested its intent that the ADA's reasonable accommodation provision be utilized in a manner different from Title VII. The legislative history also reflects and emphasizes Congress' intent that reassignment be a viable accommodation option. In crafting the ADA, Congress plainly rejected Title VII's "more than a *de*

145. *Id.* at 79.

146. *Eckles*, 94 F.3d at 1048. *But see* Condon A. McGlothlen & Gary N. Savine, Eckles v. Consolidated Rail Corp.: *Reconciling the ADA With Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043, 1054 (1997).

147. McGlothen & Savine, *supra* note 146, at 1049 n.12. The report of the House Committee on Education and Labor states that, "[t]he Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, . . . are not applicable to this legislation. . . . [U]nder the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute." H.R. REP. NO. 101-485, pt. 2, at 68 (1990) (citations omitted).

148. *Eckles*, 94 F.3d at 1049 n.12.

149. *Id.* at 1048-49.

150. *Id.* at 1051-52. The court also asserted that Rule 2-H-1 had no impact on the case. Specifically, because the employer and the union were not required to include this rule in their collective bargaining agreement, the court was unwilling to force them to exercise it. Therefore, the court held that Rule 2-H-1 did not obligate the employer and union to accommodate a disabled employee in violation of seniority rights, but instead, simply allowed such compromise if the parties so desired. *Id.* at 1050-51.

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minimis cost" standard for defining undue hardship—the standard endorsed by the United States Supreme Court in *Trans World Airlines v. Hardison.* Yet the Seventh Circuit cited *Hardison* as if it were at least persuasive in construing the ADA. Accordingly, the *Eckles* court's analysis in this regard demonstrates either a disregard for or ignorance of plainly expressed congressional intent.[151]

Although the two statutes are similar in many respects, Title I of the ADA differs from Title VII in several ways that are important to this issue. First, Congress specifically addressed the issue of the weight to be accorded seniority rights in Title VII,[152] which provides specific protection for the seniority rights of unprotected employees; however, Congress chose to remain silent on this issue within the ADA.[153] Second, the court ignores the language of the ADA, which specifically recognizes the duty of an employer to reassign a disabled employee under the reasonable accommodation provision. Finally, the court fails to acknowledge that Congress recognized the potential for conflict and expected courts to balance the reasonable accommodation of reassignment against the potential harm to seniority rights, rather than to establish a bright-line rule prohibiting all accommodations in these instances.[154] In acknowledging the potential conflict, Congress suggested that future collective bargaining agreements address the problem by including a provision that allows the employer to modify its contract terms to accommodate the ADA.[155]

The majority's reliance on the general applicability of Title VII precedent in interpreting the ADA fails to acknowledge that the reassignment issue is one where substantive differences between the two statutes severely limit the relevance, if any, of the use of Title VII in interpreting the

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151. *See, e.g.*, Daley-Rooney, *supra* note 133, at 409-12 (warning that a *per se* approach to this issue overprotects the rights of union workers while showing little respect for ADA goals); Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 123, 125-26 (1998) (asserting that not every conflicting accommodation has a direct impact on an employee's contractual rights).

152. Section 703(h) of Title VII provides: "[I]t 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) (1994 & Supp. III 1997). Likewise, the Age Discrimination in Employment Act provides that "[I]t shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system. . . ." 29 U.S.C. § 623(f).

153. The ADA, unlike other employment discrimination statutes, does not include an explicit provision protecting the seniority rights of other employees. According to one commentator, "[t]his omission may reflect Congress' intent to reject the line of Rehabilitation Act caselaw suggesting that seniority rights trump those of the disabled employee." John W. Boyle, *The Error of* Eckles*: Why Seniority Rights Present an Undue Hardship for Employees with Disabilities*, 35 DUQ. L. REV. 1023, 1032 (1997); Hodges, *supra* note 151, at 158 (stating that the omission was intentional).

154. H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

155. *Id. See, e.g.*, O'Melveny, *supra* note 133, at 235 (noting that instead of tackling the issue of potential conflicts between collective bargaining agreements and the ADA, Congress hoped that employers and unions would simply agree to "override" language in order to preempt any conflicts).

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ADA. The *Eckles* court's failure to defer to the ADA's own language, interpretative guidelines and legislative history opens the court's decision to charges that it is merely result-oriented given its approach to statutory interpretation.

Another approach that better illustrates the intent of Congress and realizes the true limitations of the Title VII reasonable accommodation provision when interpreting the ADA can be seen in the D.C. Circuit's *Aka v. Washington Hospital Center*[156] decision. In *Aka*, the court held that the existence of a collective bargaining agreement is only one factor in determining the reasonableness of a requested accommodation,[157] and that reasonableness is to be analyzed on a case-by-case basis, with the trier of fact charged with the duty of determining whether reassignment is reasonable in light of the collective bargaining agreement.[158] Rather than relying on Title VII precedent to reach its conclusion about the scope of the ADA's reasonable accommodation provision, the *Aka* court examined the ADA's statutory language, legislative history, and EEOC interpretations and concluded that all three are inconsistent with *Eckles' per se* approach.[159]

Like the plaintiff in *Eckles*, Etim Aka was a union member.[160] He

156. 116 F.3d 876 (D.C. Cir. 1997), *vacated pending reh'g en banc*, 124 F.3d 1302 (D.C. Cir. 1997), *reh'g en banc*, 154 F.3d 1284 (D.C. Cir. 1998).

157. *Id.* at 894 (determining that the issue of a conflict was premature, given that the evidence did not establish a conflict between the collective bargaining agreement terms and the ADA); *see also* Poindexter v. Atchinson, Topeka & Santa Fe Ry. Co., 914 F. Supp. 454, 457 (D. Kan. 1996) (holding that the existence of a collective bargaining agreement does not preempt an ADA claim and refusing to grant summary judgment for the defendant); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 396 (E.D. Tex. 1995) (classifying collective bargaining agreements as one factor in determining the reasonableness of an accommodation). The *Poindexter* plaintiff went on to win a jury trial. Poindexter v. Atchinson, Topeka & Santa Fe Ry. Co., No. CIV.A. 94-2341-GTV, 1996 WL 507303, at *1 (D. Kan. Aug. 5, 1996).

158. Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 894-95 (D.C. Cir. 1997).

159. *Id.* at 895-96. *See* Cmty. Hosp. v. Fail, 969 P.2d 667, 678 (Colo. 1998) (relying on *Aka*, the Colorado Supreme Court also has interpreted the ADA's legislative history as imposing a greater burden to accommodate employees versus applicants).

160. *Aka*, 116 F.3d at 878. Like *Eckles*, the collective bargaining agreement in *Aka* contained a provision that allowed for transfer of disabled workers in certain cases. Paragraph 14.5 of the collective bargaining agreement provided: "An employee who becomes handicapped and thereby unable to perform his job shall be reassigned to another job he is able to perform whenever, in the sole discretion of the Hospital, such reassignment is feasible and will not interfere with patient care or the orderly operation of the Hospital." *Id.* at 892. The court determined that the terms of the collective bargaining agreement may impose an obligation on the employer to reassign *Aka*, stating that, when read as a whole, the "provision authorizing the transfer of handicapped employees to vacant positions creates an exception to the otherwise-applicable [seniority procedure]." *Id.* Therefore, the court interpreted the provision as limiting the seniority rights of the other employees by stipulating that in some cases these rights would be abridged in order to reassign a disabled worker. *Id.* at 892-93. At least one other court has held that a transfer provision for disabled workers in a collective bargaining agreement may limit the seniority rights of other workers. *See* Buckingham v. United States, 998 F.2d 735, 741-42 (9th Cir. 1993) (upholding a transfer of a disabled employee in a unionized workplace with a seniority system because the court determined that the terms of the collective bargaining agreement had modified the rights of the other workers).

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worked as an orderly in a hospital where his position required him to engage in substantial amounts of heavy lifting.[161] During his employment, Aka suffered heart problems and was advised by his doctor to seek a new position with the hospital that required only a "light or moderate level of exertion."[162] In response to Aka's request for reassignment, the hospital informed him that no such jobs were available and placed him on a "job-search leave."[163] Although Aka applied for several positions in the hospital that were posted as vacant, he failed to receive an offer for any of them.[164] He subsequently filed suit under the ADA, alleging that his employer's refusal to reassign him constituted employment discrimination based on his disability.[165]

On appeal from the district court's grant of summary judgment for the employer,[166] the D.C. Circuit reversed, holding that collectively bargained seniority systems were relevant, but not dispositive, with respect to the reasonableness of a requested accommodation.[167] The court stated:

> the fact that a requested accommodation does not fall squarely within the terms of the applicable collective bargaining agreement is relevant only insofar as it undermines the employee's claim that the requested accommodation is 'reasonable,' or bolsters the employer's affirmative defense that the accommodation could not be provided without 'undue hardship.'[168]

In reaching its conclusion, the court made specific reference to the language of the ADA, its legislative history, and the EEOC regulations implementing the statute.[169] The court explicitly rejected the *Eckles* court's reliance on Title VII.[170]

First, the court determined that the plain language of the ADA explicitly includes reassignment to a vacant position as a possible reasonable accommodation, absent undue hardship.[171] The court noted that potentially

161. *Aka*, 116 F.3d at 878.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 879.
166. *See id.*
167. *Id.* at 893 ("[W]e note that although [the Rehabilitation] Act is quite similar to the ADA in most respects, the two acts diverge sharply on this particular question, because the ADA explicitly suggests 'reassignment to a vacant position' as a form of 'reasonable accommodation' that may be required of employers." (citations omitted)). The *Aka* court's conclusion that the Rehabilitation Act cases are not relevant is supported by a majority of courts which have considered the reassignment issue in a non-unionized workplace. *See, e.g.*, Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996) (concluding that a majority of courts have determined that the Rehabilitation Act cases are irrelevant in interpreting the reassignment provision of the ADA).
168. *Aka*, 116 F.3d at 894 (footnote omitted).
169. *Id.* at 894-95.
170. *Id.* at 895-96.
171. *Id.* at 896.

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all reasonable accommodations specified in the language of the ADA could conflict with the terms in most collective bargaining agreements.[172] The court argued that under a rationale accepting the *per se* rule, the terms of a collective bargaining agreement would always trump the ADA.[173] The effect of this outcome would be to nullify the ADA's purpose of empowering the disabled in the unionized workplace.[174]

Second, the court also recognized that the ADA's legislative history emphasizes Congress' intent that a conflict between a reassignment accommodation and collectively bargained seniority rights should be considered, but that this conflict was not dispositive with respect to reasonableness.[175] Specifically, the court noted that both the House and Senate Reports indicated that the provisions of a collective bargaining agreement are only one factor in determining whether a particular accommodation, such as reassignment, is reasonable.[176] Further, the Reports mentioned that a collective bargaining agreement with a seniority provision could be a factor in determining whether it was reasonable to reassign a disabled employee without the required seniority to a particular position.[177] Finally, the court determined that the EEOC Interpretative Guidelines further buttressed this legislative intent by classifying collective bargaining agreements as relevant, but not dispositive, in determining whether an accommodation was so disruptive to the workforce as to constitute undue hardship.[178]

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172. *Id.* The Court further stated:

> [A]lthough there is a conflict between the agreement and the "reasonable accommodation" Aka seeks, the conflict is relatively minor, and therefore it appears to present little difficulty for Aka's claim that the accommodation is "reasonable"; by the same token, the conflict appears to give Washington Hospital little purchase for any affirmative defense that the reassignment would impose an "undue hardship." . . . To put it in terms of the infringement on the "seniority rights" of other employees, the other employees' seniority rights were already limited by the handicapped-transfer provision, which prevented them from bidding for (and asserting their seniority preference in regard to) vacancies required to be given to reassigned handicapped employees under Paragraph 14.5; with the prospect of reassignments occurring also under the ADA, this limit on the other employees' seniority rights may extend to at most a few more reassignments, and may remain unchanged.

Id. at 897.

173. *Id.* at 896.

174. *Id.*

175. *Id.*

176. *Id.* at 895; *see supra* note 150 and accompanying text.

177. *Aka*, 116 F.3d at 895. The Report even provides an example of a hypothetical case involving seniority rights, stating:

> [I]f a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.

See id.

178. *Id.* (providing that "the terms of a collective bargaining agreement 'may be relevant' to the determination of whether . . . a particular accommodation would be 'unduly disruptive to other employees or to the functioning of its business'" (quoting 29 C.F.R. app. § 1630.15(d)). Thus, unlike the *Eckles* court, the *Aka* court specifically referenced the EEOC regulations when making its determination concerning how to balance the ADA with a collective bargaining agreement. *Aka*, 116 F.3d at 895.

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With respect to the *Eckles* court's reliance on Title VII case law, the court stated, "the nature of the ADA prevents the Supreme Court's Title VII decision in *Trans World Airlines v. Hardison* from being directly applicable to this case."[179] The court acknowledged that the Supreme Court, in its review of the Title VII duty of reasonable accommodation, held that the statute did not require an employer "to take steps inconsistent with the otherwise valid [collective bargaining] agreement."[180] However, the court also noted that in *Hardison*, the Supreme Court had explicitly stated that it reached its conclusion in the absence of any "clear and express indication from Congress" explaining how courts should address such inconsistencies.[181] The D.C. Circuit found that not only was the ADA's reasonable accommodation scope broader than Title VII's provision, but also that the ADA and its legislative history include the "clear and express" indications that Title VII's history lacked. Specifically, the court pointed to the enumeration of "reassignment to a vacant position" in the statutory provision requiring "reasonable accommodations," and the statements in reports from both houses of Congress stressing that conflicts between requested accommodations and provisions of collective bargaining agreements (including seniority systems) are not "determinative" in the inquiry into whether the employer must provide the accommodations.[182]

Based on this reading of the ADA's reasonable accommodations requirement, the D.C. Circuit held that a *per se* bar to accommodation through reassignment is an erroneous representation of the purpose and intent of Title I.[183] The court deemed it "inappropriate to draw blanket conclusions regarding whether the ADA can 'trump' provisions in collective bargaining agreements, or whether the ADA can require the 'sacrifice[]' of 'rights' created in other employees by these agreements."[184] The court in-

179. *Id.* at 896 n.14 (citation omitted).

180. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977).

181. *Id.*

182. *Aka*, 116 F.3d at 893; H.R. REP. NO. 101-485, pt. 2, at 68 (1990) ("By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*.").

183. *See Aka*, 116 F.3d at 894, 895-96. This reasoning is consistent with the Supreme Court's decision in *Franks v. Bowman Transportation Corp.*, in which the Court stated: "[A] collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement." Franks v. Bowman Transp. Co., 424 U.S. 727, 778-79 (1976).

184. *Aka*, 116 F.3d at 896 (citation omitted). This decision was vacated pending review en banc. Aka v. Wash. Hosp. Ctr., 116 F.3d 876 (D.C. Cir. 1997), *vacated pending reh'g en banc*, 124 F.3d 1302 (D.C. Cir. 1997), *reh'g en banc*, 156 F.3d 1284 (D.C. Cir. 1998). On rehearing, the court determined there was insufficient evidence in the record to establish a conflict between the ADA and the terms of the employer's collective bargaining agreement. *See Aka*, 156 F.3d at 1306. Therefore, it was premature to address the issue of conflict or to determine the appropriate analysis for such a conflict. *Id.* The court remanded to the district court to determine the scope of the collective bargaining agree-

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stead adopted a balancing standard that weighs the need for an accommodation against the degree of hardship imposed by the infringement on seniority rights.[185] This balance, the court noted, should be based on the particular circumstances of each case with a potential "continuum" of results.[186]

In adopting the Title VII practice of denying a requested reassignment when it conflicts with collective bargaining agreements, a majority of courts have ignored critical differences between the ADA and Title VII. Congress intended the ADA to protect all disabled employees. As the statute has been interpreted by a majority of circuit courts, however, disabled employees in a union have received less protection than non-disabled employees and disabled non-union members. The *per se* rule has essentially excused union employers from the reassignment accommodation generally required under the ADA. The ADA requires a flexible, case-by-case analysis that balances collective labor rights against individual employment rights. The fact that a requested reassignment conflicts with collectively bargained seniority rights should not change, much less control, the analysis. The courts should allow the ADA to function as Congress intended, through a balanced reasonable accommodation analysis, rather than adopting a *per se* rule developed under Title VII.

B. *Title VII's Allocation of the Burden of Proof*

The ADA does not clearly state what a plaintiff must prove to prevail on a claim of intentional employment discrimination,[187] and the Supreme Court has not addressed the issue of the proper allocation of the burden of proof in employment discrimination cases brought under the ADA. Courts that have considered claims of employment discrimination under the

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ment and whether there is any true conflict with the proposed reassignment and the collective bargaining agreement. *Id.* If the district court determines that a conflict exists, the initial appellate court's rationale and conclusion, that there is no *per se* rule barring accommodations that contravene collective bargaining agreements, would support a similar outcome on remand.

185. *Aka*, 116 F.3d at 896.

186. *Id.* The ADA explicitly states that reasonable accommodation includes, "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B) (1994). Furthermore, the legislative history indicates that the overall purpose of the ADA is to "bring persons with disabilities into the economic and social mainstream of American life." H.R. REP. NO. 101-485, pt. 2, at 22 (1990). Permitting seniority rights to prevent a disabled individual from remaining employed certainly would not advance the intent of Congress to keep these individuals in the socio-economic mainstream.

187. *See* 42 U.S.C. § 12112(a). Although the ADA's text does not provide for an allocation of the burdens for the various elements of a disparate treatment or disparate impact case, Congress specified that the burdens of proof should be allocated consistently with cases brought under the Rehabilitation Act. H.R. REP. NO. 101-485, pt. 2, at 72 (1990). Rehabilitation Act cases, however, have applied a variety of approaches to the burden of proof issue, and thus, make "Congress' mandate somewhat unclear." Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 743 (1997) (discussing the failure of Congress and courts to define the proper allocation of the burden of proof for ADA discrimination claims under Title I).

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ADA[188] have applied Title VII's burden-shifting analysis, first enunciated in *McDonnell Douglas Corporation v. Green*, and elaborated in subsequent cases.[189]

The Supreme Court in *McDonnell Douglas* created a structure for plaintiffs to establish a prima facie case of intentional employment discrimination even absent direct evidence of discrimination.[190] Under the *McDonnell Douglas* analysis, as applied to the ADA, the plaintiff may establish a prima facie case of discrimination on the basis of disability through evidence that the employee or applicant is an individual with a disability; that she is qualified for the position in question, with or without reasonable accommodation; and that, despite her qualifications, she was the subject of a negative employment decision by the employer.[191] The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.[192] If it does so, the plaintiff may

188. Every circuit except the Ninth and the Eleventh has, on at least one occasion, analyzed an ADA claim using the structure of proof first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973). For representative samples, see MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.47 (2d ed. 1999). *See, e.g.*, DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995) (applying *McDonnell Douglas* to an ADA claim for disparate treatment); Barth v. Gelb, 2 F.3d 1180, 1185 (D.C. Cir. 1993) (holding that the *McDonnell Douglas* analysis is appropriate for claims brought under the Rehabilitation Act when employer asserts that it failed to hire or promote plaintiff for reasons unrelated to his or her handicap), *cert. denied sub. nom.*, Barth v. Duffy, 511 U.S. 1030 (1994).

189. 411 U.S. at 802 (establishing the four-part test for determining whether the plaintiff has established a prima facie case of discrimination). "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring). *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2106 (describing defendant's burden to provide legitimate, non-discriminatory reasons for their actions and plaintiff's right to introduce evidence rebutting those reasons) (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993) (same); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (same).

190. *McDonnell Douglas*, 411 U.S. at 802.

191. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1179 (10th Cir. 1999) (applying *McDonnell Douglas* to ADA claims); Doe v. N.Y. Univ., 666 F.2d 761, 774 (2d Cir. 1981) (using *McDonnell Douglas* to analyze Rehabilitation Act claims). The *McDonnell Douglas* Court noted that this standard is flexible. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

192. *McDonnell Douglas*, 411 U.S. at 802. "Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255-56. The employer need not persuade the court that its proffered reasons motivated its actions. *Id.* at 255 n.8. Instead, the employer only needs to produce admissible evidence on which the jury could reasonably conclude that discriminatory animus had not motivated the employer. If the employer alleges a legitimate reason for its actions, the employer rebuts the presumption of discrimination and it drops from the case. *St. Mary's Honor Ctr.*, 509 U.S. at 506-07 (quoting *Burdine*, 450 U.S. at 255 n.10). This does not mean, however, that the jury cannot consider evidence that the plaintiff already introduced as part of her prima facie case. *See Reeves*, 120 S. Ct. at 2109 (ruling that an employee who establishes a prima facie case under a federal employment discrimination statute and presents evidence that the employer's non-discriminatory rea-

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then show that the asserted motive is a pretext,[193] and that intentional discrimination, not the employer's proffered justification, was the real basis for the employer's decision.[194] The trier of fact must then decide the ultimate question of the case: "whether . . . the defendant intentionally discriminated against" the employee.[195] At all times, the plaintiff retains the ultimate burden of persuasion to prove by a preponderance of the evidence that the employer intentionally discriminated against her.[196]

This use of the *McDonnell Douglas* burden-shifting analysis may be appropriate for some ADA claims. In some instances, there is a substantial overlap in the types of harm that the ADA and Title VII seek to prevent.[197] As noted above, individuals with disabilities may be subject to discrimination in which the employer refuses to provide the plaintiff with a job opportunity merely because of the plaintiff's membership in the protected class.[198] Active animus, stereotypes and misunderstandings about the capabilities of individuals with disabilities may lead an employer to deny an employment opportunity to an individual with a disability.[199] In such instances, the *McDonnell Douglas* analytical framework may prove a useful tool in discovering the discriminatory basis of the employer's deci-

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son for the challenged employment decision is false is not always required to introduce additional evidence of pretext to sustain a favorable jury verdict).

193. *Burdine*, 450 U.S. at 256.

194. *Id.*

195. *St. Mary's Honor Ctr.*, 509 U.S. at 511. In *St. Mary's Honor Ctr.*, the district court, in a bench trial, found that the reasons the defendant gave were not the real reasons for the plaintiff's demotion and discharge. *Id.* at 508 & n.2. Despite this finding, the court was not persuaded that the plaintiff was the victim of intentional race discrimination. *Id.* at 508. Several considerations led to this conclusion, "including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that 'the number of black employees at St. Mary's remained constant.'" *Id.* at 508 n.2.

196. *Reeves*, 120 S. Ct. at 2106.

197. *See, e.g.*, Deluca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995). In *Deluca*, the plaintiff, who had multiple sclerosis, sued his employer for firing him because of his disability. *Id.* He claimed that other employees were treated more favorably. Central to his claim was the portion of the ADA prohibiting discrimination against a qualified individual with a disability because of the disability. This was a claim for disparate treatment, and because DeLuca had no direct proof of discrimination, he used the *McDonnell Douglas* burden-shifting method to prove indirectly that his employer had fired him because he had multiple sclerosis. *Id.*

198. A 1973 survey of businesses in Los Angeles found "employer attitudes toward disabled persons were less favorable than those toward any other prospective group of applicants surveyed, including elderly individuals, minority-group members, ex-convicts, and student radicals." *See* BOWE, *supra* note 96, at 175.

199. *See, e.g.*, Sch. Bd. v. Arline, 480 U.S. 273, 283 n.9 (1987) (citing remarks of Sen. Walter Mondale regarding a woman crippled by arthritis who was denied a job as a teacher because college trustees thought "normal" students should not see her); Bagenstos, *supra* note 85, at 419 (discussing how the potential of disabled people has been severely underestimated throughout history). *But see* JOHN GLIEDMAN & WILLLIAM ROTH, THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA 288 (arguing that "a significant portion of this underutilization [of the talents of disabled individuals] is perfectly rational given the special margin of uncertainty in the information provided employers about the economic value of disabled job applicants and job holders").

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sion.[200] For instance, in a case where the employer had fired an employee with a partially amputated foot and provided several different explanations as to why this firing occurred, the *McDonnell Douglas* analysis worked to show that the employer's reasons were pretextual.[201]

As mentioned earlier, however, disability discrimination differs substantially from race or gender discrimination because the discrimination is usually not intentional.[202] Therefore, it is frequently damaging to ADA plaintiffs when courts apply a burden-shifting framework developed specifically for proving race or gender discrimination.[203] The *McDonnell Douglas* analysis does not adequately address the complex interaction between a person's disability and that person's ability to perform a job.[204] An employer will almost never admit that race was considered when making an employment decision.[205] In contrast, many disability discrimination defendants readily admit that decisions were based on the plaintiff's dis-

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200. *See* Monette v. Elec. Data Sys., Corp., 90 F.3d 1173, 1184 (6th Cir. 1996) (holding that a *McDonnell Douglas* burden-shifting analysis will be appropriate in disability discrimination cases where the plaintiff has no direct evidence of discrimination and the employer disclaims reliance on the plaintiff's disability). Likewise, some courts interpreting the Rehabilitation Act have followed this exact analysis when the defendant has denied taking the plaintiff's disability into account when making its employment decision. *See* Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (upholding placing the burden of persuasion on plaintiff to prove that she can perform the essential functions of the job, with or without reasonable accommodations, and giving the defendant the burden of production to show plaintiff is not qualified for the position); Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1985) (holding that a legally blind librarian in Rehabilitation Act claim must raise inference of discrimination through proof of a prima facie case, the employer must come forward with evidence that the rejection was for a legitimate reason and the plaintiff must then make a showing of pretext).

201. *See* Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018 (8th Cir. 1998), *reh'g and suggestion for reh'g en banc denied* (Oct. 1, 1998) (holding that inference of discrimination is shown where employer changed his story as to why he terminated employee with disability); *see also* Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998) (holding that employee who was demoted was able to show intentional discrimination by the employer); Duda v. Bd. of Educ., 133 F.3d 1054 (7th Cir. 1998) (holding that a night custodian with bipolar disorder established a sufficient disability claim under the ADA and defeated a dismissal of the case, where the employer forced the night custodian to a different assignment, thereby segregating him from other employees, and refused to allow the employee to apply for another position).

202. See *supra* notes 91-99 and accompanying text.

203. One judge aptly commented, "Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole." Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981).

204. *See* Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 883 (1980) (noting that "[d]iscrimination against the handicapped poses unique problems because the trait that gives rise to the protected status also limits an individual's ability to function"). Professor Martin further explained "[t]his link suggests that discrimination against the handicapped, unlike discrimination against other groups, necessarily encompasses more than differential treatment caused by prejudicial attitudes. A full definition of discrimination must address both the problem of prejudicial attitudes and the limitation caused by the handicap itself." *Id.*

205. *See* Cooper, *supra* note 23, at 1428-29 (discussing how the narrow defense of bona fide occupational qualification under Title VII recognizes, in limited circumstances, that sex, religion, and national origin may be legitimate considerations in establishing job qualifications).

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ability.[206] Because of that disability, the defendant concluded either that the plaintiff was not qualified, or that it would be too great an inconvenience to accommodate that disability.[207] The ADA's unique affirmative burden to reasonably accommodate an employee's disability requires that courts scrutinize an employer's explanations for not hiring a disabled person more closely than an employer's decisions under Title VII claims.[208] In particular, courts presiding over ADA cases scrutinize whether an employer acted on the basis that an applicant did not possess the qualifications for the job, with or without accommodations, or whether inaccurate assumptions that the disability might limit an applicant's ability to perform the job influenced the employment decision.[209]

Because the ADA defines "discrimination" against the disabled to include the failure to reasonably accommodate, it is particularly problematic for courts to apply Title VII's burden of proof allocations to ADA claims concerning the failure to reasonably accommodate.[210] The *McDonnell*

206. *See, e.g.*, White v. York Int'l Corp., 45 F.3d 357, 361 n.6 (10th Cir. 1995) (noting that where an employer readily acknowledges that the decision to terminate the employee was premised, at least in part, on the employee's disability, the application of the traditional burdens of proof is sufficient rather than the *McDonnell Douglas* analysis).

207. The *McDonnell Douglas* burden-shifting framework is suited directly for disparate treatment claims, and not to those ADA claims where the focus is not on the presence of disparate treatment (as the employers readily admit such treatment), but is instead an inquiry into the reasonableness (in the sense of accommodation and hardship) of the inquiry. Doe v. N.Y. Univ., 666 F.2d 761, 776 (2d Cir. 1981). In *Doe*, the defendant claimed that the plaintiff was not qualified because of her disability and, therefore, the University did not have to attempt to reasonably accommodate her disability. *See id.* at 769-70. The court held that once a plaintiff established a prima facie case, "the institution or employer . . . [has to go] forward with evidence that the handicap is relevant to qualifications for the position sought." *Id.* at 776. Under this analysis, the University had to offer evidence that the plaintiff's mental illness affected her qualifications for medical school. *Id.* at 777. The University did not, however, have to address whether it could reasonably accommodate the plaintiff so that she would be able to perform in medical school. *Id.*

208. Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1180 (6th Cir. 1996) (noting that employers often rely on an employee's disability in making employment decisions, and thus, when an employer admits (or the evidence establishes) that its decision was based on the employee's disability, direct evidence of discrimination exists so "application of the *McDonnell Douglas* burden-shifting framework is inappropriate").

209. Employers often underestimate the productivity of workers and job applicants with disabilities by reaching conclusions about their capabilities based upon the stereotypes and misconceptions of the limiting effects of impairments. SHAPIRO, *supra* note 2, at 19 ("Our society automatically underestimates the capabilities of people with disabilities. . . . [A] disability, of itself, is never as disabling as it first seems."). *See also* William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?, in* DISABILITY AND THE LABOR MARKET 242, 247 (Monroe Berkowitz & M. Anne Hill eds., 2d ed. 1989) (noting that increased information concerning a disabled worker's productivity reduces the likelihood of disability discrimination); Tamara Dembo et al., *A View of Rehabilitation Psychology*, 28 AM. PSYCHOLOGIST 719, 720 (1973) (discussing how the tendency of nonhandicapped people to devalue those with handicaps leads to discrimination in employment and other areas).

210. Most courts applying *McDonnell Douglas* to both the Rehabilitation Act and the ADA have failed to even explain why Title VII standards are relevant to disability discrimination case law. *See* Martin, *supra* note 204, at 887-88 (noting the differences in the types of discrimination faced by the

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Douglas structure,[211] with its shifting burdens, was conceived to overcome the difficulties of proving discriminatory motive, for which frequently there is no direct evidence.[212] No such reliance on inference is necessary in a disability lawsuit because an employer's failure to provide a reasonable accommodation for a qualified individual with a disability (absent undue hardship on the employer) is itself direct evidence of discrimination as defined by the ADA.[213] Thus, if the dispute between the parties concerns whether a reasonable accommodation is available, it seems absurd to ask whether the employer's stated position, that no reasonable accommodation exists, is asserted to mask discriminatory animus when more often it reflects ignorance or insensitivity.[214] The *McDonnell Douglas* framework does not aid the court in its exploration of reasonable accommodation claims because it does not further its own purpose, namely, "to sharpen the inquiry into the elusive factual question of intentional discrimination."[215]

Another potential problem arises with the application of the *McDonnell Douglas* framework when an employer wishes to rely on the undue hardship defense in response to a claim of failure to reasonably accommodate.[216] As with most affirmative defenses, the defendant who raises it should have the burden of proving it.[217] The defendant is the party with

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disabled and stating that no court has directly discussed these differences or why it was appropriate to apply the *McDonnell Douglas* test to Rehabilitation Act claims).

211. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

212. *See, e.g.*, Baxter v. Northwest Airlines, Inc., No. 96-C-2060, 1998 U.S. Dist. LEXIS 14358, at *20 (N.D. Ill. Sept. 3, 1998) (noting that without specific proof of a vacant position, the court could not determine whether the employer failed to reasonably accommodate the employee). Such an allocation of the burden of proof allows the employer to skirt the duty of accommodation and to avoid the kind of factual, interactive inquiry that the ADA requires. *See, e.g.*, Carrozza v. Howard County, 847 F. Supp. 365, 367-68 (D. Md. 1994) (granting the defendant summary judgment based on the plaintiff's "conclusory" suggestions (not qualifying as factual evidence) that the defendant could have reasonably accommodated the limitations of her bipolar disorder through any of five specific changes to her job).

213. *See* Montgomery v. John Deere & Co., 169 F.3d 556, 562 (8th Cir. 1999) (Lay, J., concurring); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283-84 (7th Cir. 1996); *Monette*, 90 F.3d at 1180-84.

214. Under many ADA claims, the inquiry focuses on whether the employer's decision to not hire or to fire a disabled employee was justified in light of the statutory accommodation burden, rather than the common Title VII situation where the inquiry is into the very existence of class-based animus. *See supra* notes 91-99 and accompanying text.

215. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981); *see also* Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1228-29 (2000).

216. The federal regulations interpreting the ADA, as well as the ADA itself, imply that an undue hardship claim is an affirmative defense. *See* 42 U.S.C. § 12112(b)(5)(A) (1994 & Supp. III 1997) (stating that an employer must demonstrate undue hardship to avoid liability for employment discrimination for failure to reasonably accommodate); 29 C.F.R. § 1630.15(d) (1994) (stating that an employer may use undue hardship to provide an employee with a "requested or necessary accommodation" as a defense to a discrimination allegation).

217. As one circuit court noted:

> The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of

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the knowledge, experience, and resources to determine whether it can make reasonable accommodations for the plaintiff.[218] Placing the burden of persuasion on the employer to prove undue hardship will help ensure that employers live up to their procedural duties under the ADA. In cases that center on reasonable accommodation, the *McDonnell Douglas* analysis simply obscures the issues that lie at the heart of the reasonable accommodation/undue hardship inquiry.

Some courts have recognized the problems in attempting to apply the *McDonnell Douglas* structure to ADA claims.[219] In fact, several courts of appeals have specifically developed an alternative framework for analyzing the different types of discrimination claims brought under the ADA.[220] For example, in situations where the employer admits they did not hire the

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other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.

Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981).

218. The affirmative burden to reasonably accommodate acknowledges that a disability is relevant to job performance. Because of structural barriers, a disabled employee may be unable to perform a job without the employer making some modifications. The ADA relieves an employer of the burden to reasonably accommodate only when the employer can prove that the accommodation would be an undue hardship. *See supra* notes 43-56 and accompanying text (explaining the duty of employers to reasonably accommodate).

219. *See, e.g.*, Flemmings v. Howard Univ., 198 F.3d 857, 861 (D.C. Cir. 1999) (holding that for a failure to accommodate claim, the plaintiff must not only prove that she has a disability, but must also prove that with a reasonable accommodation (which she must describe), she would be able to perform the essential functions of her job; her employer then bears the burden of proving that the reasonable accommodation would cause undue hardship); Montgomery v. John Deere & Co., 169 F.3d 556, 562 (8th Cir. 1999) (Lay, J., concurring) (disagreeing with the application of the *McDonnell Douglas* framework to the plaintiff's ADA reasonable accommodation claim because it is not a disparate treatment claim); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-87 (11th Cir. 1997) (holding that a plaintiff can show she was unlawfully discriminated against when an employer does not reasonably accommodate her disability, unless the employer can show such an accommodation would pose an undue hardship); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283 (7th Cir. 1996) (applying a reasonable accommodation analysis rather than the *McDonnell Douglas* analysis because the plaintiff's claim was a disability claim and not one of disparate treatment); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996) (suggesting that in disability claims, the burden need not be shifted to the employer as to whether the employee can perform the job function because traditional methods of proof are sufficient); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (stating that "once the plaintiff makes a 'facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee" (quoting Mason v. Frank, 23 F.3d 315, 318-19 (8th Cir. 1994)).

220. In cases where the employer relies on the employee's disability in its decision-making, the disputed issue will almost always be whether the employee is "otherwise qualified" to perform the job. Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1985); Doe v. N.Y. Univ., 666 F.2d 761, 776 (2d Cir. 1981). These cases fall into two broad categories: (1) those in which the plaintiff is not seeking a reasonable accommodation, but is instead making the straightforward claim that he or she can, in fact, function capably in the sought after position as it exists; and (2) those in which the plaintiff challenges a particular job requirement as unessential or claims that he or she can do the job with reasonable accommodations on the part of the employer.

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plaintiff because of her disability,[221] these courts require the plaintiff to first establish a prima facie case by demonstrating that she is a qualified individual with a disability who can perform the essential functions of the job, with or without reasonable accommodations.[222] The employer can avoid liability only by showing that it would be an undue hardship to reasonably accommodate the plaintiff.[223] As with other affirmative defenses,[224] the employer has the burden of persuasion.[225]

The Seventh Circuit's decision in *Bultemeyer v. Forth Wayne Community Schools* provides an example of the alternative burden-shifting framework. In that case, the court overturned the district court's dismissal of Bultemeyer's case, noting that the district court had mistakenly relied on the court's holding in an ADA claim involving disparate treatment.[226] The court found that because Bultemeyer had based his complaint on the

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221. *See, e.g., Prewitt*, 662 F.2d at 297 (refusing to re-employ an individual for a postal carrier position because of a physical handicap).

222. *Id.* at 309-10. However, the disabled individual bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable. Additionally, nothing in the statute alters the burden the disabled individual bears of establishing that she is capable of performing the essential functions of the job with the proposed accommodation. Put simply, if the employer claims that a proposed accommodation will impose an undue hardship, the employer must prove that fact. If the employer claims instead that the disabled individual would be unqualified to perform the essential functions of the job, even with the proposed accommodation, the disabled individual must prove that she would in fact be qualified for the job if the employer were to adopt the proposed accommodation.

223. *See* Sch. Bd. v. Arline, 480 U.S. 273, 288-89 (1987) (holding that the ultimate issue was whether the defendant could reasonably accommodate the plaintiff's tuberculosis); Barth v. Gelb, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993) (holding that when an agency invokes the affirmative defense of inability to reasonably accommodate, the defendant should have the burden of proving undue hardship); *Prewitt*, 662 F.2d at 308 (stating that the employer has greater knowledge of the essential duties of the job and therefore, is in a better position to prove undue hardship). The *Prewitt* court goes on to state that once the employer meets its burden, "the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence." *Id.* at 308.

224. Similarly, if a disabled individual is challenging a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary. *See* 42 U.S.C. § 12112(b)(6) (1994). The employer must demonstrate that he does not discriminate and does not:

> Us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

Id. This language indicates that an employer bears the burden of proving that a particular hiring policy is "job-related" and "consistent with business necessity." *Id.*

225. The language of 42 U.S.C. § 12112(b)(5)(A) makes it clear that the employer has the burden of persuasion on whether an accommodation would impose an undue hardship. *See supra* note 58 and accompanying text; *see also* Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989) (holding that the employee need only make a facial showing that reasonable accommodation is possible and the burden then shifts to the employer to prove inability to accommodate); *Prewitt*, 662 F.2d at 308 (finding that under the Rehabilitation Act, the employer has the duty to make a reasonable accommodation, and thus the burden of proving its inability to make the accommodation).

226. Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283 (7th Cir. 1996).

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ADA's reasonable accommodation provision,[227] his claim alleged facts that, if proven, could directly establish a violation of the ADA.[228] The court held that because Bultemeyer's case was not a disparate treatment case, the use of the *McDonnell Douglas* burden-shifting method of proof was unnecessary and inappropriate.[229] The court proceeded to analyze Bultemeyer's claims under the regular reasonable accommodation analysis.[230]

This approach more accurately reflects the goals of the ADA and prevents an employer from circumventing the ADA's mandate to reasonably accommodate.[231] This, however, has not kept a number of courts from attempting to fit reasonable accommodation into the *McDonnell Douglas* framework.[232] Because the alternative approach to *McDonnell Douglas* has not been adopted by all the circuit courts, trial courts and litigants are left without clear guidelines on what they will have to prove at trial, and what their burden of proof will be on key issues such as reasonable accommodation.

For the ADA to achieve its intended effect, courts must allocate the burden of proof for a cause of action under the Act differently than they have with other types of employment discrimination claims. In particular, courts should not apply the *McDonnell Douglas* allocation of the burden of proof to all ADA employment discrimination claims. Because of the unique relationship between a disability, an individual's ability to perform a job and the unique affirmative burden on employers to reasonably accommodate workers with disabilities, courts should place higher burdens

227. *Id.* Mr. Bultemeyer claims that he was a qualified individual with a disability and that his employer did not reasonably accommodate him.

228. *Id.* (noting that "[i]f it is true that [his employer] should have reasonably accommodated Bultemeyer's disability and did not, [his employer] has discriminated against him"). The court further stated that "Bultemeyer is not complaining that [his employer] treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other . . . employee. [Rather, h]is complaint relates solely to [his employer's] failure to reasonably accommodate his disability." *Id.*

229. *Id.*

230. *See supra* notes 43-51 and accompanying text (setting forth the reasonable accommodation analysis).

231. *See* Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 890-91 (D.C. Cir. 1997) (holding that a reasonable accommodation claim is not subject to the familiar three-part analysis of *McDonnell Douglas* but has its own specialized legal standards); Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (recognizing three types of handicap discrimination claims, with special evaluation standard for each: (1) where the employer claims a non-discriminatory reason for its adverse employment action; (2) where the employer maintains that the employee is not an otherwise qualified individual with a disability or that no reasonable accommodation is available, so that the plaintiff falls outside the scope of ADA protection; and (3) where the employer offers the affirmative undue hardship defense for its actions).

232. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-71 (10th Cir. 1999); Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998); EEOC v. Amego, Inc., 110 F.3d 135, 141 n.2 (1st Cir. 1997); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 882-83 (6th Cir. 1996); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 511 (1st Cir. 1996).

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on employers who wish to escape liability in disability discrimination cases. Without this allocation of burden of proof, the disabled will continue to face unnecessary employment discrimination.

C. *Title VII's Constructive Discharge Standards*

Another area in which Title VII case law has been applied to the ADA involves the constructive discharge doctrine. Unlike the classic express discharge, which arises when an employer either fires or refuses to hire a protected individual,[233] constructive discharge concerns employees who are subjected to discriminatory treatment and resign due to the intolerable working conditions.[234]

The constructive discharge doctrine was developed under the National Labor Relations Act[235] and later was adopted in Title VII cases.[236] To date, each circuit court uses the same test for establishing a constructive discharge, regardless of the particular employment statute at issue.[237] How-

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233. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (establishing the three-part approach for proving disparate treatment with circumstantial evidence in hiring cases). Although *McDonnell Douglas* was a hiring case, lower courts have adopted it for the purpose of discipline, discharge, and constructive discharge claims. *See, e.g.*, Parton v. GTE N., Inc., 971 F.2d 150, 151-53 (8th Cir. 1992) (applying *McDonnell Douglas* analysis to determine employee discharge was not motivated by gender); Ang v. Procter & Gamble Co., 932 F.2d 540, 548-49 (6th Cir. 1991) (applying *McDonnell Douglas* test to a national origin discrimination claim involving termination); Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1140-41 (11th Cir. 1983) (applying *McDonnell Douglas* test to a claim of discrimination against women in hiring, firing, and termination actions by the employer).

234. *See, e.g.*, Barnes v. Yellow Freight Sys., Inc., 778 F.2d 1096, 1098-99 (5th Cir. 1985) (discussing constructive discharge claim arising when employee was confronted with imminent discharge or a "choice to resign"). For a general overview of the constructive discharge doctrine, see Richard M. DeAgazio, Note, *Promoting Fairness: A Proposal for a More Reasonable Standard of Constructive Discharge in Title VII Denial of Promotion Cases*, 19 FORDHAM URB. L.J. 979 (1992). *See generally* ROTHSTEIN ET AL., *supra* note 188, § 2.10. If the employee was not constructively discharged, she is not entitled to the remedies of back pay, reinstatement or front pay, or other damages, even if the court finds that the employer engaged in discriminatory practices before the resignation. *Id.*; *see also* Muller v. United States Steel Corp., 509 F.2d 923, 930 (10th Cir. 1975) ("Unless [plaintiff] was constructively discharged, he would not be entitled to damages in the form of backpay . . . from the date of leaving [the defendant's] employ.").

235. *See, e.g.*, NLRB v. Tricor Prods., Inc., 636 F.2d 266, 271 (10th Cir. 1980); NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 243 (1st Cir. 1953). For a critique of the wholesale adoption of the NRLB standards into Title VII, see Rebecca Hanner White, *Modern Discrimination Theory and The National Labor Relations Act*, 39 WM. & MARY L. REV. 99 (1997); Martin W. O'Toole, Note, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986).

236. *See, e.g.*, Johnson v. Shalala, 991 F.2d 126, 131 (4th Cir. 1993) (reviewing Rehabilitation Act claims for constructive discharge); McCann v. Litton Sys. Inc., 986 F.2d 946, 950-53 (5th Cir. 1993) (reviewing age and race discrimination claims where demotion was a condition alleged to be intolerable).

237. *See, e.g.*, Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 n.5 (3d Cir. 1992) ("[T]he doctrine of constructive discharge is the same in all employee discrimination claims . . . ."); *see also* DeLuca v. Winer Indus., Inc. 53 F.3d 793, 797 (7th Cir. 1995) (stating that in analyzing constructive discharge claims under the ADA, it is appropriate to borrow from the court's approach under Title VII); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887 (3d Cir. 1984) (explaining that federal courts bor-

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ever, the application of that test for establishing a constructive discharge in employment discrimination cases varies widely between the circuits.[238] When courts apply these differing standards to ADA cases, the disabled plaintiff faces the barrier of proving discriminatory intent to recover under the constructive discharge claim.

If the employer discriminates against a disabled employee who subsequently resigns, the employee's allegations of constructive discharge must meet the same prima facie requirements as for any other violation under the ADA.[239] To satisfy the constructive discharge requirements, the plaintiff must also demonstrate that discriminatory employment practices made working conditions so intolerable that resignation was the only option.[240] Some circuits further require that the plaintiff prove that the employer intended to force the employee to resign.[241] However, the majority of circuits do not require a showing of specific intent on the part of the employer,[242]

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rowed the constructive discharge doctrine from labor law and listing cases that apply the constructive discharge doctrine across various civil rights statutes).

238. *See generally* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 259 (1992) (noting that courts differ as to "whether an employer is responsible for a constructive discharge only when the employer specifically intends to oust the [employee], or whenever the employer is responsible for the offensive conduct that causes" the resignation); 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION § 10.5 (West Group 2000) (noting that courts have differed on what is required for a finding of constructive discharge); Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 52 (1995) (noting the variety of approaches courts take to constructive discharge claims).

239. Thus, a plaintiff must establish that she: (1) is a disabled person within the meaning of the ADA; (2) is an otherwise qualified individual; and (3) was excluded from that employment under circumstances from which an inference of unlawful discrimination arises. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 135 (2d Cir. 1995).

240. James v. Sears, Roebuck & Co., 21 F.3d 989, 992 (10th Cir. 1992).

241. Parrish v. Immanuel Med. Ctr., 92 F.3d 727, 732 (8th Cir. 1996); *Johnson*, 991 F.2d at 126, 132; Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987) (holding that the employee must not only show objective feelings about workplace conditions but must also show the intent of the employer; the employer would have foreseen that a reasonable employee would want to resign). Many federal courts apply strict constructive discharge principles because they believe that employees who have been discriminatorily demoted, transferred, or denied promotion should stay and challenge the employer's discrimination internally. These courts do not want employees leaving at the smallest signs of discrimination and then suing for an unjustified windfall. *See* Ira M. Saxe, Note, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 985 (1987) ("[E]mployees should be discouraged from resigning when doing so deprives the employer of the opportunity to limit its liability by resolving the problems leading to the employee's resignation."). For a critique of the intent test for constructive discharge claims under the ADEA, see Sheila Finnegan, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561, 580 (1986) (arguing that the reasonable person test should be applied to ADEA claims for constructive discharge).

242. *See, e.g.*, Pena v. Brattleboro Retreat, 702 F.2d 322, 325-26 (2d Cir. 1983) (applying the reasonable employee standard to find the change in job responsibilities with no loss of pay or change of title insufficient to establish constructive discharge); Henson v. City of Dundee, 682 F.2d 897, 907-08 (11th Cir. 1982) (adopting the reasonable employee standard and holding hostile and offensive work environment sufficient to constitute constructive discharge); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (applying the reasonable employee standard to a constructive discharge in which the

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and find constructive discharge where the working conditions are so intolerable that "a reasonable person in the employee's shoes would resign."[243] Under either the "intent" standard or the "reasonable person" standard, the plaintiff must prove that the discriminatory actions of the employer made the work environment intolerable.[244]

A determination that working conditions are intolerable is made using a totality of the circumstances approach.[245] A finding of discrimination alone will not always negate a finding that the employee quit voluntarily.[246] The employee's resignation must be related to the employer's actions, or inactions, rather than for personal reasons.[247] Some courts require that constructive discharge be justified by the "existence of certain 'aggravating factors.'"[248] Aggravating factors can include a history of discriminatory

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opportunity for promotion, lateral transfer, and increased educational training had been denied); Heagney v. Univ. of Wash., 642 F.2d 1157, 1158 (9th Cir. 1981) (applying the reasonable employee standard to find unequal pay insufficient to constitute constructive discharge); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 61-62 (5th Cir. 1980) (finding that under the reasonable employee standard, discrimination manifesting itself in the form of unequal pay cannot, alone, support a constructive discharge).

243. Suttles v. United States Postal Serv., 927 F. Supp. 990, 1011 (S.D. Tex. 1996) (stating that plaintiff need not show specific intent by the employer); Hurley-Bardige v. Brown, 900 F. Supp. 567, 572-73 (D. Mass. 1995) (noting that a majority of courts do not require a showing of intent by the employer, but adhere to a more lenient standard that the employee must only prove that a reasonable person would have resigned as a result of workplace conditions); *see also* Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) (noting that the standard for constructive discharge is a work environment so hostile that a reasonable person would feel compelled to resign); Lynch v. Freeman, 817 F.2d 380, 385 (6th Cir. 1987) (same); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984); Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984) (same).

244. Irving v. Dubuque Packing Co., 689 F.2d 170, 173 (10th Cir. 1982); Muller v. United States Steel Corp., 509 F.2d 923, 927 (10th Cir. 1975).

245. *See, e.g., Bourque*, 617 F.2d at 66 (noting that refusal to grant damages award for plaintiff's back pay after resignation was not inconsistent with Title VII because "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships"); *see also* 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, 1482-83 (1994) (describing the framework used in hostile environment cases).

246. *See* Johnson v. Shalala, 991 F.2d 126, 131 (4th Cir. 1993) (holding that there is no constructive discharge for failure to reasonably accommodate); Boldini v. Postmaster Gen., 928 F. Supp. 125, 132-33 (D.N.H. 1995) (unclear whether violation of reasonable accommodation requirement is sufficient evidence of constructive discharge); *Hurley-Bardige*, 900 F. Supp. at 571 (requiring plaintiff to show more than failure to accommodate and stating that plaintiff needs to show evidence that her co-workers and supervisors demeaned her).

247. *See, e.g.*, Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1162 (3d Cir. 1993) (finding no constructive discharge where plaintiff alleged only overzealous supervision and unduly harsh criticism of performance); Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Every job has its frustrations, challenges and disappointments; . . . [an employee] is not . . . guaranteed a working environment free of stress."); *Clark*, 665 F.2d at 1173 (holding that discrimination alone will not constitute a constructive discharge).

248. Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1558 (D.C. Cir. 1997). *See, e.g.*, Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989) (stating that plaintiff must show "aggravating factors" such as a continuous pattern of discriminatory treatment to sustain a constructive discharge claim);

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acts, an atmosphere of hostility toward an employee that causes a loss of confidence or humiliates the employee,[249] or a pattern of continuous discriminatory behavior as opposed to an isolated act.[250] In the Sixth Circuit, deliberate intent can be considered an "aggravating factor," but it is not considered an absolute prerequisite to establishing a constructive discharge.[251]

Major problems arise when courts apply the Title VII constructive discharge standard to ADA constructive discharge claims. Because Title VII does not include the same affirmative requirement that employers make reasonable accommodations, requiring the plaintiff also to prove the existence of an "aggravating factor" or intent again undermines the ability of the plaintiff to recover.

Indeed, courts have held that the failure to make a reasonable accommodation, while technically a violation of the ADA, will not itself satisfy the standard for constructive discharge. For example, in *Erjavac v. Holy Family Health Plus*,[252] the plaintiff, an insulin-dependent diabetic, requested more flexible access to the bathroom as a reasonable accommodation.[253] Rather than grant her request, her employer imposed new requirements on break time that made it more difficult for her to obtain flexible bathroom breaks. Although the court recognized that Erjavac might have

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Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (holding that plaintiff must show proof of aggravating factors in addition to proof of discrimination); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (using the phrase "aggravating situation" interchangeably with "intolerable conditions"); Young v. Howmet Corp., No. 1-95-CV-118, 1996 U.S. Dist. LEXIS 4631, at *11 (W.D. Mich. Feb. 12, 1996) (requiring that an individual show more than a mere failure to accommodate for a constructive discharge under the Rehabilitation Act).

249. *See Mungin*, 116 F.3d at 1558 (holding that an employee's resignation must be accompanied by aggravating factors); Tonry v. Security Experts, Inc., 20 F.3d 967, 971-72 (9th Cir. 1994) (holding that demotion and reassignment to graveyard shift, salary cut, and loss of other benefits supported constructive discharge claim).

250. Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) (noting that a continuous pattern of discrimination may be sufficient to show an aggravating factor).

251. *Young*, 1996 U.S. Dist. LEXIS 4631, at *25 (noting that the Fourth Circuit applies a "standard more stringent than Michigan law to the extent that plaintiff was required to prove an intent to discharge"); *see Yates*, 819 F.2d at 637 (requiring a plaintiff to show "aggravating factors" in addition to discrimination); *see also* O'Toole, *supra* note 235, at 588 (arguing that the courts which apply an intent standard incorrectly burden the plaintiff's ability to bring employment discrimination claims).

252. 13 F. Supp 2d. 737, 752 (N.D. Ill. 1998) (holding that the plaintiff could not satisfy the standard for construction discharge where the employer had failed to reasonably accommodate her disability); *see also* Miranda v. Wis. Power & Light Co., 91 F.3d 1011, 1017 (7th Cir. 1996) (holding that an employee who failed to receive reasonable accommodation could not make out a claim for constructive discharge because she failed to identify any actions by her employer that created an intolerable working environment even though one of the competing applicants for the supervising position the plaintiff sought draped her house in toilet paper after learning that she suffered from a bowel disorder).

253. *Erjavac*, 13 F. Supp. 2d. at 751.

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had a claim for failure to reasonably accommodate her disability,[254] it dismissed her constructive discharge claims because of lack of aggravating factors.[255]

Some courts have noted, in dicta, that the failure to make reasonable accommodation, by itself, could create a working environment so hostile that a reasonable employee would resign his or her position.[256] However, these courts indicate that this would not be the norm. For example, the court in *Hurley-Bardige v. Brown* observed that there could be situations where an employer who refused to build a ramp or elevator needed by an employee who used a wheelchair could be found guilty of constructively discharging that employee in violation of the ADA without proof of aggravating factors.[257]

The requirement in some courts that an employee prove intentional discrimination further compromises the ability of disabled employees to recover for constructive discharge because most of the discrimination against the disabled has been labeled "unconscious" or the result of "benign neglect."[258] Although a majority of appellate courts do not require a plaintiff to show that the employer harbored a "deliberate intent" to force th employee to resign in order to establish a constructive discharge,[259] both the Fourth and Eighth Circuits have so required.[260] In these circuits, if the

254. *Id.* at 753 ("While Erjavac may indeed succeed in proving disability discrimination, there is no evidence that it was 'aggravated' beyond ordinary discrimination, or that her working conditions required resignation.").

255. *Id.* at 752-53 (finding that no reasonable juror could find Erjavac's work conditions so intolerable that she was forced to resign); *see also* Hogue v. MQS Inspection, Inc., 875 F. Supp. 714, 723-24 (D. Colo. 1995) (holding that failure to make reasonable accommodation was insufficient to support constructive discharge claim because it did not make working conditions intolerable).

256. Hurley-Bardige v. Brown, 900 F. Supp. 567, 573 n.7 (D. Mass. 1995); *cf.* Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 719 (1st Cir. 1994) ("[C]onstructive discharge . . . occur[s] when an employer effectively prevents an employee from performing his job.").

257. *Hurley-Bardige*, 900 F. Supp. at 573 n.7 Commentators have provided other potential examples as well. *See* Ravitch, *supra* note 245, at 1511-12 (stating that where an employer refused to transfer an employee with a respiratory condition to a smoke-free work station, this failure to accommodate could create a hostile work environment sufficient to constitute constructive discharge).

258. *See infra* notes 91-99 and accompanying text.

259. *See, e.g., Hurley-Bardige*, 900 F. Supp. at 572 (noting that the First Circuit adheres to a more lenient standard under which an employee need only prove that a reasonable person would have resigned as a result of workplace conditions). In these circuits, "[t]he focus is upon the reasonable reaction of the employee [to her working conditions]; it is not necessary to show that the employer subjectively intended to force a resignation." Junior v. Texaco, Inc., 688 F.2d 377, 379.(5th Cir. 1982). *See* Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980). Under this standard, the employee need show only that he or she was faced with working conditions under which a "reasonable person in the employee's position and circumstances would have felt compelled to resign." Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981).

260. Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1133 (4th Cir. 1995); Harvey v. City of Little Rock, 78 F.2d 1223 (8th Cir. 1986); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981). *But see* Hukkanen v. Int'l Union of Operating Eng'rs Local 101, 3 F.3d 281 (8th Cir. 1993) (holding that an employer's state of mind is not controlling in a claim of constructive discharge and

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employee cannot show that the employer intended to force the employee to resign, no constructive discharge claim can be sustained.[261]

The impact of this precedent requiring deliberate intent or aggravating factor is particularly harmful to claims brought under the ADA and the Rehabilitation Act.[262] As noted earlier, these laws differ from other civil rights laws in that they mandate an affirmative obligation to accommodate employee disabilities on the part of the employer.[263] Under the laws in those circuits requiring employer intent or an "aggravating factor," a disabled plaintiff will not be able to set forth a viable constructive discharge claim based solely on an employer's failure to provide reasonable accommodations. This additional burden on the disabled employee effectively eviscerates the protections ostensibly afforded under both the ADA and the Rehabilitation Act.

This under-protective standard by which some circuits assess constructive discharge claims can also reduce the effectiveness of the protections afforded by the disability laws.[264] The drafters of both the Rehabilitation Act and the ADA clearly stipulated that employer intent not play a role in the determination of discrimination. The ADA's first section describes the

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thus, it did not matter that an employer only intended to have "fun" with an employee rather than to compel resignation).

261. Johnson v. Shalala, 991 F.2d 126, 131 (4th Cir. 1993); *Bunny Bread Co.*, 646 F.2d at 1256.

262. *See Amirmokri*, 60 F.3d at 1133 (4th Cir. 1995) (comparing and distinguishing the requirements of constructive discharge and harassment). The courts noted that claims for workplace harassment and constructive discharge are both governed by a two-part test. *Id.* The first part of each test is the severity of the conditions. *Id.* Whereas the conduct must be "severe and pervasive" for a harassment claim, the work environment for a claim of constructive discharge must be "intolerable." Second, the employer's response is critical in both types of claims. *Id.* To overcome liability for a hostile environment harassment claim, the employer must have taken prompt and adequate action. *Id.* To defeat a constructive discharge claim, the employer must have taken action reasonably calculated to end the intolerable working environment. *Id.* Focusing on this last test, the court explained by means of example that a superficial response by the employer should not suffice to defeat a constructive discharge:

> Suppose for example that an employee suffers workplace harassment on account of his national origin and his employer responds with token action that does not sincerely address the problem. If the harassment is severe and pervasive, the employee can bring a workplace harassment claim and obtain relief. If, however, the environment became intolerable and the employee was forced to resign, he would be unable (in the face of a token response) to bring a constructive discharge claim and would therefore be without a remedy. Requiring a response reasonably calculated to end the intolerable environment avoids this inequitable result.

Id.; *see also* Kende, *supra* note 238, at 78 (arguing that courts should apply mitigation of damages principles to constructive discharge claims rather than an intent test).

263. *See supra* notes 42-49 and accompanying text.

264. *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979). The ADA states that its goals are to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals." 42 U.S.C. § 12101(a)(8) (1994). Congress passed the Rehabilitation Act to remedy the "glaring neglect" of the disabled. 118 CONG. REC. 526 (1972) (statement of Sen. Percy). The framers of the Act recognized that the nation no longer could "tolerate the invisibility of the handicapped in America." 118 CONG. REC. 525-(1972) (statement of Sen. Humphrey). Likewise, Congress passed the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

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breadth of the law's prohibition on discrimination and Congress' aim that the ADA address all forms of discrimination that the disabled face, not just intentional discrimination.[265] Moreover, the Supreme Court has noted in dicta that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to prescribe only conduct fueled by a discriminatory intent."[266] To achieve the remedial purposes that led Congress to pass the Rehabilitation Act, "harms resulting from action that discriminated by effect as well as by design" must be rooted out.[267]

An employer that is insensitive to the needs of an employee with a disability will, in many cases, cause the same injuries as an employer who deliberately forces a disabled employee to resign. A brief review of two Rehabilitation Act cases in different circuits demonstrates the discordant outcomes that the intent requirement can cause.

In *Kent v. Derwinski*,[268] the court held that an emotionally and mentally disabled employee was constructively discharged, as defined by Ninth Circuit case law, because she was subject to intolerable conditions, namely unnecessary discipline and taunting.[269] To prove constructive discharge, the plaintiff had only to demonstrate that "whether, judging from a totality of the circumstances, a reasonable person in [her] position would have felt that she was 'forced to quit because of intolerable and discriminatory working conditions.'"[270]

In *Kent*, the Veterans Administration Medical Center (VAMC) hired Ms. Kent to work in the VAMC laundry. Although Ms. Kent's work received "fully satisfactory" evaluations initially, her work and her health began to suffer once the facility hired a new supervisor.[271] Ms. Kent was

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265. 42 U.S.C. § 12101(a)(5) provides:

> [The Congress finds that] individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Id.

266. Alexander v. Choate, 469 U.S. 287, 296-97 (1985).

267. *Id.* at 297.

268. 790 F. Supp. 1032 (E.D. Wash. 1991) (section 501 case holding that employee who had been subjected to taunting and ridicule of co-workers about her mental retardation and emotional disability was constructively discharged and subjected to inappropriate discipline).

269. *Id.* at 1040. "From the beginning of her employment, . . . Ms. Kent was taunted by co-workers as being 'brain dead,' or a 'droolie,' or looking like she was 'hung-over,' or had been 'sniffing glue.'" *Id.* at 1036. Ms. Kent's first supervisor reprimanded any worker who taunted her in this manner. *Id.* Her later supervisor, however, would lecture Ms. Kent for up to two hours on concerns ranging from getting along with her co-workers to her work productivity. *Id.* at 1037, 1040.

270. *Id.* at 1040.

271. *Id.* at 1036.

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hospitalized twice for breakdowns and eventually resigned her position.[272] The court found that Ms. Kent's supervisor subjected her to inappropriate disciplinary measures, and failed to prevent taunting by co-workers.[273] Although the court noted that the VAMC management had tried to accommodate Ms. Kent's disability by training and counseling Ms. Kent's supervisor in appropriate methods of supervision and discipline, the court found that these efforts were "too little too late."[274] There was no indication that the work environment would change, and it was so overwhelming that "a reasonable person . . . would have found Ms. Kent's work situation intolerable and discriminatory because of her handicap and would have felt forced to quit."[275] Because the *Kent* court found that the employer's good faith efforts at accommodation were insufficient and that the failure to provide reasonable accommodation created intolerable working conditions these facts resulted in constructive discharge.[276]

However, in *Johnson v. Shalala*, the Fourth Circuit Court of Appeals held that an employee failed to establish that she was constructively discharged because she could not show employer intent.[277] Dr. Johnson suffered from a number of medical ailments, the most troublesome of which was "idiopathic CNS hypersomnolence, a form of narcolepsy or excessive sleepiness that required her to sleep nine or more hours per night and to take short naps during the day."[278] Dr. Johnson also had cardiac arrhythmia, which "precluded her from taking medication to control her narcolepsy."[279] These medical problems were exacerbated by the fact that she

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272. *Id.* at 1038.

273. *Id.* at 1040. Ms. Kent's supervisor would "lecture Ms. Kent . . . ordering Ms. Kent to stand against the wall and not work, grabbing Ms. Kent's arm in the restroom and ordering her to keep silent about the conditions in the laundry, and criticizing Ms. Kent for her behavior, which was due to her handicap." *Id.* at 1037.

274. *Id.* at 1041. The court found,

> Even though efforts were made to accommodate Ms. Kent's handicap by training, counseling and discussion, no real change took place. Ms. Randall [Ms. Kent's supervisor] continued to make numerous critical remarks to Ms. Kent about her work productivity . . . to single her out for discipline if any dispute arose involving her. Co-workers continued the taunting and name calling.

Id. at 1040.

275. *Id.* at 1041. For a variety of perspectives on the duty to reasonably accommodate mental impairments, see Loretta K. Haggard, *Reasonable Accommodation of Individuals With Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343 (1993); Paul Mickey, Jr. & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*, 9 LAB. LAW. 531 (1993); Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931 (1997); Deborah Zuckerman, *Reasonable Accommodation for People with Mental Illness Under the ADA*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 311 (1993).

276. *See Kent*, 790 F. Supp. at 1041.

277. 991 F.2d 126, 132 (4th Cir. 1993).

278. *Id.* at 128.

279. *Id.*

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had a commuting time of approximately one hour, necessitating "that she pull over for fifteen-minute naps, making it difficult for her to arrive at work at a fixed time."[280]

Dr. Johnson's employer implemented several accommodations at her request, but the district court found that the employer "had not reasonably accommodated Johnson's handicap and had constructively discharged her by failing to act in the face of known intolerable conditions."[281] On appeal, the employer challenged only the district court's finding that the employer acted with "deliberateness."[282] Although the court stated that "[d]eliberateness can be demonstrated by . . . circumstantial evidence,"[283] it found "insufficient [evidence] to show a deliberate intent to discharge an employee when there ha[d] been an attempt to accommodate that same employee," even if the accommodation did not meet the requirements of the Rehabilitation Act.[284] Although her employer "could have done more, and should have done more" to provide accommodation under the Rehabilitation Act, the court held that the evidence was insufficient to support a finding of a "deliberate intent to force Johnson from her job."[285]

The Fourth Circuit held that evidence of a failure to accommodate a disability, even when such action leaves in place untenable working conditions,[286] is not sufficient grounds to find discrimination in the absence of impermissible employer intent.[287] Despite the evidence that the employer's accommodation attempts were inadequate under the standards of the Reha-

280. *Id.*

281. *Id.* at 130.

282. *Id.* at 131.

283. *Id.* ("Deliberateness can be demonstrated by actual evidence of intent by the employer to drive the employee from the job, or circumstantial evidence of such intent, including a series of actions that single out a plaintiff for differential treatment.").

284. *Id.* at 132. (acknowledging that the duty to accommodate employees under the Rehabilitation Act complicates the application of Title VII's requirement of differential treatment to establish intent to discharge but fails to develop separate standard for disability claims).

285. *Id.* (The court held that a different conclusion might "convert every failure to accommodate under the Rehabilitation Act into a potential claim for constructive discharge," and would allow plaintiffs who have not been accommodated to quit their jobs "without first resorting to the administrative and judicial remedies provided by Congress to mediate these disputes while the employment relationship can still be salvaged"). *Id.* at 131.

286. *Id.* at 130 (finding that an employer's inability to satisfactorily accommodate a disability does not suffice to show a constructive discharge). In *Johnson*, the court held that although the NIH made certain accommodations for Dr. Johnson's narcolepsy (limited flex-time, car pool assignments, job reassignment), these accommodations failed to satisfy the requirements of the Rehabilitation Act. *Id.* at 132. These accommodations actually appear to have increased Dr. Johnson's stress level, making her working conditions even less tolerable. *Id.* at 129-30.

287. *Id.* at 132. Previously, the Fourth Circuit had held that "[i]ntent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985). Thus, although the Fourth Circuit prior to *Johnson* had required civil rights plaintiffs to show that their employer possessed a "deliberate intent" to force them to resign in order to establish a constructive discharge, it allowed such plaintiffs to meet this burden by showing the existence of intolerable working conditions.

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bilitation Act, Johnson failed to state a claim because constructive discharge in the Fourth Circuit requires that the employer intended to drive the employee from the job.[288] In both cases, the disabled employee felt compelled to resign in order to escape unacceptable working conditions. Under the "deliberate intent" standard set forth in *Johnson*, however, the employee, even when faced with accommodations that the court viewed as inadequate, was unable to maintain the claim for constructive discharge under the Rehabilitation Act.

Accordingly, the constructive discharge standard used by the Fourth Circuit and others requiring deliberate intent is inconsistent with the stated policy of eliminating the barriers that prevent the disabled from enjoying full participation in the workplace.[289] For example, if an employer is merely insensitive to the fact that the bathroom doors at his place of employment are too narrow for a wheelchair user, an employee has no constructive discharge claim if the employee decided to resign rather than not use the bathroom during work hours or use alternative bathroom facilities across the street. Even if the employee requested the accommodation and the employer forgot to make the change, or made an inadequate accommodation, this would still be insufficient to establish a constructive discharge under the Fourth Circuit's approach. Clearly, the standard for reasonable accommodation should not require that the employee show that the employer actively wanted to get rid of him because of his disability. Rather, the reasonable accommodation burden requires that even an employer who

288. *Johnson*, 991 F.2d at 131-32. Such a showing of deliberateness could only be made if the employee demonstrated the "complete failure" to accommodate after repeated requests, or through "direct evidence" of intent to force the employee from the job. *Id.* at 132.

289. *Cf.* Aviles-Marinez v. Monroig, 963 F.2d 2, 6 (1st Cir. 1992) (finding that a former employee adequately alleged constructive discharge for political reasons after asserting that his employer caused him an emotional crisis and forced him to take a leave of absence); Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir. 1989) (finding that a showing of repeated instances of grossly offensive conduct and commentary would cause a reasonable employee to contemplate departure and claim constructive discharge); Greenberg v. Hilton Int'l Co., 870 F.2d 926, 936 (2d Cir. 1989) (noting that an attorney could reasonably believe that a client who was demoted, unfairly criticized and forced to work late so as to miss her bus could make a claim of constructive discharge); Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987) (adhering to the view that "the mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge"); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) (holding that a plaintiff must show some aggravating factors, rather than a single isolated instance of employment discrimination, to support a claim of constructive discharge); Derr v. Gulf Oil Corp., 796 F.2d 340, 342-44 (10th Cir. 1986) (clarifying that constructive discharge is a matter to be determined by the view of a reasonable person); Buckley v. Hosp. Corp. of America, Inc., 758 F.2d 1525, 1530-31 (11th Cir. 1985) (finding that a plaintiff who produced evidence that she was humiliated after being demoted and offered a position under a supervisor with whom she had personality conflicts in the past was sufficient to create a jury question on the issue of constructive discharge); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887-88 (3d Cir. 1984) (holding that a reasonable person could find that a pregnant employee who was told to either accept a new assignment or leave to make room for a male employee was constructively discharged); Pittman v. Hattiesburg Mun. Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981) (holding that a showing of unequal pay alone does not support a finding of constructive discharge).

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fails to make a reasonable accommodation because of cluelessness or forgetfulness should be held responsible for that failure. Disabled employees experience the same hardships under the forgetful employer scenario as they do when the employer tries to actively get rid of them. For race and gender, the laws require only that the employer refrain from discriminating; this is not true for disability discrimination. The ADA places a larger burden on employers that courts must recognize. Congress designed the ADA to prevent disability discrimination by all employers, the insensitive as well as the haters. In the context of constructive discharge, the consequences when courts require proof of deliberate intent are clear. "It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown."[290]

Clearly, these circuit decisions create a major impediment to the full implementation of the ADA and Rehabilitation Act. "[A] stringent requirement that an employer's intent be shown is 'inconsistent . . . with the realities of modern employment.'"[291] Although arguably the intent standard is incorrect when applied to Title VII claims, the standard does much greater harm to ADA claims. Most discriminatory failures to provide reasonable accommodations are not accompanied by such intent on the part of the employer. This definition of the constructive discharge rule also decreases the employer's incentives to rectify and to reasonably accommodate an employee because the employer knows that the employee may tire of seeking workplace changes and simply resign because of the continuing discrimination. The rigid intent requirement therefore permits employers to accomplish the effect of a discriminatory discharge without risking the same on-going liability.[292] Perhaps most perverse, the constructive dis-

290. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981). Moreover, the Fourth Circuit's concern in *Johnson* that affirming the district court's judgment would "threaten[] to convert every failure to accommodate" into a constructive discharge claim is misplaced. *Johnson*, 991 F.2d at 131. An employer's failure to accommodate an employee's disability would support a claim of constructive discharge only if the employee's working conditions are intolerable, and remain intolerable as a result of the employer's failure to provide effective accommodations. Often this will not be the case. A failure reasonably to accommodate a disabled employee's desire for a promotion, for example, will support a claim under the Rehabilitation Act, even though denials of promotions standing alone rarely if ever are sufficient to support a claim of constructive discharge. Prewitt v. United States Postal Serv., 662 F.2d 292, 307-09 (5th Cir. 1981); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980) (not finding constructive discharge where employee received unequal pay, because "a reasonable employee would [not] be forced to resign" due to "unequal pay alone"); *cf.* Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984) (finding a constructive discharge where employer refused to promote employee and where other aggravating circumstances were present); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (same).

291. Nolan v. Cleland, 686 F. 2d 806, 814 n.17 (9th Cir. 1982) (quoting *Bourque*, 617 F.2d at 65).

292. The constructive discharge doctrine forces an employer who illegally fires an employee to continue paying damages until the employee can find substantially equivalent employment. ROTHSTEIN ET AL., *supra* note 188. This provides a substantial deterrent to continuing discriminatory practices. *Id.*

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charge standard not only lessens the incentives of employers not to discriminate, it actually forces employees to experience continual discrimination, and possibly risk to their health and safety, by requiring them to stay in their jobs without reasonable accommodation to remain eligible for back pay relief.

IV. A POTENTIAL SOLUTION: ADOPTING AN EXPLANATION OF BORROWING

In the three situations reviewed above, the courts have interpreted the ADA in a manner that is inconsistent with the statute's goals. In the ADA context, courts appear to be taking a shortcut rather than thoughtfully addressing the similarities and differences between the two employment discrimination statutes.[293] Using shortcuts is not always a good method because courts can easily overlook subtle but important differences between statutes; i.e., sometimes an orange is not an orange. Although drawing analogies can provide guidance on how new congressional enactments should be interpreted, actual borrowing between statutes should have limits.

Although the Supreme Court recently has decided several ADA cases,[294] it has not addressed the problem of inappropriate borrowing from Title VII in ADA cases or attempted to place any constraints on that borrowing. Indeed, the Court has added to the confusion by failing to adopt a consistent method of statutory interpretation for ADA claims.[295] Most recently, the Court adopted a narrow approach to the ADA's employment provisions, refusing to defer to the EEOC's regulations concerning the definitional section of the ADA.[296] The Court's refusal to state what level

293. *See, e.g.*, Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1049 (7th Cir. 1996) (noting the relevance of Title VII and the Rehabilitation Act to an ADA claim).

294. 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); Bragdon v. Abbott, 524 U.S. 624 (1998);

295. *See Bragdon*, 524 U.S. at 631, 636, 638-39, 646 (1998) (repeatedly relying on agency interpretation in the ADA context and stating that "[a]s the agency directed by Congress to issue implementing regulations to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference") (citations omitted)). *But see Sutton*, 527 U.S. at 481-82 (relying on a "plain meaning" interpretation of the statute to avoid any need to inquire into the deference due to the EEOC positions). For a discussion of the Supreme Court's adoption of a strict textualist view of statutory interpretation, see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355-363 (1994); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749-52, 763-66 (1995); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 486-519.

296. *Sutton*, 527 U.S. at 480 ("Although the parties dispute the persuasive force of these interpretative guidelines, we have no need in this case to decide what deference is due."). This could be a case where the Supreme Court has engaged in some improper borrowing from Title VII or merely is confused. For many years, the Supreme Court, as well as other federal courts, has failed to give the EEOC

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of judicial deference applies to interpretations of the ADA will undoubtedly lead some courts to conclude that those agencies lack the interpretative authority that most federal administrative agencies possess.[297] If federal courts do not consider the EEOC's regulations and interpretative guidance in deciding ADA cases, they will be more likely to turn to Title VII's precedent concerning like provisions when they have an interpretative question. Thus, the Supreme Court has increased the likelihood that courts will, by necessity, borrow from Title VII when deciding ADA claims.[298]

Employment discrimination statutes contain different obligations based on the nature of the discrimination to be addressed.[299] Courts need to be sensitive to these factors before they construe all employment discrimination statutes in the same manner, using the same procedural rules and definitions.[300] To do this, courts need to examine information regarding the

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regulations for Title VII the same level of respect and deference as other agencies receive. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 89 (stating that "statutory gaps and ambiguities [in the ADA] are to be resolved by the agency, with the courts deferring to the agency's interpretation so long as that interpretation is reasonable") (footnote omitted); Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1549 (1999) (reviewing recent court decisions and finding that the EEOC does not receive the same level of deference for its regulations as other agencies). A partial explanation for this lack of deference to the EEOC's Title VII regulations may result from the fact that the EEOC lacks congressional authorization to issue legally binding regulations under that statute. However, the EEOC, under the ADA, has clear congressional authority to issue regulations with the force of law. *See* 29 C.F.R. app. § 1630 (2000). Thus, its regulations with respect to the ADA deserve more, not the same, deference as its regulations under Title VII. As to the EEOC's interpretative guidance, the Supreme Court recently held that such agency pronouncements receive a lower level of deference. Christensen v. Harris County, 120 S. Ct. 1655, 1662-63 (2000) (stating that *Skidmore* deference, not *Chevron*, applies to informal agency interpretations).

297. The Court's decisions in *Albertson's*, *Murphy* and *Sutton* all expressly reserved the question whether the interpretations of the EEOC receive *Chevron* deference. *Albertson's*, 527 U.S. at 563 n.10 ("As the parties have not questioned the regulations and interpretative guidance promulgated by the EEOC relating to the ADA's definitional section, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due") (citation omitted); *Murphy*, 527 U.S. at 523 ("As in *Sutton*, we assume *arguendo* that the . . . EEOC regulations regarding the disability determination are valid."); *Sutton*, 527 U.S. at 480 ("Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.").

298. The on-going intense battle within the Court over plain meaning versus legislative history demonstrates, if nothing else, that whether language is plain or not often is only in the eyes of the beholder. *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 513-880 (2d ed. 1995) (discussing theories and doctrines of statutory interpretation).

299. *See supra* notes 53-60 and accompanying text.

300. *See* Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretative Theory*, 78 N.C. L. REV. 1254, 1330 (2000) (suggesting that courts adopt an interpretative approach that respects congressional judgments by relying on legislative history more fully); Steven P. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991) (arguing that the courts need to develop a new methodology for interpreting civil rights statutes); *cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950) (providing critical analysis of the various

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ADA, including its regulations and legislative history.[301] From these sources, courts can develop a better understanding of the ADA and when it may be inappropriate to import concepts from Title VII into the ADA. This understanding should also result in decisions that more accurately reflect Congress' intent to place the burden of reasonable accommodation on the employer, and to provide the disabled with a meaningful tool against discrimination in the workplace.

One of the major problems with this borrowing results from the federal courts' failure to explain, or even acknowledge, that they are reapplying a standard developed under Title VII.[302] Courts must openly acknowledge this adoption of Title VII precedent so that future litigants can better understand when and where it will be applied.[303] The inconsistent application of

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canons employed by the judiciary and showing how each canon has an opposite, yet recognized canon, leading to a different result); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 243 n.3 (1998) (disavowing claim "that it is useful to employ bits and pieces of legislative reports or debates to resolve particular issues of meaning" and instead advocating attention to "what problems concerned Congress and what was the general thrust of its response").

301. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353-84 (1990) (arguing that courts should consider not only the statutory text but a broad range of sources, including legislative history, legislative purposes, policy concerns and evolutive factors). *See also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 71-123 (1990); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1605-06 (1985); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988). *But see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and the Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31-34 (Amy Gutmann ed. 1997) (arguing that "[i]ronically, . . . the more courts have relied upon legislative history, the less worthy of reliance it has become"); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) (contending that "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61-62 (1994) (cautioning against using legislative history so as to "devalue" statutory words). For a discussion on why a pragmatic approach to statutory interpretation may provide results more closely-related to Congress' intent, see Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist? Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1240-41 (1996) (asserting that textualist statutory interpretation may actually thwart legislative intent by applying the statute too narrowly).

302. *See* Young v. Warner-Jenkinson Co., 152 F.3d 1018 (8th Cir. 1998), *reh'g and suggestion for reh'g en banc denied* (1998); Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 303 (4th Cir. 1998); Duda v. Bd. of Educ., 133 F.3d 1054 (7th Cir. 1998). Some have speculated that courts have adopted a narrow interpretation of the ADA due to a misunderstanding of the concept of disability and disability discrimination. *See* Blanck, *supra* note 7; Colker, *supra* note 12.

303. Some commentators have speculated that the main reason may be that courts do not see any difference between the two statutes. Because both Title VII and the ADA are facially similar and share the same goal, equal employment opportunity, many courts may not understand that workplace discrimination experienced by disabled persons differs from that experienced by the protected classes under Title VII. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 44, 46 (2000) (noting that "[t]he concept that equality requires differential treatment, however, has long been contested in American society, as many have argued that different treatment is inherently unequal" and that "many judges are not strongly imbued with the notion that basic civil rights are at stake in ADA cases"); SHAPIRO, *supra* note 2, at 105-41 (noting that enactment

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the ADA leads to frustration, not only for plaintiffs but for employers as well. To prevail under the ADA, some plaintiffs have resorted to applying the statute's vague language to claims that advance agendas beyond increasing equality in the workplace for disabled individuals.[304] On the other side, employers cannot determine their responsibilities and what standards will govern judicial review of their conduct.[305] If courts developed the ADA's precedent separately, rather than borrowing haphazardly from Title VII, they would help both employers and employees better understand their responsibilities under the statute which may ultimately lead to a more rational application of the law.

A potential solution to the courts' inappropriate borrowing would include: (1) more careful consideration of the reapplication of Title VII precedent to the ADA, and (2) when such borrowing is appropriate, the provision of a full explanation justifying the reapplication.[305] By explaining their rationale for looking to another statute and their apparent rejection of the ADA's language, history and regulations in favor of Title VII precedent, courts will be forced to recognize and address the similarities and the differences between the statutes. Failing to explain why they borrow opens the courts to the charge that they are result-oriented, borrowing from Title VII when it achieves the desired outcome for a case, and refusing to borrow when the ADA statute provides what the court perceives as the correct result. Moreover, without an explanation as to why the court has borrowed, other courts will not know whether the interpretation of the ADA is consistent.

Several scholars have argued that this duty of explanation, or duty of candor, should be applied to statutory interpretations of all types. These commentators have urged courts to be candid about how they approach their decision-making role and to reveal the course that influenced their final determination. They state that such an approach will lead to better-

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of the ADA was not preceded by the same kind of social upheaval that led to the enactment of the Civil Rights Act of 1964).

304. Edward Feisenthal, *Disabilities Act is Being Invoked in Diverse Cases*, WALL ST. J., Mar. 31, 1993, at B1 (discussing the increasing use of the ADA by anti-smoking zealots).

305. *See, e.g.*, Vicki A. Ladeir & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence*, 21 BERKELEY J. EMP. & LAB. L. 246, 246-47 (2000) (discussing the difficult positions of employers when balancing employee rights versus safety concerns); Mark A. Rothstein & Sharona Hoffman, *Genetic Testing, Genetic Medicine and Managed Care*, 34 WAKE FOREST L. REV. 849, 869-70 (1999) (examining the confusion surrounding the ADA's application to genetic testing).

306. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-38 (1987) (making "the case for candor"). On the value of candor in statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 362-83 (1990). Scott A. Altman argues that judges should be candid, but not introspective because even a false belief in the existence of legal constraints will induce both candor and constraint. *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297-99 (1990).

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reasoned decisions and more understandable outcomes.[307] Applying this approach to disability discrimination cases should correct much of what is wrong with the ADA today.

Well-settled principles of administrative law plainly require agencies to provide reasoned explanations for their legal interpretations.[308] The "hard look" doctrine requires that the agencies offer detailed explanations for their decisions. Under this doctrine, courts review agency rulemaking to ensure that the agency has taken a "hard look" at all the relevant aspects of a problem, has answered comments raised in the rulemaking record and has advanced an adequate explanation of why it chose a particular solution over other alternatives.[309] The explanations must show that agencies have given "adequate consideration" to all factors made relevant by the control-

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307. *See* Shapiro, *supra* note 306, at 739.

308. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 129 (1994). Seidenfeld states:

> Thus, in reviewing an agency's interpretation, courts should require the agency to identify the concerns that the statute addresses and explain how the agency's interpretation took those concerns into account. In addition, the agency should explain why it emphasized certain interests instead of others. In other words, the agency must reveal what led it to balance the statutory aims as it did. The agency should also respond to any likely contentions that its interpretations will have deleterious implications.

Id. See also Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316 (1996) (concluding that at least in theory, "current doctrine obliges courts to require agencies to provide reasoned explanations for their legal conclusions"). *See generally* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L. J. 1013, 1059-62 (1998) (arguing that, in the post-*Chevron* era, "administrative agencies have become America's common law courts," charged with "apply[ing] incompletely specific legal doctrines to new contexts" and with "supply[ing] new understandings of those doctrines").

309. *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (noting that court will require that the commission provide "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not causally ignored"); *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974) (stating that "[t]he court does not make the ultimate decision, but it insists that an official or agency take a 'hard look' at all relevant factors"). For a discussion of the application of the hard look doctrine and its effects on the rulemaking process, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26 (1992) (arguing that the threat of "overly intrusive judicial review" causes agency decisionmakers to "be reluctant to undertake new rulemaking initiatives, to experiment with more flexible regulatory techniques, and to revisit old rulemaking efforts"); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 539-56 (1997) (contending that Seidenfeld's analysis overlooks "the larger point that judicial review can be a potent weapon in the hands of entities that are opposed to protective legislation"); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490-99 (1997) (identifying a "regulatory paralysis" and stating that "[t]he literature on ossification identifies the hard look doctrine of judicial review as the culprit most responsible for discouraging agency rulemaking"). *See generally* Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 403 (1975) (considering "under what legal theories and in what circumstances, a court may be justified in imposing procedural burdens upon an agency engaged in rulemaking").

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ling statute.[310] All of these requirements can be understood as an effort to ensure that the agency's decision was a "reasoned" exercise of discretion and not merely a response to political pressure.[311] Subsequently, courts have applied a form of the hard look doctrine to the review of other areas of decision-making by agencies and courts.[312]

Applying a review structure similar to the hard look doctrine to a district court ADA decision that borrows from Title VII would require that the court provide an explanation as to why it believed that such borrowing was appropriate in that case.[313] If the court decides to borrow precedent from another statute rather than rely on the statute at issue, the court must demonstrate that it has at least carefully considered the interpretative problem. For example, if the courts had to explain the reasoning behind their decision to impose Title VII constructive discharge standards on the ADA, they are more likely to develop a standard of constructive discharge that specifically addressed the burdens and responsibilities the ADA imposes on employers, rather than assume that the two statutes are the same.

This is not to say that the courts will adopt completely different results in these cases. At least plaintiffs and defendants will know why they have adopted different standards. However, the explanation will provide other courts with a better means of evaluating the manner in which the court reached its decision and whether they wish to adopt the same reasoning and approach. Because there will be less confusion about varying interpreta-

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310. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The court noted that:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

311. *See id.* ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'"); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and the Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 822 (reporting that court involvement in the dialogue on the proper meaning of Federal Power Act adds to the legitimacy of the resulting interpretation); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 625 (1994) (defending the courts' adoption of the hard look doctrine, and describing how judges forced an agency defending a rule to show that is had taken a "'hard look' at all the relevant aspects of the problem, answered comments raised in the rulemaking record, and advanced an adequate explanation of why it chose this particular solution over other alternatives").

312. The "hard look" doctrine has been applied broadly to a variety of court activities. *See, e.g.*, Turpin v. Merrell Dow Pharms., Inc., 959 F.2d 1349, 1350-52 (6th Cir. 1992) (noting that the application of a standard of evidentiary reliability is consistent with the hard look doctrine, under which the district courts have a duty to evaluate the reliability of expert opinion testimony, even after such testimony is in the record, in order to determine whether the case should go to the jury).

313. *See* Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177, 181-82 (1983) (noting that the hard look doctrine imposes a significant burden on an agency defending a rule).

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tions of the ADA, this duty will result in more rational decisions.

V. CONCLUSION

The enactment of the ADA shows the powerful influence of analogy. As Matthew Diller has stated:

> By analogizing the issues facing people with disabilities to the problems faced by [other] minorit[ies], advocates were able to harness some portion of the persuasive power of the civil rights movement. The analogy provided a powerful new way of thinking and talking about the problems faced by people with disabilities and suggested a series of concrete and achievable legislative goals.[314]

More recently, however, the case law interpreting the ADA has demonstrated that the analogy to Title VII has its limits. This Article urges that the courts consider the policies that underlie the ADA, the broad remedial goals of the statute, the past history of discrimination against the disabled, and, most importantly, the fundamental differences between racial discrimination and discrimination against the disabled, before they engage in the wholesale importation of the Title VII standards.

Persons with disabilities face significant obstacles to full and gainful employment in our society. Unfortunately, many of these barriers can be attributed to ignorance or neglect on the part of employers. Congress enacted the ADA with its reasonable accommodation requirement to address these obstacles. Many courts, however, have narrowly interpreted the ADA by reflectively borrowing concepts and precedent from Title VII. Because Title VII addresses a different form of discrimination and provides different remedies, some of its precedent has severely limited the ability of ADA plaintiffs to recover. In effect, by borrowing, courts have significantly weakened the requirement that employers comply fully and effectively with the requirements of the ADA.

This borrowing, and its harmful consequences, forces an examination of whether Title VII's concepts of discrimination should fully apply to discrimination under the ADA. In some respects, Title VII precedent serves as a useful analogue to ADA cases. However, the continuing failure by some courts to appreciate the subtle but fundamental differences between different types of discrimination and the subsequent misguided transplant of Title VII law, continues to frustrate disabled persons seeking redress for discrimination in the workplace.

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314. Diller, *supra* note 303, at 51.

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