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Accommodations Wanted: Interpreting the Role of Adverse Employment Actions in Failure-to-Accommodate Claims

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ACCOMMODATIONS WANTED: INTERPRETING THE ROLE OF ADVERSE EMPLOYMENT ACTIONS IN FAILURE-TO-ACCOMMODATE CLAIMS

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I. INTRODUCTION

Teddy Beasley started each of his workdays as an inbound materials handler at O'Reilly Auto Parts by gathering alongside his co-workers for a mandatory pre-shift meeting.[1] In these meetings, his managers assigned tasks and explained important safety procedures.[2] However, while his co-workers caught up with one another and gathered information from their managers, Teddy Beasley stood in isolation. This is because Teddy is a deaf man who can only understand about thirty percent of verbal communication through lipreading and who communicates through American Sign Language (ASL).[3] After months of his employer ignoring his requests for either an ASL interpreter or meeting transcripts, Teddy resigned.[4] Teddy's tragic story represents the experience of many other individuals with disabilities across the nation who have been denied employment opportunities by employers unwilling to provide needed accommodations.

Individuals with disabilities account for a large portion of the U.S. population.[5] Nearly one in four, or sixty-one million, people in the U.S. currently live with a disability.[6] Of this population, forty percent of working age people with disabilities are presently employed.[7] Disabilities can affect people's daily activities and workplace needs in unique ways, and so what it means to have an accessible workplace looks different for every disabled person.[8] In fact, two people with the same disability can

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1. Beasley v. O'Reilly Auto Parts, 69 F.4th 744, 747-48 (11th Cir. 2023).

2. *Id.*

3. *Id.* at 746.

4. *Id.* at 751-52.

5. *Disability Inclusion*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html (Sept. 16, 2020).

6. *Id.*

7. *Disability Employment Statistics,* U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/research-evaluation/statistics (last visited July 20, 2024) (defining "working age" as individuals between the ages of sixteen and sixty-four).

8. Before this point in the Comment, I referred to "people with disabilities," following "people first" language through which the disability is secondary to the person's primary identity as a person. In recent trends, self-advocates are choosing to use "identity first language" which refers to "disabled people." Identity-first language recognizes that disabilities are a vital part of a disabled person's identity and aims to de-stigmatize the word "disability." *See* Arlene S. Kanter, *The ADA at Thirty: Its Limits &*

require vastly different accommodations.[9] Thus, the ability to request reasonable and specific workplace accommodations is essential to the millions of working disabled individuals.

In 2023, the U.S. celebrated the fiftieth anniversary of the Rehabilitation Act of 1973.[10] The Rehabilitation Act is one of the most consequential civil rights laws and was the first law to ban disability discrimination by federally funded entities,[11] paving the way for the groundbreaking Americans with Disabilities Act of 1990 (ADA).[12] The ADA banned disability discrimination in employment,[13] and so, under Title I of the ADA, employers must provide "reasonable accommodations" to the known disabilities of their employees.[14] Failing to make reasonable accommodations constitutes discrimination under the ADA unless the employer demonstrates that providing the requested accommodation would cause "undue hardship."[15]

Despite the recognized need for workplace accommodations, courts remain divided on what constitutes a successful failure-to-accommodate claim under the ADA. The U.S. Court of Appeals for the Eleventh Circuit recently brought attention to this ongoing disagreement when it heard Teddy Beasley's failure-to-accommodate claim against O'Reilly Auto Parts.[16] In *Beasley v. O'Reilly Auto Parts*, the Eleventh Circuit held that, to succeed on a failure-to-accommodate claim, plaintiffs must show that they have suffered an adverse employment action as a result of their employer's failure to make reasonable accommodations.[17] This decision directly contradicts the Tenth Circuit's recent holding in *Exby-Stolley v. Board of County Commissioners* that an adverse employment action is not a requisite element of failure-to-accommodate claims.[18] The Third and Eighth Circuits, aligned with the Eleventh Circuit, have held that adverse

Potential, 71 SYRACUSE L. REV. 621, 625 n.24 (2021). *See also* Brittany Wong, *It's Perfectly OK to Call a Disabled Person "Disabled," and Here's Why*, HUFFPOST (Sept. 16, 2021), https://www.huffpost.com/entry/what-to-call-disabled-person_l_5d02c521e4b0304a120c7549.

9. *Disability and Health Overview*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html (Apr. 3, 2024).

10. *Statement from President Joe Biden on 50th Anniversary of the Rehabilitation Act,* THE WHITE HOUSE (Sept. 26, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/26/statement-from-president-joe-biden-on-50th-anniversary-of-the-rehabilitation-act/.

11. *Id.*

12. 42 U.S.C. §§ 12101-12213 (2012).

13. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 29 U.S.C. § 705; 42 U.S.C. §§ 12101-12103; 47 U.S.C. §§ 152, 221, 225, 611 (2006 & Supp. III 2010)).

14. 42 U.S.C. § 12112(b)(5)(A).

15. *Id.*

16. *See* Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (11th Cir. 2023).

17. *Id.* at 747-49.

18. *See* Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 792 (10th Cir. 2020).

employment actions are required in failure-to-accommodate claims.[19] Conversely, the Second, Fifth, and Sixth Circuits, like the Tenth Circuit, have disagreed and held that adverse employment actions are not required.[20]

This Comment examines the role of adverse employment actions in failure-to-accommodate claims under current precedent and discusses how courts should proceed on the topic. Section II provides the necessary background to understand the current circuit split on adverse employment actions. First, Section II discusses the history of disability discrimination legislation and how Title I of the ADA operates to prevent disability discrimination in the workplace. Section II then discusses and analyzes the recent *Beasley* and *Exby-Stolley* decisions. Finally, this Section details the state of the circuit split outside of the Tenth and Eleventh Circuits.

Section III presents and advocates for a different approach to the debate on adverse employment actions. Specifically, it argues that the disagreement in this circuit split boils down to an ambiguous definition of adverse employment actions and that one cohesive definition must be adopted. This Section advocates that courts should embrace a broader understanding of what constitutes an adverse employment action, whereby an employer's failure to accommodate a qualified disabled employee itself constitutes an adverse employment action. This broader understanding, Section III argues, better embraces the text of Title I of the ADA without creating an unintended barrier for qualified disabled employees seeking to assert their rights. Additionally, this broader approach emphasizes that an employer's failure to accommodate is, objectively, a wrongful act under the ADA. Finally, Section III argues that this broader interpretation better embodies the meaning of the ADA.

II. BACKGROUND

Through Title I of the ADA, the federal government pledges to protect disabled people from workplace discrimination that is predicated upon their disabilities.[21] The federal government made this pledge largely due to the efforts of disabled individuals and activists who demanded a change

19. *See* Behm v. Mack Trucks, Inc., 2023 U.S. App. LEXIS 10528, *2 (3rd Cir. May 1, 2023); Mobley v. St. Luke's Health Sys., Inc., 53 F.4th 452, 456 (8th Cir. 2022); *Beasley*, 69 F.4th at 747-48.

20. *See* Owens v. City of New York Dept. of Educ., 2022 U.S. App. LEXIS 35393, *2-3 (2nd Cir. Dec. 22, 2022); Thompson v. Microsoft Corp., 2 F.4th 460, 467 (5th Cir. 2021); Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 417 (6th Cir. 2021); *Exby-Stolley*, 979 F.3d at 792.

21. *See* Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329, U.S.C.S. 1665 (Law. Co-op. Aug. 1990). The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . and to invoke the sweep of congressional authority, including its power to enforce the fourteenth amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."

in the law to recognize the status of disabled persons as rightsholders.[22] Title I of the ADA symbolizes an important milestone in disability discrimination legislation, but courts remain divided about what constitutes a successful failure-to-accommodate claim.

Part A provides a general overview of disability discrimination legislation, beginning with how Title I of the ADA is enforced. This Part outlines the elements of an ADA claim, how disabled employees can make ADA claims, and how the Equal Employment Opportunity Commission (EEOC) enforces Title I's provisions. Part A also defines the key terms "disability" and "adverse employment action." Part B then discusses the current state of the circuit split by examining the *Beasley v. O'Reilly Auto Parts* and *Exby-Stolley v. Board of County Commissioners* decisions and the rationales behind the opposing views. Finally, Part C highlights how the federal circuits currently interpret the role of adverse employment actions in failure-to-accommodate claims.

A. Disability Discrimination Legislation and Interpretation

Disability discrimination legislation embodies a relatively modern legal framework designed to protect disabled people from discrimination in everyday life. For most of U.S. history, no such legal framework existed, and disabled Americans had no legal recourse when facing discrimination. In 1973, Congress passed the Rehabilitation Act as the first recognized form of disability discrimination legislation.[23] Yet, the Rehabilitation Act was, and continues to be, significantly limited in its application as it merely prohibits disability discrimination in programs or activities that either receive federal financial assistance or are conducted by an executive agency.[24] To remedy this, Congress passed the ADA in 1990 and alleviated the gap in the protection of disabled people.[25]

Not only did the Rehabilitation Act and the ADA empower disabled individuals to demand equal rights and opportunities in public life, but the Acts also challenged a lingering societal belief that disabled people are perpetually in need of medical treatment or curing.[26] These statutes attacked that narrative and recognized disabled people as rightsholders who are disadvantaged, not by any disability but, rather, by societal

22. Perri Meldon, *Disability History: The Disability Rights Movement*, NAT'L PARK SERV., https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm (Mar. 22, 2024).

23. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 255, 357, § 2 *reprinted in* 1973 U.S. Code Cong. & Admin. News 409, 410 (codified as amended at 29 U.S.C. § 701-794 (1988)).

24. *Id.*

25. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 29 U.S.C. § 705; 42 U.S.C. §§ 12101-12103); 47 U.S.C. §§ 152, 221, 225, 611 (2006 & Supp. III 2010).

26. Kanter, *supra* note 8, at 625.

barriers that prevent their full inclusion.[27] Before these Acts, public policy focused on addressing the needs of disabled people by categorizing them according to their specific diagnoses.[28] The ADA, however, recognizes that disabled people are a part of a minority population, often subject to discrimination, and deserving of basic civil rights protections.[29]

In the context of employment discrimination, Title I of the ADA and the Rehabilitation Act are the relevant statutes.[30] While the Rehabilitation Act continues to apply to federal employees, disability discrimination claims regarding employment mainly fall under Title I of the ADA.[31] As such, this Comment focuses on Title I of the ADA. Subsection 1 of this Part describes the enforcement mechanisms of Title I of the ADA; Subsection 2 defines key language relevant to this Comment's discussion; and Subsection 3 discusses how this language is defined in other employment law contexts.

1. Enforcing Title I of the ADA

Title I of the ADA requires covered entities to provide qualified disabled individuals an equal opportunity to benefit from the full range of employment opportunities available to others.[32] Following Title I's "general rule," covered entities may not discriminate against qualified individuals based on their disabilities concerning "job application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[33] When an employer refuses to make reasonable accommodations to the known limitations of a qualified disabled employee or denies employment opportunities based on such a need, the employer's actions constitute disability discrimination under Title I.[34]

i. Elements of a Claim under the ADA

Qualified disabled employees may allege one of several types of discrimination when bringing a claim under the ADA. Namely, a

27. *Id.*

28. Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992) https://dredf.org/about-us/publications/the-history-of-the-ada/.

29. *Id.*

30. *See The ADA: Your Responsibilities as an Employer,* EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited July 21, 2024).

31. *See id.*

32. *See Introduction to the Americans with Disabilities Act*, U.S. DEP'T OF JUST. C.R. DIV., https://www.ada.gov/topics/intro-to-ada/ (last visited July 23, 2024).

33. 42 U.S.C. § 12112(a).

34. 42 U.S.C. § 12112(b)(5)(A)-(B).

qualified disabled employee may claim discrimination in the form of disparate treatment, disparate impact, hostile work environment, or failure-to-accommodate.[35] To establish a failure-to-accommodate claim, claimants must show that they: (1) are a qualified individual with a disability within the meaning of the ADA; (2) work for an employer who is subject to the ADA and is on notice of the employee's disability and need for an accommodation; and (3) did not receive reasonable accommodations despite the employer's knowledge of the employee's physical or mental limitations.[36] Courts are divided on whether an additional fourth element—that the employer's discriminatory action constituted an adverse employment action—is required.[37]

However, employers are not required to make reasonable accommodations if doing so would cause "undue hardship" to the business.[38] According to the EEOC, undue hardship means that the accommodation would be too difficult or expensive to provide considering the employer's size, financial resources, and business needs.[39] Under this exception, employers may not refuse to provide an accommodation solely because it involves additional costs.[40] Additionally, an employer does not have to provide the specific accommodation the employee requests so long as the accommodation provided effectively meets the disability-related need.[41]

ii. Establishing a Claim under the ADA

The federal circuit courts have regularly approved the use of the *McDonnell Douglas* burden-shifting framework for disparate treatment claims arising under the ADA, but the circuits have disagreed about the applicability of the framework in failure-to-accommodate claims.[42] Under the *McDonnell Douglas* burden-shifting framework, a complainant using circumstantial evidence to establish a disability discrimination claim must first establish a prima facie case of discrimination.[43] Upon proving a

35. Badwal v. Bd. of Trs. of the Univ. of D.C., 139 F. Supp. 3d 295, 308 (D.D.C. 2015) (citing Lee v. District of Columbia, 920 F. Supp. 2d 127, 132-33 (D.D.C. 2013)).

36. Higgins v. New Balance Ath. Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999).

37. *See* Beasley v. O'Reilly Auto Parts, 69 F.4th 744, 747-48 (11th Cir. 2023); *see also* Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 792 (10th Cir. 2020).

38. 42 U.S.C. § 12112(b)(5)(A).

39. *Disability Discrimination and Employment Decisions*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/disability-discrimination-and-employment-decisions (last visited July 23, 2024).

40. *Id.*

41. *Id.*

42. Aaron Matthew Laing, *Failure to Accommodate, Discriminatory Intent, and the* McDonnell Douglas *Framework: Distinguishing the Analyses of Claims Arising from Subparts (A) and (B) of § 12112(B)(5) of the ADA*, 77 WASH. L. REV. 913, Abstract (2002).

43. Hrdlicka v. Gen. Motors LLC, 63 F.4th 555, 566-67 (6th Cir. 2023). To establish a prima

prima facie case, the burden then shifts to the employer to demonstrate that there was a legitimate, nondiscriminatory reason for the adverse employment action.[44] The burden may then shift back to the employee to show that the purported nondiscriminatory reason "was actually a pretext designed to mask discrimination."[45]

iii. The Role of the EEOC

Congress tasked the EEOC with interpreting, administering, and enforcing federal employment discrimination laws, including the ADA.[46] Thus, the EEOC primarily leads the enforcement of Title I of the ADA.[47] In doing so, the EEOC investigates discrimination charges that disabled employees file against their employers.[48] If the EEOC finds that discrimination has occurred, it then has the authority to attempt to settle the charge.[49] If the EEOC is unsuccessful in settling the charge, it can then file a lawsuit on behalf of the disabled individual.[50] Recognizing the EEOC's role in implementing the ADA, courts look to EEOC regulations and guidelines when interpreting the ADA.[51]

2. Defining "Disability" Under the ADA

According to the ADA, a person with a disability is either: "(A) a person who has a physical or mental impairment that substantially limits one or more major life activities, (B) a person who has a history or record of such an impairment, or (C) a person regarded as having such an impairment."[52] The ADA further clarifies that courts should construe the term "disability" broadly to provide coverage to the "maximum extent

facie case, an employee must demonstrate that (1) they have a disability, (2) they are otherwise qualified for the job "with or without reasonable accommodation," (3) they "suffered an adverse employment decision," (4) their employer "knew or had reason to know" of their disability, and (5) their position remained open, or they were replaced. *Id.* (citing Williams v. AT&T Mobility Servs. LLC, 847 F.3d 384, 395).

44. *Id.*

45. *Id.* at 567 (citing Whitfield v. Tennessee, 639 F.3d 253, 259 (6th Cir. 2011)).

46. 42 U.S.C. § 12117(a) (referring to the EEOC as the "Commission").

47. *See Employment Rights: Who Has Them and Who Enforces Them,* OFF. OF DISABILITY EMP'T POL'Y, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-rights-who-has-them-and-who-enforces-them (last visited July 23, 2024).

48. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last visited July 23, 2024).

49. *Id.*

50. *Id.*

51. *See* Cordova v. Univ. of Notre Dame Du Lac, 936 F. Supp. 2d 1003 (N.D. Ind., 2013) (finding that before the ADAAA provided a specific definition for the term "major life activities," courts frequently looked to the EEOC regulations for guidance).

52. 42 U.S.C. § 12102(1)(A)-(C) (2008).

permitted."[53] In 2008, Congress followed this principle when it enacted the ADA Amendments Act of 2008 (ADAAA), which broadened the scope of coverage under the ADA and Section 504 of the Rehabilitation Act by expanding how disabilities are defined.[54]

i. Substantial Limitation

According to the EEOC, the relevant determination in considering whether a person's impairment "substantially limits a major life activity" is the person's ability to perform that activity in comparison to most people.[55] However, an impairment need not completely prevent or restrict the individual from performing the major life activity to be considered substantially limiting.[56] Moreover, the impairment need only substantially limit one major life activity.[57] The ADAAA identifies major life activities including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, learning, and working.[58] The statute also includes the operation of major bodily functions as a major life activity.[59]

ii. History or Record of Impairment

A person has a "record of such an impairment" if they have a history of a mental or physical impairment that substantially limited one or more

53. 42 U.S.C. § 12102(4)(A) (2008).

54. Congress broadened the definition of "disability" by: "expanding the definition of 'major life activities,' redefining who is 'regarded as' having a disability, modifying the regulatory definition of 'substantially limits,' specifying that 'disability' includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active, and prohibiting consideration of the ameliorative effects of 'mitigating measures' when assessing whether an impairment substantially limits a person's major life activities, with one exception." *ADA Amendments Act of 2008 Frequently Asked Questions*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments (last visited June 21, 2024).

55. While a determination of whether an impairment substantially limits a major life activity as compared to most people will not usually require scientific, medical, or statistical evidence, such evidence may be used if appropriate. *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 (last visited July 21, 2024); *see also Do you Have a "Disability" Covered by the ADA?*, DISABILITY RTS. PA., https://www.disabilityrightspa.org/wp-content/uploads/2018/05/ADAEligibilityMAY2018.pdf (last visited July 21, 2024).

56. *See* 42 U.S.C. § 12102(2)(b)(4) (2008) (clarifying that the ADAAA rejects court decisions holding that to be "substantially limited" in performing a major life activity under the ADA, an individual must have an impairment that prevents or severely restricts them from doing activities of central importance to most people's daily lives).

57. "The term 'disability' means, with respect to an individual . . . a physical or mental impairment that substantially limits *one or more* major life activities of such individual." 42 U.S.C. § 12102(1)(A) (2008) (emphasis added).

58. 42 U.S.C. § 12102(4)(a) (2008).

59. *Id.*

major life activities.[60] Even if the person does not currently have a disability, they may have a history or record of such impairment.[61] An individual can prove a record of a disability through documentation such as hospitalization records, documented time off, or records of other medical treatment.[62] To qualify as a disabled person under the "record of" definition, a person must also establish that the recorded disability substantially limited a major life activity.[63]

iii. Regarded as Having an Impairment

Individuals are "regarded as having such an impairment" if they establish that they have been subjected to an action prohibited under the ADA because of an actual or perceived impairment.[64] Under this definition, it is not necessary to show that the impairment actually limited a major life activity.[65] Rather, it is enough that the person is assumed to have a disability and, as a result, was subject to a form of discrimination violating the ADA. Under this definition, a person only "regarded as" having a disability cannot assert a reasonable accommodations claim.[66]

3. Title VII Definition of Adverse Employment Actions

Though Title I of the ADA does not explicitly mention adverse employment actions in its language, some federal circuit courts have ruled that an adverse employment action is a necessary element in failure-to-accommodate claims.[67] Before addressing this circuit split, it is important to understand how courts define adverse employment actions. Courts have generally declined to create an exhaustive list of activities that qualify as adverse employment actions and have, instead, opted for a more

60. *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 (last visited July 21, 2024). An individual can also meet the "record of" definition of disability if they were once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not). *Id.*

61. *Id.*

62. *Id.*

63. *See id.* (stating that an individual can meet the "record of" definition of disability if they do not currently have a substantially limiting impairment but previously did).

64. 42 U.S.C. § 12102(3)(A) (2008).

65. *Id.*

66. "A covered entity under Title I . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section." 42 U.S.C. § 12101(6)(a)(1)(h) (2008).

67. *See* 42 U.S.C. §§ 12111-12117 (2000); *see also* Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 791 (10th Cir. 2020).

flexible definition.[68] Nevertheless, courts agree that adverse employment actions include: termination of employment or a demotion by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities.[69] Therefore, under this definition, if an adverse employment action were an element of failure-to-accommodate claims, disabled employees would need to demonstrate that they were terminated or suffered another significant employment action to satisfy that element.

Historically, courts have followed a narrow interpretation of what constitutes an adverse employment action. This interpretation arose from case law interpreting Title VII of the Civil Rights Act of 1964, which mandates that claimants prove an adverse employment action when filing a claim.[70] For decades, federal courts utilized a narrow definition of adverse employment action when considering Title VII claims.[71] Under this definition, courts interpreted adverse employment actions to mean "ultimate employment decisions," such as unlawful hiring, firing, leave, or compensation.[72] According to this interpretation, an employee would need to face consequences as severe as termination or a pay-cut before satisfying the adverse employment element and, hence, having a Title VII claim. Significantly, a recent Fifth Circuit decision suggests that at least some courts are willing to broaden their understanding of what constitutes an adverse employment action.[73]

In *Hamilton v. Dallas County*, the Fifth Circuit revisited this narrow interpretation when it examined a police department policy that limited which days of the week its employees could elect to take off depending upon the employee's sex.[74] Under this policy, men could choose to have full weekends off while women could not.[75] In *Hamilton*, the Fifth Circuit departed from the narrow interpretation of adverse employment actions—

68. *See* Haddon v. Exec. Residence at the White House, 313 F.3d 1352, 1363 (Fed. Cir. 2002) (stating that while courts have declined to adopt an exhaustive list of what constitutes an adverse employment action, termination or demotion in an employee's wage or salary generally falls within the meaning of adverse employment actions).

69. Burlington Indus. v. Ellert, 524 U.S. 742, 761 (1998).

70. To set forth a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, a plaintiff must allege that they: (1) are a member of a protected class, (2) were meeting the legitimate expectation of their employer, (3) suffered an adverse employment action, and (4) circumstances exist which give rise to an inference of discrimination. Yang v. Robert Half Int'l, Inc., 79 F.4th 949, 964 (8th Cir. 2023).

71. *See* Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995) (finding that Title VII was designed to address ultimate employment decisions, such as hiring, granting leave, discharging, promoting, and compensating); *see also* Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (noting that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring and firing).

72. *Id.*

73. *See* Hamilton v. Dallas Cty., 79 F.4th 494, 497 (5th Cir. 2023).

74. *Id.*

75. *Id.*

which only permitted recovery for ultimate employment decisions—when it held that this sex-based policy violated Title VII.[76] The Fifth Circuit reiterated that Title VII does not say, explicitly or implicitly, that employment discrimination is lawful if limited to non-employment decisions.[77] While Title VII did indeed prohibit discrimination for ultimate employment decisions, it also made it unlawful for employers "otherwise to discriminate against" employees in relation to their "terms, conditions, or privileges of employment."[78] In *Hamilton*, the Fifth Circuit asserted that Supreme Court precedent, like *Hishon v. King & Spalding*,[79] supports a broad interpretation of adverse employment actions. Further, the Fifth Circuit concluded that the phrase "terms, conditions, or privileges of employment" of Title VII extends beyond the written terms and conditions of an employment contract and is, therefore, not limited to economic or tangible discrimination.[80]

Although the *Hamilton* case involved Title VII of the Civil Rights Act and not Title I of the ADA, multiple similarities between Title VII and Title I make *Hamilton* and other Title VII precedent relevant to Title I. For instance, the ADA and the Civil Rights Act share a common goal of prohibiting discrimination.[81] Additionally, Title I of the ADA and Title VII of the Civil Rights Act both prohibit employers from making unfair changes to the compensation, terms, conditions, and privileges of an employee's employment for discriminatory reasons.[82] With these similarities in mind, courts are likely to follow similar trends when interpreting and applying provisions of the ADA and the Civil Rights Act. Thus, a shift toward a broader understanding of adverse employment actions in Title VII cases is significant when examining the role of adverse employment actions under the ADA.

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76. *Id.*

77. *Id.* at 501.

78. 42 U.S.C. § 2000e-2(a)(1).

79. Hishon v. King, 467 U.S. 69, 77 (1984) (holding that an adverse employment action "need only be a term, condition, or privilege of employment").

80. *Hamilton,* 79 F.4th at 501.

81. *See* Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII (codified as amended at § 2000e-2(a)(1)); *see also* Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 29 U.S.C. § 705; 42 U.S.C. §§ 12101-12103; 47 U.S.C. §§ 152, 221, 225, 611 (2006 & Supp. III 2010)).

82. "It shall be unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

B. Circuit Split: Interpreting the Necessity of Adverse Employment Actions

Federal circuit courts are split regarding whether plaintiffs need to demonstrate adverse employment actions when pursuing failure-to-accommodate claims under Title I of the ADA. Although this circuit split has persisted for years, the Supreme Court has not yet weighed in.[83] This results in the unequal enforcement of Title I across the country, requiring qualified disabled employees in the Third, Eighth, and Eleventh Circuits to establish an additional element in failure-to-accommodate claims that their counterparts in the other circuits do not have to demonstrate.

1. Adverse Employment Action Not Required

In *Exby-Stolley v. Board of County Commissioners*, the Tenth Circuit decided en banc that adverse employment actions are not a requisite element in failure-to-accommodate claims.[84] In *Exby-Stolley*, the plaintiff claimed her former employer violated Title I of the ADA by failing to accommodate her disability.[85] Specifically, her employer did not reasonably accommodate her work responsibilities even after she informed the employer of physical limitations that prevented her from completing her work.[86] Although the plaintiff proposed multiple accommodations, her employer provided none.[87]

At the trial level, the court stated in a jury instruction that the plaintiff had to establish that she was either discharged or suffered some other adverse employment action to prevail on her claim.[88] This jury instruction described an adverse employment action as a "significant change in employment status," such as hiring or firing.[89] The jury returned a verdict for the employer, indicating that the plaintiff failed to prove she was either "discharged from employment," "not promoted," or subjected to some "other adverse action."[90] The plaintiff appealed, and a three-judge panel for the Tenth Circuit affirmed the trial court's decision.[91] The Tenth Circuit reheard the case en banc, and held that the trial court erred in

83. The U.S. Supreme Court denied a petition for writ of certiorari on this issue. *See* Bd. of Cty. Comm'rs of Weld Cty. v. Exby-Stolley, 141 S. Ct. 2858 (2021).

84. *See* Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 788 (10th Cir. 2020).

85. *Id.* at 788-89.

86. *Id.* at 789.

87. *Id.*

88. *Id.*

89. *Id.* at 792.

90. *Id.* at 820.

91. *Id.* at 788.

instructing the jury that an adverse employment action was required.[92] In its decision, the Tenth Circuit stated four reasons to support its decision that adverse employment actions are not required in failure-to-accommodate claims.

First, the Tenth Circuit found that requiring an adverse employment action in failure-to-accommodate claims would be contrary to controlling precedent.[93] According to the Tenth Circuit, its appellate court decisions have "repeatedly and invariably" presented prima facie cases for ADA failure-to-accommodate claims without ever mentioning a requisite adverse employment action.[94] The court explained that if an appellate court claims to provide a complete outline of the elements of a prima facie failure-to-accommodate claim but omits a key element, it risks seriously misleading lower courts and the public.[95] Therefore, the appellate courts in the Tenth Circuit must have purposefully omitted adverse employment action as an element of a prima facie failure-to-accommodate claim.[96]

Second, the Tenth Circuit found that requiring an adverse employment action would render failure-to-accommodate claims and disparate treatment claims indistinguishable from one another.[97] Both failure-to-accommodate and disparate treatment claims are recognized under Title I of the ADA.[98] However, the court indicated that these claims should be distinguished by one significant factor: the manner in which the employer engaged in discrimination.[99] Disparate treatment claims allege that the employer discriminated against the employee by acting in a discriminatory manner.[100] Alternatively, failure-to-accommodate claims allege that the employer failed to act at all.[101] The court concluded that requiring an adverse employment action by an employer in a failure-to-accommodate claim would blur the lines that distinguish these two claims by requiring plaintiffs to demonstrate both an adverse act and a lack of action on the part of their employer.[102]

Third, the Tenth Circuit determined that requiring an adverse

92. *Id.* at 792.

93. *Id.*

94. *Id.* (citing Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1204 (10th Cir. 2018)) (noting that under the "modified McDonnell Douglas burden shifting framework" governing failure-to-accommodate claims, a plaintiff must establish a prima facie case by demonstrating that (1) they are disabled, (2) they are otherwise qualified, and (3) they requested a plausibly reasonable accommodation).

95. *Id.* at 792.

96. *Id.*

97. *Id.* at 795.

98. 42 U.S.C. § 12112(b)(5)(A)-(B) (2008).

99. *Exby-Stolley*, 979 F.3d at 795-96.

100. *Id.* at 796.

101. *Id.*

102. *Id.*

employment action would undermine the purpose of the ADA and the EEOC's understanding of the elements of failure-to-accommodate claims.[103] The court held that requiring adverse employment actions in failure-to-accommodate claims would significantly frustrate the purposes of the ADA.[104] Employers would not be held accountable for failing to reasonably accommodate disabled employees so long as they did not also subject them to an adverse employment action.[105] Undoubtedly, this would prevent disabled employees from enjoying the same benefits and privileges of employment as their peers without disabilities.[106] Further, the EEOC adopted this same line of reasoning for not requiring adverse employment actions in failure-to-accommodate claims.[107]

Fourth, the Tenth Circuit concluded that requiring an adverse employment action would contradict the regularly followed practices of the other federal circuit courts.[108] Although the decisions in the other circuits are not uniform, the Tenth Circuit reasoned that the predominant view rejects incorporating adverse employment actions as an element of ADA failure-to-accommodate claims.[109] Ultimately, the court stated that it did not discover a single circuit that consistently incorporated an adverse employment action requirement.[110]

The dissent in *Exby-Stolley* focused its discussion on Title I of the ADA's "general rule." According to the dissent, this general rule requires that an employer's failure-to-accommodate be "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[111] This language, the dissent argued, does not require a plaintiff to establish that the employer acted adversely toward the plaintiff, but it does mean the failure-to-accommodate is actionable only if it is "in regard to" the "terms, conditions, and privileges of employment."[112] Therefore, the dissent argued that the "in regard to" clause must be satisfied by something more than an employer's failure to accommodate.[113]

The defendants in *Exby-Stolley* filed a writ of certiorari with the Supreme Court, arguing that federal circuit courts were evenly split on

103. *Id.* at 799.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 804.
108. *Id.* at 791-92.
109. *Id.* at 804.
110. *Id.* at 810.
111. *Id.* at 827 (McHugh, J. dissenting) (citing 42 U.S.C. § 12112(a)).
112. *Id.*
113. *Id.* at 823.

the question of whether failure-to-accommodate claims require adverse employment actions.[114] The defendants argued that employers should know how to comply with the law and that workers deserve clarity about how to secure their rights under the ADA. But the Supreme Court denied the defendant's petition without giving reason for its denial.[115] This may have been because there was not a clear circuit split in 2021 when the Supreme Court denied the writ of certiorari.[116]

In sum, the Tenth Circuit relied upon precedent, other federal circuit decisions, the EEOC's interpretation, and the inherent nature of failure-to-accommodate claims, to conclude that adverse employment actions are not a requisite element of failure-to-accommodate claims.[117] Three years later, the Eleventh Circuit reached the opposite conclusion in *Beasley v. O'Reilly Auto Parts*.[118]

2. Adverse Employment Action Required

In 2023, the circuit split regarding the necessity of an adverse employment action element became undeniable with the Eleventh Circuit's decision in *Beasley v. O'Reilly Auto Parts*. The plaintiff in *Beasley* was a deaf man who worked as an inbound materials handler at an O'Reilly Auto Parts distribution center and communicated primarily through ASL.[119] The plaintiff claimed his employer violated Title I of the ADA by failing to reasonably accommodate his disability.[120] Specifically, the plaintiff requested that his employer provide an ASL interpreter on three separate occasions.[121] After requesting text message summaries of mandatory meetings that were irregularly provided,[122] the plaintiff, for the first time, requested an interpreter to discuss his exclusion from these mandatory meetings with management.[123] Later, the plaintiff again requested an interpreter to resolve a disputed disciplinary matter that arose from his several unexcused absences.[124] Then, the plaintiff requested an interpreter for a third time when he ask that one attend a company picnic with him.[125]

114. Bd. Of Cty. Comm'rs of Weld Cty. v. Exby-Stolley, 141 S. Ct. 2858 (2021).
115. *Id.*
116. *See Exby-Stolley*, 979 F.3d at 804.
117. *Id.* at 821.
118. *See* Beasley v. O'Reilly Auto Parts, 69 F.4th 744, 747-48 (11th Cir. 2023).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 751.

The plaintiff filed a charge with the EEOC and received a "right to sue" letter which he filed against his employer.[126] The employer filed a motion for summary judgment arguing that the plaintiff had not suffered an adverse employment action and that none of his requested accommodations related to an essential job function.[127] The district court granted the employer's motion, holding that, to succeed on a failure-to-accommodate claim, a plaintiff must demonstrate that he suffered an adverse employment action.[128]

Upon review, the Eleventh Circuit explained that an employer violates the ADA when it: (1) discriminates against an individual based on disability; and (2) does so "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[129] The court explained that the first element of discrimination is satisfied when an employer denies reasonable accommodations.[130] However, the Eleventh Circuit ultimately concluded that this discrimination is actionable under the ADA only if the employee satisfies the second element, which requires proving that the failure-to-accommodate resulted in an adverse employment action.[131] Accordingly, the plaintiff in *Beasley* needed to show that his employer's failure to accommodate his deafness negatively impacted his hiring, promotion, firing, compensation, training, or other term of employment.[132]

Reviewing the facts, the Eleventh Circuit held that a factfinder could reasonably determine that the employer's failure to provide an interpreter for the plaintiff's first and second requests adversely affected the terms, conditions, and privileges of his employment. First, denying the plaintiff an interpreter for mandatory meetings pertaining to important safety information affected the terms of the plaintiff's employment.[133] Second, denying the plaintiff an interpreter to resolve a disciplinary dispute could adversely affect the plaintiff's pay or future potential disciplinary actions filed against him.[134] Still, the court held that the plaintiff failed to provide any evidence of an adverse employment action resulting from his employer's failure to provide an interpreter during the company picnic.[135]

126. *Id.* at 752.
127. *Id.*
128. *Id.*
129. *Id.* at 754 (citing 42 U.S.C. § 12112(a)).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 755.
134. *Id.*
135. *Id.* at 756.

The EEOC filed an amicus curiae brief in support of the plaintiff.[136] In its brief, the EEOC argued that the lower court erred in requiring the plaintiff to show a separate adverse employment action.[137] Contrary to the district court's ruling, the EEOC stated that "no separate 'adverse employment action' is required to sustain an ADA failure-to-accommodate claim."[138] The EEOC explained that the court was incorrect in its interpretation of Title I of the ADA.[139] The statutory phrase "terms, conditions, and privileges of employment" was supposed to signify a congressional intent to strike employment discrimination, not to create an additional element that qualified disabled employees must prove in certain Title I claims.[140]

In *Beasley*, the Eleventh Circuit ultimately reversed the district court's order granting summary judgment to the plaintiff's employer, and held that the employer discriminated against the plaintiff based on his disability, resulting in an adverse employment action.[141] The Eleventh Circuit's analysis in the *Beasley* decision directly challenged the Tenth Circuit's analysis in its *Exby-Stolley* decision.

C. Current State of the Circuit Split

Several other circuits have considered the role of adverse employment actions in failure-to-accommodate claims. At the time of its decision in *Exby-Stolley*, the Tenth Circuit noted that its research did not reveal a single circuit that consistently included adverse employment action as a required element in failure-to-accommodate claims.[142] Since then, the Second, Third, Fifth, Sixth, Eighth, and Eleventh Circuits have discussed this issue, with the most recent discussion being the *Beasley* decision.[143]

The Third and Eighth Circuits maintain that an adverse employment

136. Brief for the Equal Emp. Opportunity Comm'n, as Amici Curiae Supporting Plaintiff-Appellants, Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (2023) (No. 21-13083).

137. *Id.* at 3.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Beasley*, 69 F.4th at 754.

142. Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 810 (10th Cir. 2020) (concluding that the First, Fourth, Fifth, Sixth, Eleventh and D.C. Circuits either stated or strongly suggested that adverse employment actions are not an element of failure-to-accommodate claims and that the Third and Eighth Circuits purported to incorporate adverse employment actions but implemented it only in name).

143. *See* Owens v. City of N.Y. Dept. of Educ., 2022 U.S. App. LEXIS 35393, *2-3 (2nd Cir. Dec. 22, 2022); Behm v. Mack Trucks, Inc., 2023 U.S. App. LEXIS 10528, *2 (3rd Cir. May 1, 2023); Thompson v. Microsoft Corp., 2 F.4th 460, 467 (5th Cir. 2021); Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 417 (6th Cir. 2021); Mobley v. St. Luke's Health Sys., Inc., 53 F.4th 452, 456 (8th Cir. 2022); *see Beasley*, 69 F.4th at 747-48.

action is a requisite element of a failure-to-accommodate claim.[144] The Third Circuit holds that to establish a prima facie claim under the ADA, qualified disabled employees must show they experienced an adverse employment action.[145] The Third Circuit also clarified that in failure-to-accommodate claims, the relevant adverse employment action is itself the employer's refusal to make reasonable accommodations.[146] Therefore, while the Third Circuit requires employees to demonstrate an adverse employment action when claiming discrimination under the ADA, it also recognizes that the failure to accommodate can, in itself, be an adverse employment action.

Since the *Exby-Stolley* decision, the Eighth Circuit has not thoroughly analyzed the role of adverse employment actions in failure-to-accommodate claims. In one case, the Eighth Circuit listed an adverse employment action as a necessary element of a prima facie failure-to-accommodate claim.[147] However, in another case, the court acknowledged the significant controversy regarding the role of adverse employment actions but ultimately refrained from providing its own interpretation.[148]

In contrast, the Second, Fifth, and Sixth Circuits do not require claimants to prove that an adverse employment action resulted from their employer's alleged failure to accommodate.[149] Specifically, the Second Circuit held that, while discrimination claims under the ADA generally require proof of an adverse employment action, failure-to-accommodate claims do not.[150] Similarly, the Sixth Circuit recognized that failure-to-accommodate claims do not include the additional requirement of proving an adverse employment action, although it is typically necessary for general discrimination claims.[151] The Fifth Circuit likewise stated that failure-to-accommodate claims are unique to other claims under the ADA and do not require an adverse employment action.[152]

144. *See Behm*, 2023 U.S. App. LEXIS 10528, at *2; Fowler v. AT&T, Inc., 19 F.4th 292, 306 (3rd Cir. 2021); Soutner v. Penn State Health, 841 F.Appx 409, 415 (3rd Cir. 2021); *Mobley*, 53 F.4th at 456; Hopman v. Union Pac. R.R., 68 F.4th 394, 402 (8th Cir. 2023).

145. *Fowler,* 19 F.4th at 299.

146. *Id.* at 306.

147. *Mobley*, 53 F.4th at 456.

148. *Hopman,* 68 F.4th at 402.

149. *See* Owens v. City of N.Y. Dept. of Educ., 2022 U.S. App. LEXIS 35393, *2-3 (2nd Cir. Dec. 22, 2022); Thompson v. Microsoft Corp., 2 F.4th 460, 467 (5th Cir. 2021); Sambrano v. United Airlines, Inc., 2022 U.S. App. LEXIS 4347, *15 (Feb. 17, 2022); Hrdlicka v. Gen. Motors LLC, 63 F.4th 555, 566 (6th Cir.2023); Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 417(6th Cir. 2021).

150. *Owens,* 2022 U.S. App. LEXIS 35393, at *3.

151. *See Hrdlicka,* 63 F.4th at 570.

152. *Thompson,* 2 F.4th at 467 (clarifying that an adverse employment action is an ultimate employment decision such as hiring, granting leave, or firing). Since then, the Fifth Circuit indicated its willingness to adopt a broader understanding of what constitutes adverse employment decisions; *see*

In sum, the Third, Eighth, and Eleventh Circuits require disabled employees to demonstrate that they suffered adverse employment actions when making failure-to-accommodate claims while the Second, Fifth, Sixth, and Tenth Circuits do not require disabled employees to demonstrate any such adverse employment action.

III. DISCUSSION

Disabled individuals are a vital part of the workforce. Accordingly, the circuit split concerning what constitutes a successful failure-to-accommodate claim under the ADA is increasingly important. Both the Tenth and Eleventh Circuits offer reasonable interpretations of Title I's text, but they disagree on whether an adverse employment action is a necessary element. Despite this difference, there may be an opportunity for agreement if courts are willing to reconsider their definition of adverse employment actions.

This Section argues that courts should shift their attention in this circuit split. Rather than focusing on whether Title I of the ADA requires an employee to prove an adverse employment action, courts should reconsider their understanding of what constitutes an adverse employment action. Part A of this Section argues that the root of this circuit split lies in an inconsistent and ill-defined idea of adverse employment actions. Subsequently, this Section details three reasons why courts should adopt a broader understanding of adverse employment actions. First, Part B argues that this approach best embraces the text of Title I without imposing an additional barrier on disabled people. Second, Part C of this Section suggests this approach recognizes that an employer's failure to accommodate is actionable and discriminatory in and of itself. Third, Part D of this Section argues that this approach best embodies the meaning and intent of the ADA.

A. Explaining the Split: What Qualifies as an Adverse Employment Action?

Ultimately, the circuit split concerning the role of adverse employment actions in failure-to-accommodate claims arises from differing interpretations of the ADA's general rule that covered entities may not discriminate against disabled employees in terms of their hiring, advancement, termination, compensation, job training, and "other terms, conditions, and privileges of employment."[153] The court in *Beasley* held

Hamilton v. Dallas Cty., 79 F.4th 494, 497 (5th Cir. 2023).

153. 42 U.S.C. § 12112(a).

that this general rule is the basis for requiring adverse employment actions in ADA claims, but the court in *Exby-Stolley* did not reach the same conclusion.

Adverse employment actions are not mentioned within the text of Title I of the ADA. Yet, the *Beasley* court concluded that the ADA's general rule is the basis for requiring adverse employment actions in all ADA claims.[154] In *Beasley*, the court explained that the rule's mandate that the discriminatory act be "in regard to" the disabled person's employment means that Title I discrimination claims can only arise where there has been an adverse employment action.[155] The dissent in *Exby-Stolley* similarly argued that requiring an adverse employment action would not require a plaintiff to establish that the employer acted adversely toward the plaintiff, but that the failure-to-accommodate was in regard to the terms, conditions, or privileges of employment.[156] Essentially, these opinions have defined adverse employment action to mean an employer's discriminatory action or inaction that affects the terms, conditions, or privileges of employment of disabled employees.

On the other hand, the *Exby-Stolley* majority defined adverse employment action through a narrower interpretation. The court in *Exby-Stolley* found that the ADA's general rule did not establish an adverse employment action as a requisite element of ADA claims.[157] The court defined adverse employment actions as additional, real actions taken by an employer beyond merely discriminating against the employee.[158] Thus, under this understanding of adverse employment actions, employers would need to cause significant change such as firing or failing to promote disabled employees to satisfy the adverse employment action element.[159] Understandably, the *Exby-Stolley* court concluded that requiring such an element would significantly burden qualified disabled employees and would severely limit their ability to make failure-to-accommodate claims.

Effectively, the circuit split regarding the role of adverse employment actions in failure-to-accommodate claims rests on an ambiguous definition of adverse employment actions. Courts recognizing a broader definition of adverse employment actions are more inclined to include adverse employment actions as an element in failure-to-accommodate

154. *See* Beasley v. O'Reilly Auto Parts, 69 F.4th 744, 754 (11th Cir. 2023).

155. *Id.*

156. Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 841-42 (10th Cir. 2020) (McHugh, dissenting).

157. *See id.* at 788.

158. *See id.* at 795-96 (holding that adverse employment actions are required in disparate treatment claims, as opposed to failure-to-accommodate claims, because disparate treatment claims under the ADA allege that the employer discriminated against the employee by acting rather than failing to act).

159. *Id.* at 789 (quoting the post-trial jury instructions defining an adverse employment action as a significant change in employment status such as hiring, firing, or a significant change in benefits).

claims because they interpret this element to simply mean that the action must be work-related. Therefore, this "additional" element does not create a significant barrier for claimants. Courts recognizing a narrower definition of adverse employment actions are reluctant to include adverse employment actions as a requisite element of failure-to-accommodate claims because these courts understand adverse employment actions as severe, additional actions beyond an employer's generally discriminatory behavior that create unnecessary barriers for claimants.[160]

Thus, to resolve this circuit split, courts must agree upon one clear definition of adverse employment actions. This Comment argues that courts should define adverse employment actions broadly and should therefore recognize that any discriminatory action or inaction by an employer constitutes an adverse employment action. This definition is more closely aligned with the Eleventh Circuit's interpretation in *Beasley* in that it recognizes adverse employment actions as a necessary element of ADA claims. Therefore, defining adverse employment actions to mean any articulable discriminatory action by an employer would not impose additional burdens on qualified disabled employees, while still upholding the purpose behind Title I of the ADA.

B. Adopting a Broader Understanding of Adverse Employment Actions Embraces Title I's Text Without Imposing an Additional Burden on Disabled Employees

A broad rule recognizing that an employer's discriminatory action or inaction constitutes an adverse employment action is necessary to provide disabled employees due protection under Title I of the ADA. Looking to the plain language of the general rule, the ADA's drafters evidently intended to prohibit discrimination specifically in the context of job applications, hiring, advancement, termination, compensation, job training, and all other terms, conditions, and privileges of employment.[161] This broad language in the general rule contemplates nearly any discriminatory action that an employer may take against a disabled employee or applicant. By adopting and utilizing a broader definition of adverse employment actions, courts could more reliably apply this general rule to all discrimination claims under Title I. Maintaining the element of adverse employment actions, in the general sense, would ensure that claims brought under Title I are only those relating to the terms, conditions, and privileges of employment, as contemplated by the language of Title I.

160. *Compare Exby-Stolley*, 979 F.3d at 790 *with* Beasley v. O'Reilly Auto Parts, 69 F.4th 744, 754 (11th Cir. 2023).

161. 42 U.S.C. § 12112(a) (2008).

Moreover, adopting a broad rule that recognizes an employer's failure to accommodate as an adverse employment action would not impose an additional barrier on qualified disabled employees. So long as an employer fails to accommodate an employee's known physical or mental disability in a way that affects the terms, conditions, and privileges of employment, the employee may succeed on the claim. In fact, adopting a broad rule recognizing that any discriminatory action or inaction constitutes an adverse employment action would alleviate the burden on qualified disabled employees to prove an additional employer action in jurisdictions that currently adopt either a narrow or unclear understanding of adverse employment actions.

C. Adopting a Broader Understanding of Adverse Employment Actions Recognizes That an Employer's Failure to Accommodate Alone is Actionable

Under Title I of the ADA, employers have an affirmative duty to provide reasonable accommodations to their employees.[162] If an employer fails to provide reasonable accommodations at the request of a qualified disabled employee, the employer has manifestly failed to uphold this duty.[163] Adopting a general rule that an employer's discriminatory actions or inactions are adverse employment actions would allow qualified disabled employees to file claims against their employers the instant they fail to provide necessary accommodations.

Recent case law signals that some federal circuit courts are willing to adopt broader definitions of adverse employment actions than previously utilized.[164] These courts have recognized that some employer actions are so egregious they must constitute adverse employment actions. An employer's failure to accommodate a disabled employee should fall into the category of recognized intolerable actions. The experiences of disabled people in the workplace and the discrimination they face should not be belittled or left unaddressed merely because it does not rise to the level of an ultimate employment decision.

Recognizing an employer's failure to accommodate as an adverse employment action further acknowledges that employers should not escape liability for refusing reasonable accommodations simply because their failures do not fall neatly into a recognized definition of adverse employment action. A broad rule recognizing that any and all disability discrimination constitutes an adverse employment action would hold more employers accountable for failing to accommodate their employees.

162. 42 U.S.C. § 12112(b)(5) (2008).

163. *Id.*

164. *See* Hamilton v. Dallas Cty., 79 F.4th 494, 497 (5th Cir. 2023).

The employer's failure to accommodate can and should be actionable when the accommodation is denied, not simply when the discrimination is so extreme that it results in an ultimate employment decision.

D. Adopting a Broader Understanding of Adverse Employment Action Better Embodies the Meaning of the ADA

Congress enacted the ADA "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to present "clear, strong, consistent, enforceable standards" in addressing discrimination.[165] However, the federal circuit courts have demonstrated that the law surrounding adverse employment actions in failure-to-accommodate claims under Title I are anything but clear.[166] If courts adopted a brightline rule recognizing an employer's failure-to-accommodate as an adverse employment action, Congress's goal of a clear national mandate may be realized. Congress intended for the ADA to be interpreted broadly to ensure maximum coverage for disabled people.[167] Adopting a broad understanding of adverse employment actions helps achieve the true purpose behind the ADA.

Moreover, adopting one clear rule would provide necessary clarity to employers and employees alike. Under this rule, disabled employees would not be required to prove additional elements solely because of the jurisdiction they file their claim in, and they could be better informed about their rights and protections under Title I. Additionally, employers would be better informed about what actions they must take to avoid liability under the ADA. Employers may even be more likely to grant reasonable accommodations if the law is clear that they might otherwise face penalties.

IV. CONCLUSION

Disabled employees are entitled to protection against discrimination in the workplace. Congress enacted Title I of the ADA to create such protection, but courts have since obscured the essential elements of failure-to-accommodate claims. The current ambiguity in the elements of failure-to-accommodate claims creates uncertainties and challenges for disabled employees. Clarity in interpreting the role of adverse employment actions in failure-to-accommodate claims is imperative for effective implementation of the ADA's provisions.

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165. 42 U.S.C. § 12101(b)(1) (2008).

166. *See supra* Sections II.B.1, II.B.2.

167. *See* 42 U.S.C. § 12102(4)(A) (2008) (clarifying that courts should interpret "disability" in a way that favors broad coverage of individuals to the "maximum extent permitted").

Adopting a broader definition of adverse employment actions embraces the text and purpose of Title I of the ADA without imposing an additional barrier on disabled employees. Additionally, the broader interpretation recognizes that an employer's failure to accommodate is actionable in itself. This recognition encourages employers to grant reasonable accommodations and allows for all parties to better understand their legal rights. Finally, invoking the broader definition best embodies Congress's intended meaning and purpose of the ADA.

By adopting a consistent and broad definition of adverse employment action, the true intent of Title I of the ADA can be realized, fostering a society where the rights and contributions of disabled employees are fully upheld. By resolving this ongoing circuit split with a broad definition of adverse employment action, disabled employees experiencing discrimination, like Teddy Beasley, will be empowered to vindicate their rights as intended under the ADA.