Hastings Law Journal

Volume 66 | Issue 5 Article 8

6-2015

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Michael Edward Olsen Jr.

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Michael Edward Olsen, Jr.*

Over the course of nearly two decades, courts have narrowed the employment protections of the Americans with Disabilities Act of 1990 by interpreting the term "disabled" so narrowly that virtually no person qualified for the Act's protections. Moreover, if a person was sufficiently "disabled," they were often so severely disabled that they could not work at all; thus, they were not "qualified individuals" who could perform the essential functions of the job.

In response, Congress passed the Americans with Disabilities Act Amendments Act of 2008 to give broad coverage to persons with disabilities. Courts have followed this mandate by interpreting the term "disabled" broadly; however, courts still find that persons are not "qualified" because they cannot perform the essential functions of their position. This Note shows that courts frequently give deference to employers in the "essential functions" inquiry. Moreover, courts import normative assumptions about how jobs should be performed into the essential functions inquiry, contrary to congressional intent. As a consequence, courts infrequently reach the reasonable accommodation process—where the court asks whether the employer can accommodate an employee's limitations without imposing an undue hardship on the employer.

This Note suggests several remedies. First, Congress could clarify that courts are not required to defer to an employer's job description and, relatedly, courts could give greater weight to the actual job duties performed by an employee. Finally, Congress could explicitly delegate substantive rulemaking authority to the EEOC, as it did with the term "disabled."

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* J.D. Candidate, 2015, University of California Hastings College of the Law. I would like to thank Professor Joan Williams for her feedback and guidance in writing this Note. I would also like to thank my partner Brian Nguyen for his love and support. This Note is dedicated to my son, Tyler Michael Bach Nguyen, who was born in April 2014. I hope Tyler will one day enter a workforce that is just and equal for all persons. I would also like to thank Henna Choi for reviewing drafts of this Note. Thanks also to the Notes team, particularly Elliot Hosman and Andrew Ohlert, for their thoughtful feedback. Finally, I would like to thank Editor-in-Chief Emily Goldberg Knox for her tremendous work and leadership, as well as the entire staff of Volume 66 for their dedication in producing this Issue.

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INTRODUCTION

Title I of the Americans with Disabilities Act of 1990 ("ADA")[1] prohibits employment discrimination against a "qualified individual with a disability."[2] Congress premised the ADA partly on a finding that people with disabilities have experienced a history of discrimination in employment

1. 42 U.S.C. §§ 12111–12117 (2015).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213).

and other facets of public life.[3] People with disabilities have faced discrimination through exclusionary qualification standards and stereotypical assumptions about their ability to contribute to society.[4] Over the course of nearly twenty years of litigation, however, the courts systematically removed rights that Congress had conferred on people with disabilities by narrowly construing the term "disabled" under the ADA.[5] In response, Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") to bring the courts back in line with congressional intent by amending the ADA and instructing courts to interpret "disability" more broadly.[6]

This Note evaluates recent court decisions that have put the disabled status of a plaintiff on trial for a second time: once when determining whether the person is an "individual with a disability" and again when determining whether the plaintiff is "qualified" for the job (in other words, whether the person can perform the "essential functions" of the job). This Note argues that courts have used the qualified individual analysis to do precisely what Congress instructed them not to—permit discrimination against people with disabilities in employment—and as a result, they are not meeting the goals of the ADA or the ADAAA. This Note also argues that the "ideal worker" norm underlies the reluctance of courts to impinge on an employer's business judgment, and as a result, courts limit the ability of disabled plaintiffs to challenge the determination of what constitutes an "essential" function of the job.

Part I of this Note outlines the history and purpose behind the ADAAA. Part II describes the successes of the ADAAA in recent court decisions. Part III demonstrates that courts have continued to limit the ADAAA's ability to remedy disability discrimination by focusing on whether a person is a "qualified individual" with a disability, which gives employer-defendants a second chance to challenge the disabled status of the plaintiff. Part IV of this Note argues that courts often instinctively use workplace norms in granting deference to employers on the question of what constitutes an essential function; however, courts and the ADA will only make inroads on workplace accommodations for disabled persons through illuminating these norms in the essential functions analysis. This Note suggests several solutions: Congress should consider amending the ADA to—once again—override the developing trend in the courts against disabled plaintiff-employees by (1) clarifying that it did

3. *Id.* § 2.

4. *Id.*

5. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000).

6. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12117).

not intend for courts to defer to an employer's determination of what constitutes an "essential function," and (2) modifying the "qualified individual" inquiry to favor a more balanced approach that takes into account the goals and purposes of the ADA. This amendment would allow for a more robust determination of what qualifies as a "reasonable accommodation."

I. The History of the ADAAA

A. The Americans with Disabilities Act of 1990

Americans with disabilities face far worse job prospects than those without disabilities. Even twenty years after the passage of the ADA, 17.3 percent of persons with disabilities are employed, as compared to 64.2 percent of the general population.[7] According to the Census Bureau, 56.7 million people, or nineteen percent of the population, have a disability.[8] Some consider disability "the last frontier for workplace equality."[9] In enacting the ADA, Congress stated, "[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[10] Effective March 24, 2014, affirmative action guidelines for federal contractors mandated a seven percent workforce utilization goal for individuals with disabilities.[11] This recent regulation is motivated by the fact that underutilization of persons with disabilities has been a historical cause of income inequality in the United States.[12]

In light of a history of underutilizing the disabled workforce, as well as exclusionary job qualification standards, Congress passed the ADA in 1990 to provide a "clear and comprehensive national mandate for the

7. Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation—March 2015 tbl. A-6 (2015), http://www.bls.gov/news.release/pdf/empsit.pdf.

8. *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. Census Bureau (July 25, 2012), http://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html.

9. Barbara Otto, *Hey Employers: If You Build It, Job Seekers with Disabilities Will Come*, Huffington Post (Sept. 13, 2013, 4:45 PM), http://www.huffingtonpost.com/barbara-otto/job-seekers-with-disabilities_b_3921181.html.

10. 42 U.S.C. § 12101(a)(4) (2015).

11. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,681, 58,682 (Sept. 24, 2013) (to be codified at 41 C.F.R. pt. 60-741).

12. *Id.* ("The median household income for 'householders' with a disability, aged 18 to 64, was $25,420 compared with a median income of $59,411 for households with a householder who did not report a disability."); *see* 42 U.S.C. § 12101(a)(6) ("[C]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally . . . .").

elimination of discrimination against individuals with disabilities."[13] Individuals alleging discrimination based on an actual disability can pursue remedies based upon the following claims:

> (1) Failure to accommodate—demonstrating a failure to make a reasonable accommodation to an "otherwise qualified individual" unless such entity can "demonstrate" that the accommodation would impose an undue hardship;[14]
>
> (2) Unlawful qualification standards—demonstrating that the entity imposed unlawful qualification standards that screen out individuals with disabilities and those standards are not "shown to be job-related for the position in question and . . . consistent with business necessity;"[15] or
>
> (3) Adverse employment action—demonstrating that an adverse action occurred because of a person's disability.[16]

This Note primarily focuses on (1) and (3), but discusses (2) below in relation to one scholar's interpretation of the essential functions inquiry.[17]

To prove a prima facie case of disability discrimination under the ADA, a plaintiff must show that (1) she has a disability; (2) she is qualified, with or without reasonable accommodation, to perform the essential functions of the position; and (3) the employer took an adverse action against the plaintiff because of the disability (or failed to make reasonable accommodations for the plaintiff).[18] This Note focuses on the "disability" and "qualified individual" prongs, as courts have primarily used these two prongs to limit plaintiffs' access to relief under the ADA and ADAAA.

Despite a congressional mandate prohibiting discrimination on the basis of disability, federal courts have eroded the protections of the ADA in a series of decisions that interpreted "disability" narrowly. Beginning with *Sutton v. United Airlines, Inc.*, the Supreme Court severely limited the scope of the ADA by interpreting "disabled" to exclude individuals whose disability could be corrected through the use of mitigating measures, such as eyeglasses or medications.[19] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court continued to

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13. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12117).

14. 42 U.S.C. § 12112(b)(5)(A).

15. *Id.* § 12112(b)(6).

16. The general rule under 42 U.S.C. § 12112(a) is as follows: "No covered entity shall discriminate against a qualified individual on the basis of disability 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." Discrimination based on membership in the protected classification is determined pursuant to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

17. *See* discussion of Michael C. Subit, *infra* note 126.

18. 42 U.S.C. §§ 12111–12112.

19. Sutton v. United Airlines, Inc., 527 U.S. 471, 475, 482 (1999) (holding that twin sisters with severe myopia did not qualify as "disabled" because their vision could be corrected by wearing glasses).

narrow the ADA by holding that the term "disability" should be "interpreted strictly to create a *demanding* standard for qualifying as disabled" under the statute.[20] The Court further held that to be substantially limited in performing a "major life activity," the impairment must prevent an individual from doing activities that are of "central importance" in most people's daily lives.[21] For instance, activities like standing or lifting were not considered "central" to most people's daily lives; therefore, difficulties walking or the inability to lift weights of a certain amount were not considered disabilities. In so holding, the Court referenced the ADA of 1990, where Congress found that some 43 million Americans have a disability, and reasoned: "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."[22] In addition to the determination that the activity must be central to most people's daily lives, the Court held that the impairment must also be "permanent or long term."[23]

Because of this restrictive definition of "disability," between 1990 and 2008, plaintiffs rarely qualified as disabled, and employers won summary judgment in more than ninety percent of all disability claims.[24] Moreover, litigants that could succeed were caught in a particularly difficult situation because even if they qualified as disabled under this extreme limitation, their own disabilities were likely so severe as to render them "unqualified" for the positions they sought.[25]

B. The Americans with Disabilities Act Amendments Act of 2008

President George W. Bush signed the ADAAA into law in September of 2008.[26] Under the statute, the definition of disability is the same as that under the ADA.[27] According to the ADAAA, the term "disability" means

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20. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187, 197 (2002) (emphasis added) (holding that carpal tunnel syndrome did not qualify as a disability).

21. *Id.* at 198.

22. *Id.* at 197.

23. *Id.* at 198.

24. Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 Okla. L. Rev. 667, 692 (2010) (citing Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 Ala. L. Rev. 305, 306 (2008)).

25. Hillary K. Valderrama, *Is the ADAAA A "Quick Fix" or Are We Out of the Frying Pan and Into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 Hous. L. Rev. 175, 198 (2010) (quoting Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 Lab. Law. 417, 450 (2003)).

26. *See* Americans with Disabilities Amendments Act of 2008, H.R. 3195, 110th Cong. (2d Sess. 2008); *The Americans with Disabilities Act Amendments Act of 2008*, U.S. Equal Emp. Opportunity Commission, http://www.eeoc.gov/laws/statutes/adaaa_info.cfm (last visited June 9, 2015).

27. 42 U.S.C. § 12102(1) (2015).

"a physical or mental impairment that substantially limits one or more major life activities" of an individual.[28] An individual may also show she has a disability by having "a record of such an impairment," known as the "record-of" prong, or by "being regarded as having such an impairment," commonly referred to the "regarded-as" prong.[29] Legislative history indicates that Congress enacted the ADAAA to reject the Court's narrow interpretations of "disability" and "reinstat[e] a broad scope of protection to be available under the ADA."[30] This finding was codified in the definitional section of the ADA.[31] Some legal scholars have described these amendments as "instructional," in the sense that the ADAAA directs courts to "interpret the *same* statutory language in a different way."[32]

The statute attempts to achieve a broad scope of coverage in three ways. First, the ADAAA indicates that courts should construe the definition of disability in order to give "broad coverage" to affected individuals.[33] The direction to interpret "disability" broadly, along with the provision of a non-exhaustive list of conditions that qualify as "major life activities,"[34] are direct responses to the Supreme Court's restrictive interpretations of the ADA, and the Equal Employment Opportunity Commission's ("EEOC") previous regulations, which set the burden of proof for proving "substantially limits" higher than Congress intended.[35] Finally, as a rejection of the *Sutton* standard,[36] the ADAAA provides that courts should not consider mitigating measures, such as medication or assistive devices, to determine whether an impairment substantially limits a major life activity.[37]

Second, the amendments make it easier for an individual to qualify as disabled because it provides a non-exhaustive list of what constitutes a major life activity.[38] For instance, an impairment will limit a major life activity if it affects "seeing, hearing, eating, sleeping, [or] walking" or affects

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28. *Id.* §12102(1)(A); *see* 29 C.F.R. § 1630.2(g)(1)(i) (2015).

29. 42 U.S.C. § 12102(1)(B)–(C). This Note focuses on the "actual disability" prong of the ADA.

30. H.R. REP. No. 110-730, pt. 1, at 2 (2008).

31. 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

32. Kate Webber, *Correcting the Supreme Court—Will it Listen? Using the Models of Judicial Decision-Making to Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L.J. 305, 352 (2014).

33. 42 U.S.C. § 12102(4)(A).

34. *Id.* § 12102(2).

35. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(6), 122 Stat. 3553, 3554.

36. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 479 (1999) (noting that "no agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA").

37. 42 U.S.C. § 12102(4)(E)(i).

38. *Id.* § 12102(2)(A).

major bodily functioning, such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[39] According to Congress, the broad definition of what qualifies as a major life activity was intended to reject the *Toyota* standard, which required that the impaired activity be of "central importance" to most people's daily lives.[40]

Third, unlike the ADA, which only delegated *procedural* rulemaking authority to the EEOC, the ADAAA explicitly delegated broad rulemaking authority to the EEOC to interpret the definition of "disability" and enact rules of construction in order to carry out the goals of the Act.[41] As a result, the EEOC has issued a series of regulations that expand what qualifies as an "impairment."[42] The EEOC additionally stated that the "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting,"[43] eliminating any suggestion that an intermittent or short-term impairment does not qualify as a disability.

With this expanded definition of disability, some legal scholars thought that the ADAAA would open the floodgates of litigation by allowing claims by persons who "do not have a disability under any rational interpretation of that term."[44] Human resources professionals likewise argued that the amendments would "radically expand the ADA's coverage" by including people with minor impairments.[45] Other legal scholars predicted that a broadened definition of disability would make it "less likely that employers [would] be able to succeed on a motion for summary judgment."[46]

Under the qualified individual prong, an employee must (1) "satisf[y] the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills,

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39. *Id.* § 12102(2)(A)–(B).

40. Americans with Disabilities Act Amendments Act of 2008 § 2(b)(4).

41. 42 U.S.C. § 12205a.

42. 29 C.F.R. § 1630.2(h)(1) (2015) (an impairment includes "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine [systems]").

43. *Id.* § 1630.2(j)(1)(ix).

44. *See, e.g.*, Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366 (2010).

45. Memorandum from Jeffrey C. McGuineess, President, HR Policy Ass'n to HR Policy Prime Representatives (Sept. 28, 2007), https://www.law.georgetown.edu/archiveada/documents/1HRPolicyMemo_000.pdf).

46. *See, e.g.*, Evan Sauer, *The ADA Amendments Act of 2008: The Mitigating Measures Issues, No Longer a Catch-22*, 36 OHIO N.U. L. REV. 215, 236 (2010).

licenses, etc."[47] and (2) be able to "perform the *essential functions* of the position held or desired, with or without reasonable accommodation."[48] The purpose of this essential functions inquiry, according to the EEOC, is to ensure that individuals with disabilities are not denied jobs they are able to perform because they cannot perform marginal functions of the position.[49] A job function may be essential if (1) "the reason the position exists is to perform that function" or (2) there are a "limited number of employees available among whom the performance of that job function can be distributed."[50] Thus, for instance, a truck driver who must drive a truck across state lines and cannot obtain an appropriate commercial license from the Department of Transportation ("DOT") may not be a "qualified individual" under the statute.

C. The Broader Picture: Explaining Judicial Hostility

Before turning to current case law under the ADAAA, this Subpart looks at the work of legal scholars who have attempted to explain why courts have been hostile to the ADA, and how these theories may apply to the ADAAA as well. Each theory attempts to provide a framework for understanding, and thus rectifying, judicial hostility to disability discrimination claims

Kevin M. Barry describes the ADA as a "micromanager" statute because it attempted to answer all of the questions surrounding its implementation in detail, whereas its counterpart and predecessor, the Rehabilitation Act of 1973,[51] was a "delegating" statute that expected courts to fine tune the ambiguities.[52] The Rehabilitation Act applies to federal employers, and violations of section 504 are evaluated under the same standard as the ADA.[53] Thus, "where section 504 of the Rehabilitation Act is cursory, the ADA is rife with detail."[54] With such a comprehensive statutory scheme, Barry posits that it is "appropriate for a court to rely solely on the text" of the statute, without reference to legislative objectives or interpretive guidance.[55] However, as a natural outcome of the ADA being a micromanager statute, courts would look no further than the text of the statute in construing its terms. On this

47. Interpretive Guidance on Title 1 of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(m) (2015).

48. *Id.* (emphasis added).

49. *Id.*

50. *Id.* § 1630.2(n)(2).

51. 29 U.S.C. § 794 (2015).

52. Kevin M. Barry, *Exactly What Congress Intended?*, 17 Emp. Rts & Emp. Pol'y J. 5, 16–17 (2013).

53. 29 U.S.C. § 791(f) ("The standards used to determine whether this section has been violated in a complaint alleging . . . employment discrimination under this section shall be the standards apply under title I of the Americans with Disabilities Act of 1990.").

54. Barry, *supra* note 52, at 18.

55. *Id.* at 17.

view, the observed hostility to the ADA can be explained by the fact that courts have relied primarily on the limited guidance of the statute on the particular question of what qualifies as a "disability," without looking to the interpretations and regulations promulgated by the EEOC.[56]

Various other scholars posit a more transsubstantive theory of why courts have been unreceptive to the ADA—namely, the courts have been hostile to employment discrimination statutes *writ large*.[57] Courts may be ideological activists on questions of equality and discrimination because these issues sometimes overlap with constitutional questions of equal protection, the latter of which is the province of the courts.[58] With the disabled in particular, it is interesting to note that decisions limiting the reach of the ADA mirror the refusal to afford heightened scrutiny to laws that affect people with disabilities.[59] In this context, Deborah A. Widiss notes the phenomenon of what she terms "shadow precedents."[60] Widiss argues that courts

> narrowly construe the significance of congressional overrides and instead rely on the prior judicial interpretation of statutes as expressed in overridden precedents. Thus, for example, although Congress clearly disagreed with a Supreme Court decision holding that pregnancy discrimination is not sex discrimination, lower courts noting that the statutory language of the override only explicitly references "pregnancy, childbirth, or related medical conditions," continue to apply the reasoning employed by the Court in that overriden case when faced with sex discrimination claims in other contexts.[61]

Widiss explains how courts have narrowly construed the Pregnancy Discrimination Act ("PDA"),[62] which explicitly amended Title VII to include in the definition "because of sex" that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes."[63] For instance, Widiss notes that courts have followed the reasoning of the Supreme Court in *General Electric Co. v. Gilbert*[64] when they hold that breastfeeding is not within the strict meaning of the PDA. These courts reason that because the express language of the PDA does not include breastfeeding, Title VII does not cover policies that draw distinctions among persons on the basis

56. *Id.*

57. *See, e.g.*, Webber, *supra* note 32, at 351; Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 537 (2009).

58. *Id.*

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

60. Widiss, *supra* note 57, at 512.

61. *Id.*

62. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

63. *Id.*

64. 429 U.S. 125 (1976).

of breastfeeding.[65] This is despite the fact that the PDA was enacted to reject the reasoning of *Gilbert* and to make clear that "distinctions based on pregnancy are per se violations of Title VII."[66]

From a normative perspective, courts may express resistance to disability claims because these claims challenge entrenched workplace norms, such as *how* particular job functions should be completed. Joan Williams, writing in the context of gender discrimination, describes the background norm of the "ideal worker"—a powerful norm that limits workplace equality for women.[67] She posits that an "ideal worker" in the United States would be male, work eight hours per day plus overtime, and have no children.[68] Courts may assume, for instance, that physical presence at the job site is necessary, without requiring proof that the requirement is essential to the specific job, even in the face of countervailing evidence.[69] Employers and the courts may view the ADA as a "preferential treatment law that forces employers to ignore employee qualifications and economic efficiency."[70] Critics thus view the ADA as a law designed to give *special* treatment to people with disabilities, rather than one that takes these background norms into account.[71] This Note proposes that the workplace norms described by Williams and others are a normative grounding for the workplace policies—such as attendance, work schedules, and methods of performing particular job functions—that the ADA intended to challenge through the reasonable accommodation process.[72] This Note argues that courts often instinctively use these very norms in granting deference to employers on the question of what constitutes an essential function; however, courts and the ADA will only make inroads on workplace accommodations for disabled persons through considering these norms in the essential functions analysis.

With an understanding of the history of the ADA, the ADAAA, and a potential understanding of why courts have been hostile to the ADA, the next Part of this Note turns to the ADA case law in the post-ADAAA world. This Note will then explain how some current judicial

65. Widiss, *supra* note 57, at 554 (citing various post-PDA cases that follow the reasoning of *Gilbert*).

66. H.R. REP. NO. 95-948, at 3 (1978).

67. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1597 (1991).

68. *Id.* at 1569.

69. *See, e.g.*, McMillan v. City of New York, 711 F.3d 120, 123 (2d Cir. 2013).

70. *See generally* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior & the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 377 (1997).

71. *Id.*

72. *See, e.g.*, 136 CONG. REC. 11, 451 (1990) (citing Prewitt v. U.S. Postal Serv., 662 F.2d 292 (5th Cir. 1981) (noting that an employer erroneously required the use of both arms when the *function* of the position—lifting and carrying mail—could nonetheless be carried out by the employee who only had one arm).

interpretations of the qualified individual prong of the prima facie case—namely, whether the plaintiff can perform the essential functions of the job—bar a plaintiff's ability to successfully bring a discrimination claim.

II. Courts Have (Almost) Universally Embraced an Expansive Definition of Disability

Courts have almost universally embraced the expansive definition of disability under the ADAAA.[73] As an example, since the passage of the ADAAA, courts have newly acknowledged Type II diabetes[74] and sleep apnea[75] as "disabilities" under the Act. Noting the expansive coverage of the ADAAA, for instance, the District Court for the Eastern District of Pennsylvania found fibromyalgia to be a disability, even though the course of the disease is episodic and only appears in wet or rainy weather.[76] At least one commentator looking at district court decisions through 2012 indicated that federal district courts are in fact carrying out the objectives of the ADAAA.[77]

Nonetheless, several trial courts have incorrectly applied pre-ADAAA case law to current disability claims.[78] It is unclear whether the Courts of Appeals will allow these decisions to stand, as many are just beginning to interpret the ADAAA, and not every circuit has had a chance to consider the ADAAA.[79] One of the first interpretations of "disability" under the

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73. *See* Barry, *supra* note 52, at 28–31 (noting that lower courts have found a wide array of impairments to be disabilities under the ADAAA, including "alcoholism, ankle injury, anxiety disorder, auto-immune disorder, back injury, bipolar disorder, brain tumor, broken legs, cancer, carpal tunnel syndrome, depression, diabetes, eating disorder, fibromyalgia, Friedreich's Ataxia (a degenerative neurological condition), gastrointestinal problems, heart disease, HIV infection, insomnia, monocular vision and other vision problems, multiple sclerosis, obesity, obsessive compulsive disorder, pain in hands, joints, and hip, psoriatic arthritis, sleep apnea, stuttering, and TIA (mini-strokes)").

74. Szarawara v. Cnty. of Montgomery, No. 12-5714, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013).

75. Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *5–6 (W.D. Pa. Feb. 24, 2012).

76. Howard v. Pa. Dep't of Pub. Welfare, No. 11-1938, 2013 WL 102662, at *11, 12 (E.D. Pa. Jan. 9, 2013); 29 C.F.R. § 1630.2(h)(1) (2015).

77. *See* Barry, *supra* note 52.

78. *Compare* Fierro v. Knight Transp., No. EP-12-CV-00218-DCG, 2012 WL 4321304, at *3 (W.D. Tex. Sept. 18, 2012) ("[M]erely having cancer—which, though, may be an 'impairment' . . . is not enough to support an inference that Fierro has an actual disability."), *with* 42 U.S.C. § 12102(2)(B) (2015) (Major life activities include "the operation of a major bodily function, including . . . normal cell growth . . . ."), *and* 11 Civ. 2450 (HB) National Disability Law Reporter (Jan. 10, 2012) (holding that under the ADAAA, "[c]ancer will 'virtually always' be a qualifying disability because abnormal cell growth is a limitation on a major bodily function"). Moreover, the term "substantially limits" ought to be construed expansively. EEOC regulations provide that "[a]n impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity *as compared to most people in the general population*." 29 C.F.R. § 1630.2(j)(1)(ii) (emphasis added). Thus, cancer should qualify as a disability under this definition.

79. Part of the reason for the delay in cases considering the ADAAA is that the amendments did not take effect until January 1, 2009, and courts construed this to mean that the ADAAA did not apply retroactively. *See* Price v. City of New York, No. 13-1533, 2014 WL 983506, at *121 (2d Cir. 2014); Verhoff v. Time Warner Cable, Inc., 299 F. App'x 488, 494 (6th Cir. 2008); Levy *ex rel.* Levy v.

ADAAA came from the Fourth Circuit in *Summers v. Altarum Institute*.[80] There, the court was faced with an ambiguity in the statute, specifically whether a temporary impairment qualified under the disability prong.[81] Noting that Congress intended the ADAAA to apply broadly[82] and that the EEOC regulations should be given deference,[83] the court held that even temporary impairments would qualify for protection if they substantially limited a life activity.[84]

Similarly, panels of the Third, Seventh, and Eleventh Circuits have broadly interpreted "disability" under the ADAAA. In March 2014, the Eleventh Circuit, noting the expansive definition of disability, reversed a lower court order holding that a degenerative back disease was not a disability.[85] In August 2014, the Third Circuit similarly upheld a jury verdict for a plaintiff who suffered from alcoholism and was terminated following her admission to a drug rehabilitation program.[86] Finally, in December 2013, the Seventh Circuit reversed a lower court order that had concluded that high blood pressure with intermittent blindness was not a disability because it was "transitory" and "suspect."[87] In reversing this order, the circuit court held that high blood pressure itself, even without loss of eyesight, was a disability under the ADAAA because it affects circulatory function, which is a major life activity.[88] Moreover, the court determined that it was irrelevant that the plaintiff could control his high blood pressure with medication because mitigating measures are not relevant to the existence of a disability under the ADAAA.[89]

Hustedt Chevrolet, No. 05-4832(DRH)(MLO), 2008 WL 5273927, at *4 n.2 (E.D.N.Y. Dec. 17, 2008); Gibbon v. City of New York, No. 07 Civ. 6698(NRB), 2008 WL 5068966, at *5 n.47 (S.D.N.Y. Nov. 25, 2008); Kiesewetter v. Caterpillar Inc., 295 F. App'x 850, 851 (7th Cir. 2008); Parker v. ASRC Omega Natchiq, No. 6:08-CV-00583, 2008 WL 4974584, at *5 (W.D. La. Nov. 20, 2008), *aff'd*, 2009 WL 2903707 (5th Cir. Sept. 11, 2009).

80. Summers v. Altarum Inst., Corp., 740 F.3d 325 (4th Cir. 2014).

81. *Id.*

82. *See* 42 U.S.C. § 12102(4)(A) (2015).

83. *Summers*, 740 F.3d at 329, 331–33 (citing 29 C.F.R. § 1630.2(j)(1)(i)).

84. *Id.* at 332.

85. Mazzeo v. Color Resolutions Int'l, LLC, 746 F.3d 1264, 1269–1270 (11th Cir. 2014) (holding that a doctor's affidavit stating that the plaintiff's herniated disc limited his "ability to walk, bend, sleep, and lift more than ten pounds" was sufficient to survive summary judgment under "the new standards and definitions put in place by the ADAAA").

86. *See* Diaz v. Saucon Valley Manor Inc., 579 F. App'x 104, 109 (3d Cir. 2014).

87. Gogos v. AMS Mech. Sys., Inc., 737 F.3d 1170, 1171 (7th Cir. 2013). The court also noted, without deciding, that temporary an impairment that may be eliminated by surgical intervention may not qualify as a disability.

88. *Id.* at 1173.

89. *Id.* The ADAAA provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4)(E)(i) (2015). This explicitly overrides the Court's reasoning in *Sutton v. United Airlines, Inc.*, which held that if a person's impairment is *corrected*, it does not substantially limit a major life activity, and therefore it cannot be a disability. 527 U.S. 471, 482–83 (1999).

Thus, the several circuit courts that have considered what counts as a disability in the post-ADAAA world, along with a number of district court decisions saying the same, suggest that the majority of courts have adopted a broad interpretation of "disabled" under the ADAAA. As a result of the broadened definition of "disabled," courts are now more willing to assume that a plaintiff is disabled—for purposes of a motion to dismiss—and allow the case to proceed to discovery.[90]

III. Continuing Hurdles for Plaintiffs with Disabilities and the Essential Functions Inquiry

Despite these successes, disability discrimination claims still face early dismissal on the basis that the plaintiff failed to satisfy the "qualified individual" prong of her prima facie case.[91] Specifically, courts have dismissed claims under the theory that employees are not "qualified individuals" under the ADAAA (and pre-ADAAA cases where courts reached this question) because their disability makes them unable to perform the essential functions of their current or desired job.[92] When making these decisions, two factors weigh against plaintiffs. First, the employee carries the burden of proving she is qualified. Second, courts defer to the employer's judgment as to the employee's qualified status. This process puts the plaintiff's disabled status on trial for a second time—the first being the court's determination of whether she is indeed disabled—which frustrates congressional intent to create broad protections for people with disabilities.

Deference to an employer's judgment about essential job functions severely limits the success of a plaintiff's claim because it prevents the employee from proving the qualified individual prong of her prima facie case. According to one empirical study, whereas employers previously won summary judgment on the basis of the disability prong and less frequently on the basis of the qualified individual prong, employers now win summary judgment much more frequently on the basis of the candidate's qualified status:

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90. *See, e.g.*, Barrilleaux v. Mendocino Cnty., No. 14-cv-01373-TEH, 2014 WL 3726371, at *5 (N.D. Cal. July 25, 2014).

91. Borrowed from the Title VII burden-shifting framework, the prima facie case requires a plaintiff to show that (1) she met the qualifications of the job; (2) she suffered an adverse job action; and (3) the adverse action occurred under circumstances giving rise to an inference of discrimination based on membership in the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

92. *See, e.g.*, EEOC v. Ford Motor Co., 782 F.3d 753, 762–63 (5th Cir. 2015); Spears v. Creel, 2015 WL 1651646, at *5–6 (11th Cir. Apr. 15, 2015).

> [E]mployers thus far have achieved more favorable outcomes in the post-amendment rulings on the qualified status issue. In the pre-amendment decisions, courts granted summary judgment to employers in 47.9% of the outcomes, but this figure jumped to 69.7% in the post-amendment outcomes, representing a more than 21 percentage point increase.[93]

This study suggests that those disabled plaintiff-employees are not moving beyond the summary judgment stage on the basis of the qualified individual prong, which seems to frustrate a central purpose of the ADAAA: to refocus the attention of courts to the issue of discrimination and, thus, the reasonable accommodation process.[94] The study found that of 127 post-ADAAA cases, plaintiffs' *overall* success increased 7.7 percent compared to pre-ADAAA cases;[95] however, the success of disability claims overall would be even higher if not for the concomitant increases in summary judgment on the basis of the qualified individual analysis.[96]

Even if plaintiffs can demonstrate that they have a disability, the barrier is whether, given their disability, they are a "qualified individual." As a reminder, the ADAAA defines a "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions" of the job.[97] The EEOC regulations outline seven non-exclusive factors to determine what qualifies as an "essential job function."[98] Many courts, however, focus almost exclusively on two factors:

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93. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067 (2013).

94. *See* 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008) (the issue under the ADAAA is whether discrimination occurred).

95. Befort, *supra* note 93, at 2069.

96. *Id.* at 2070.

97. 42 U.S.C. § 12111(8) (2015) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."). The statute provides an "undue hardship" defense that excuses an employer from making an accommodation if it "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

98. The regulation reads:

> Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (viii) The current work experience of incumbents in similar jobs.

the employer's judgment as to essential functions and written job descriptions prepared by the employer.[99]

Scholars have warned that pre-ADAAA cases interpreting the "essential functions" requirement could create "judicial backlash" against disabled plaintiffs seeking to remedy discrimination under the Act.[100] As an example of the way courts may interpret the "essential functions" requirement as a gatekeeper for ADA reasonable accommodation claims, one scholar points to *EEOC v. Picture People, Inc.*[101] There, a deaf employee was hired as a "performer" for a photography studio to handle "customer intake, sales, portrait photography, and laboratory duties."[102] When Master Photographer Libby Johnston was hired to improve the store, she noted that the plaintiff's "written communications [were] awkward, cumbersome, and *impractical*."[103] Despite only positive reviews of her *performance*, including her success selling photo packages, and criticism directed only at the *method* by which she accomplished those duties,[104] the studio assigned her almost exclusively to the lab, cut her hours, and eventually terminated her in October 2008.[105] The Tenth Circuit ultimately upheld her termination, reasoning that *verbal* communication was an essential function of the job, even though the plaintiff could communicate through other mediums.[106] In particular, the court found it relevant that (1) "strong verbal communication skills" were stated as a requirement of the employee's position and (2) the employee's nonverbal communication skills did not provide her with the "fast, efficient" ability to direct children while taking their pictures or the ability to sell photo packages through verbal communication.[107] The court found her inability to communicate verbally to be a death knell for her qualified status, especially since her employer only allowed twenty minutes for each photo session.[108]

The *Picture People* dissent argued that issues of material fact precluded summary judgment for three reasons: First, no job descriptions or testimony showed that strong verbal communication skills were required.[109] Second, the majority ignored evidence that the plaintiff did *in fact* perform the

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29 C.F.R. § 1630.2(n)(3) (2015).

99. *See infra* notes 133–35 and accompanying text.

100. *See* Amy Knapp, Comment, *The Danger of the "Essential Functions" Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 728 (2013).

101. *Id.*; EEOC v. Picture People, Inc., 684 F.3d 981, 983–84, 986 (10th Cir. 2012).

102. *Picture People, Inc.*, 684 F.3d at 984.

103. *Id.* (internal citation and quotation marks omitted).

104. *Id.* at 999 (describing the plaintiff's "'huge sale' to the Krol family").

105. *Id.* at 985.

106. *Id.* at 983–84 (discussing fact that plaintiff could, among other means, communicate by "writing notes, gesturing, pointing, and miming").

107. *Id.* at 986.

108. *Id.*

109. *Id.* at 998 (Holloway, J., dissenting).

essential functions of her job.[110] Third, although verbal communication was a *useful* method of achieving an essential function of the position, namely communication, it was not *itself* an essential function.[111] To support its argument, the dissent noted legislative history indicating that the essential functions requirement was intended to focus "on the desired result [of the function] rather than the *means* of accomplishing it."[112] This case supports unthinking deference to an employer's preference for performing a job function in a particular way, which is clearly contrary to congressional intent.

Thus, while *Picture People* is not demonstrative of a trend in the case law, it demonstrates that where a plaintiff is found or stipulated to be a person with disabilities, a court may nonetheless circumvent legislative intent by focusing on the qualified individual analysis and deferring to the employer's judgment as to essential job function. Indeed, courts often state explicitly that they defer to the employer's judgment. The Second Circuit, for instance, has stated that a court must give "substantial deference to an employer's judgment as to whether a function is essential to the proper performance of a job."[113] Likewise, the Seventh Circuit has stated that it "generally defer[s]" to an employer's determination of essential job functions.[114] Other Courts of Appeals have similarly held that written job descriptions are owed *substantial* deference.[115] Lower courts also take these courts at their word when they call for deference to an employer's judgment.[116] Indeed, even in cases overturning narrow employer-driven constructions of the essential functions inquiry, courts maintain the use of this language. It is hard to see what "considerable deference" to an employer's judgment entails if *both* a variety of factors ought to be considered *and* "no one listed factor will be dispositive."[117] Moreover, courts are now frequently bypassing the "disabled" analysis altogether, that is, *assuming* that *even if* the plaintiff is disabled, they are not a "qualified individual" because they cannot perform the essential functions of their job.[118]

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110. *Id.* at 999.

111. *Id.* at 998–99.

112. *Id.* (emphasis added) (citing Skerski v. Time Warner Cable Co., 257 F.3d 273, 280 (3d Cir. 2001)).

113. McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 98 (2d Cir. 2009).

114. Feldman v. Olin Corp., 692 F.3d 748, 755 (7th Cir. 2012).

115. *See, e.g.*, Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 786 (8th Cir. 2004) ("Eighth Circuit cases generally give deference to the employer's judgment of essential job functions, especially when staffing is problematic."); Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 683 (5th Cir. 1996) (noting that a written job description was entitled to substantial deference).

116. *See, e.g.*, McMillan v. City of New York, No. 10 CIV 4806(JSR), 2011 WL 5237285, at *3–4 (S.D.N.Y. Aug. 23, 2011), *rev'd*, 711 F.3d 120 (2d Cir. 2013).

117. *Id.* at 126 (citing Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995)).

118. *See, e.g.*, Beckner v. Tread Corp., No. 7:13CV00530, 2014 WL 6902328, at *6 (W.D. Va. Dec. 8, 2014) ("The court will assume, without deciding, for purposes of this analysis that Beckner can clear this first hurdle and carry his burden of establishing he had a disability as defined in the ADA.

The Tenth Circuit's decision in *Picture People* should be contrasted with a case where the court correctly analyzed the essential functions inquiry. In *Keith v. County of Oakland*, the Sixth Circuit held that summary judgment was improper where a deaf lifeguard applicant's job offer was revoked based on a doctor's speculation about the abilities of the deaf.[119] The plaintiff underwent a physical exam and the examining doctor stated that he was not qualified because he was deaf.[120] The plaintiff proffered evidence that he could communicate, and established through the affidavits of experts that the primary function of a lifeguard required attentiveness to visual cues, not auditory ones.[121] Accordingly, the court found that reasonable minds could differ on the question of whether a deaf person could perform the essential functions of the position.[122] Thus, the court correctly eschewed the employer's demand that all lifeguards communicate through auditory cues—instead, the essential functions inquiry properly focuses on the desired tasks and the purposes of those tasks; here, that is *effective communication to ensure safety of pool patrons*, and not *how* that communication occurs.

With this as a background, this Note will now turn to how courts have interpreted the essential functions analysis in cases decided under the ADAAA. These cases fall into two sometimes overlapping categories: courts that apply a presumption in favor of the employer's determination that certain job functions are essential despite congressional intent that courts determine whether those functions are *actually* performed in a particular job,[123] and those that do not give deference to an employer's determination of essential job functions, instead favoring an individualized inquiry. This Note argues that the latter approach, as exemplified by the

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Indeed, the thrust of this case is at the second step—whether Beckner can establish that he was able to perform the essential functions of the welding job.").

119. Keith v. Cnty. of Oakland, 703 F.3d 918, 920, 930 (6th Cir. 2013).

120. *Id.* at 923–24 ("Dr. Work failed to make an individualized inquiry. After Dr. Work entered the examination room and briefly reviewed Keith's file, he declared, 'He's deaf; he can't be a lifeguard.' Dr. Work made no effort to determine whether, despite his deafness, Keith could nonetheless perform the essential functions of the position, either with or without reasonable accommodation."). Compare this case with *Koessel v. Sublette County Sheriff's Department*, where a sheriff's deputy suffered a stroke and thereafter returned to work with some demonstrated irritability towards coworkers. 717 F.3d 736, 740 (10th Cir. 2013). There, the two doctors who examined the plaintiff found that his emotional problems "*could* interfere with several essential job functions." *Id.* at 744 (emphasis added). The court upheld the termination on the ground that the plaintiff failed to introduce evidence that he was able to or had actually performed under stressful situations. *Id.* While it is *possible* that this was similarly mere *speculation* about the plaintiff's abilities, the facts are less than clear, and there is no evidence that the doctors' medical opinions were issued with such brevity and lack of individualized attention as those in *Keith*.

121. *Keith*, 703 F.3d at 923–24.

122. *Id.* at 927.

123. *See* H.R. REP. NO. 101-485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (stating that "essential functions" are those that are "fundamental and not marginal" to the position).

approach of the Sixth Circuit in *Rorrer v. City of Stow*,[124] is correct in light of the purposes of the ADA.

A. Deference to the Employer

In cases decided under the ADA and the ADAAA, courts are split on how much deference to give an employer's determination of which job functions are essential. The statute itself provides that a written job description is "evidence" of essential job functions,[125] which some legal scholars[126] and courts[127] have interpreted to mean that Congress mandated *deference* to an employer's determination of what an essential job function is.[128] However, the House Report states that Congress rejected an amendment that "would have created a presumption in favor of the employer's determination of essential functions."[129] This demonstrates that Congress did not intend courts to *defer* to an employer's determination of what qualifies as an essential function. This conclusion is bolstered by the purpose behind the statute—remedying discrimination against people with disabilities, discrimination that ultimately stemmed from prejudgments about those disabilities. Indeed, a congressional report reads, in part:

> The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a *preconceived and often erroneous judgment about an individual's capabilities based on "labeling" of that person as having a particular kind of disability*.[130]

This demonstrates that Congress did not intend courts to apply a presumption in favor of employers when the statute only requires "consideration" of a job description as "evidence" of an essential function.[131] Moreover, a presumption in favor of what the employer deems to be an essential function would allow an employer to circumvent a purpose of the ADA, which is to "prohibit employers from requiring disabled employees to perform certain tasks that the law deems nonessential."[132]

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124. 743 F.3d 1025, 1039 (6th Cir. 2014).

125. 42 U.S.C. § 12111(8) (2015).

126. *See, e.g.*, Michael C. Subit, *Clear as Mud: The Law on Reasonable Accommodation with Respect to Qualification Standards* 14 (2013) (unpublished paper presented at the ABA's 2013 National Conference on Equal Employment Law), *available at* http://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/29_subit.authcheckdam.pdf.

127. *See, e.g.*, Feldman v. Olin Corp., 692 F.3d 748, 755 (7th Cir. 2012).

128. 29 C.F.R. 1630.2(n)(1) (2015) (emphasis added).

129. H.R. Rep. No. 101-485, pt. 3, at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 446.

130. H.R. Rep. No. 101-485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340 (emphasis added).

131. 42 U.S.C. § 12111(8) (2015).

132. Rorrer v. City of Stow, 743 F.3d 1025, 1043 (6th Cir. 2014).

Nonetheless, a handful of Courts of Appeals (in addition to the Tenth Circuit discussed above)—including the Eighth, Third, and Seventh circuits—have allowed the essential functions requirement to serve as a second bar to a plaintiff's ability to bring disability discrimination claims.[133] Two other Courts of Appeals, including the Ninth and Second Circuits,[134] have used similar reasoning in holding an "attendance" policy to be an essential function of the job; however, because these fall into a group of cases dealing explicitly with attendance policies and work schedules, these are included separately in the discussion below.[135]

1. The Eighth Circuit

Despite Congress' intent that the essential functions inquiry focus on job duties that are essential—meaning, fundamental[136]—the Eighth Circuit dismissed an employee's argument that being DOT qualified to drive was not an essential job function.[137] The plaintiff argued that DOT qualification was only required for the tangential (and rarely performed) activities of training new employees and driving delivery trucks.[138] According to the district court, although the job description mandated DOT qualification, the employee had not been required to regularly operate a vehicle for the company—this duty was so rare that upon his termination, the employee had gone more than a year without being asked to drive a delivery truck.[139] Rather than looking at the totality of the circumstances, including the amount of time the employee spent performing the function and the current work experience of incumbents in similar jobs, on appeal, the Court of Appeals concluded, as a matter of law, that DOT qualification was an essential function, relying on precedent finding that a similar position at a different location required such a qualification.[140] In so concluding, the court did not require any *current* evidence and effectively deferred to "the employer's judgment, and the experience and expectations" of the employer.[141] As another court put it:

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133. An empirical study notes that employers generally win summary judgment under the qualified individual prong of the prima facie case. *See* Befort, *supra* note 93, at 2067.

134. See discussion of *McMillan*, *infra* pp. 1511–14, where the Second Circuit implicitly overruled its prior decisions holding attendance to be an essential function. *See also* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012).

135. *See infra* Part III.C.

136. *See* H.R. REP. No. 101-485, pt. 2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (stating that "essential functions" are those that are "fundamental and not marginal" to the position); *see also Rorrer*, 743 F.3d at 1043 (stating that allowing an employer's judgment of "essential" to control "contradicts a central purpose of the ADA, which is to prohibit employers from requiring disabled employees to perform certain tasks that the law deems nonessential").

137. *See generally* Knutson v. Schwan's Home Serv., Inc., 870 F. Supp. 2d 685 (D. Minn. 2012).

138. *Id.* at 692.

139. *Id.*

140. Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 914–15 (8th Cir. 2013).

141. *Id.* at 915 (citing Dropinski v. Douglas Cnty., 298 F.3d 704, 708–09 (8th Cir. 2002)).

> An "essential" task, however, is not any task that an employee would feel compelled to perform if ordered to perform it by his or her employer. . . . That definition—"a task is essential if the employer orders it done"—contradicts a central purpose of the ADA, which is to prohibit employers from requiring disabled employees to perform certain tasks that the law deems nonessential.[142]

The fact that similar employees in the *past* were required to perform this activity[143] has little bearing on the essential functions question with regard to the current dispute about the essential functions of the position.

2. *The Third Circuit*

In *Yovtcheva v. Philadelphia Water Department*, a case from the Third Circuit, the plaintiff-chemist suffered from asthma.[144] It was undisputed that the plaintiff was disabled under the actual disability prong of section 12101.[145] A chemical in the workplace made it difficult for her to breathe.[146] The employer attempted a reasonable accommodation by fitting the plaintiff with a full-face respirator, although she was unable to use it because she suffered from a panic attack while wearing it.[147] Nonetheless, the Third Circuit held that the plaintiff was not a qualified individual under the ADA because she refused to accept a partial-face respirator.[148] The court concluded that such an accommodation could have "alleviated Yovtcheva's claustrophobia problems while protecting her from the effects of exposure to any organic solvents."[149] Thus, because she refused the second accommodation, the court found that she failed to establish the second prong of her prima facie case.[150] The court refused to consider the plaintiff's suggestion that a different solvent would have remedied her asthma attack and avoided subjecting her to the panic attacks that a respirator caused because, the court held, the employer is only required to offer *some* accommodation.[151] Although courts have generally held that disabled plaintiffs are not entitled to the reasonable accommodation of their preference,[152] requiring a plaintiff to accept an accommodation

142. Rorrer v. City of Stow, 743 F.3d 1025, 1043 (6th Cir. 2014).
143. *Id.*
144. Yovtcheva v. Philadelphia Water Dep't., 518 F. App'x 116, 120 (3d Cir. 2013).
145. *Id.*
146. *Id.*
147. *Id.* at 121.
148. *Id.* at 121–22.
149. *Id.*
150. *Id.* at 122.
151. *Id.* at 122, 124.
152. *See, e.g.*, Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) ("An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation."); Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035 (2d Cir. 1993) ("[A] reasonable accommodation generally does not require an employer to reassign a disabled employee to a different position.").

that was in fact not an accommodation at all, in light of her other impairment, is unreasonable. Thus, at a minimum, there appears a genuine question of material fact whether the plaintiff was a "qualified individual" and whether the employer offered a reasonable accommodation.

3. Lower Courts and the Seventh Circuit as Exemplars

Lower court decisions also demonstrate the determinative nature of the essential functions inquiry. For instance, in *Shell v. Smith*,[153] the plaintiff, an employee of the City of Anderson, suffered from a variety of disabilities, including "hearing and vision impairments and cognitive disabilities," all of which prevented him from obtaining a driver's license.[154] At the time, the plaintiff was working as a "Mechanic's Helper," a position that he had held for twelve years.[155] The plaintiff, also a vocal and politically active Democrat, was terminated when a Republican Mayor took office[156] "solely" because he did not possess a commercial driver's license ("CDL"), which was listed as required in the job description.[157] Following Seventh Circuit precedent, the district court held that the twelve-year "forgiveness"[158] of this job requirement did not establish a genuine issue of material fact as to whether a CDL was an essential function of the position. Indeed, the court "presumed" the employer's understanding controlled what constituted an essential function of the job and granted the defendant's motion for summary judgment.[159]

B. Individualized Inquiry: Getting the Essential Functions Requirement Right

Despite the above cases, some courts have held that the employer's job description is not controlling. One author has noted that "[e]ven though the employee ultimately bears the burden of persuasion regarding her qualifications, the courts have not blindly accepted employers' assertions that a function is 'essential.'"[160] Examples abound of district courts considering all relevant factors in determining essential job functions: One court has found that selectively timed enforcement of a so-called essential job function *can* be evidence that the function was not essential, but rather pretext for discrimination.[161] Another court considered evidence

153. Shell v. Smith, No. 1:13-cv-00583-JMS-MJD, 2014 WL 3895951 (S.D. Ind. Aug. 7, 2014.).
154. *Id.* at *3.
155. *Id.*
156. *Id.*
157. *Id.* at *3–4.
158. *Id.* at *5.
159. *Id.* at *6.
160. Valderrama, *supra* note 25, at 204.
161. Scavetta v. King Soopers, Inc., No. 10-cv-02986-WJM-KLM, 2013 WL 316019, at *3 (D. Colo. Jan. 28, 2013).

that an employee never performed a function, such as lifting, in determining whether that function was an essential function of the job.[162] Another held that despite a dispatch center's twenty-four hour staffing requirements, working night shifts was not necessarily an essential function of the dispatcher job.[163] These courts have properly followed Congress' intent that courts conduct a broad, fact-intensive inquiry to determine what an "essential function" of a particular job is.[164]

The Sixth Circuit recently explained a central problem with deference to the employer's judgment as to the essential functions. The court stated:

> If an employer's judgment about what qualifies as an essential task were conclusive, an employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is essential, avoid the clear congressional mandate that employers make reasonable accommodations. . . . Written job descriptions are also not dispositive.[165]

The court emphasized that the qualified issue could not be decided separately from the individualized inquiry.[166] For those who request an accommodation, a good faith interactive process is required to (1) identify the limitations imposed by a disability and (2) ensure that applicants and employees are not disqualified based on "stereotypes and generalizations about a disability, but based on the actual disability and the effect that disability has on the particular individual's ability to perform the job."[167] This interpretation is more consistent with the purposes of the ADAAA because it emphasizes the need for *changes* in the workplace rather than presumptively favoring an employer's judgment of what qualifies as an essential function. Moreover, this interpretation provides an individualized assessment of the individual employee's limitations by contextualizing the employee's specific limitations within the particular workplace when determining the qualified status issue.

In April 2014, the Eleventh Circuit issued a splintered opinion illustrating that an employer's judgment about the essential functions of a job is now a touchstone under the ADAAA.[168] This opinion in *Samson v. Federal Express Corporation* is the first Court of Appeals decision to reverse summary judgment on the essential functions inquiry in the post-

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162. Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 998 n.129 (W.D. Tex. 2012) (crediting an employee's testimony that she *never* lifted more than forty pounds, despite a job description stating that lifting and carrying over forty pounds would be required occasionally).

163. Szarawara v. Cnty. of Montgomery, No. 12-5714, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013) (noting that "given the fact-intensive nature of the issue, it would be inappropriate at this stage for the Court to decide whether working night shifts is an essential function of Plaintiff's job").

164. *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 340.

165. Rorrer v. City of Stow, 743 F.3d 1025, 1039 (6th Cir. 2014) (internal quotation marks omitted) (citing Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1258 (11th Cir. 2007)).

166. *Id.*

167. *Id.* at 1040 (citing Keith v. Cnty. of Oakland, 703 F.3d. 918, 923 (6th Cir. 2013)).

168. Samson v. Fed. Express Corp., 746 F.3d 1196, 1201 (11th Cir. 2014).

ADAAA landscape.[169] The court held that there was a genuine issue of material fact as to whether Samson, a vehicle mechanic with diabetes, was a qualified individual under the statute.[170] Federal Express ("FedEx") revoked Samson's job offer for a technician position after he failed a DOT medical certification, making insulin-dependent diabetics ineligible per FedEx policy.[171] The court correctly held that test driving delivery trucks is a marginal function of the technician position, and therefore being DOT qualified to drive was not an essential function of the job.[172] In holding that the essential functions inquiry was a question for the jury, the court relied on the fact that FedEx Technicians do not perform this function with any regularity and that the employee who was eventually hired only test drove trucks three times over the course of three years.[173] Specifically, the court stated that if a job description were conclusive, an employer could "avoid the clear congressional mandate" to make a reasonable accommodation simply by asserting that a function is essential.[174] The dissent concluded that summary judgment would have been proper because the employer had deemed occasional test driving to be an essential function of the job, and therefore, it was an essential function as a matter of law.[175] The main point of contention between the dissent and the majority was whether driving, although *infrequent*, could be an *essential* requirement of the technician position.[176]

Similar to the Eleventh Circuit, the Fifth Circuit recently refused to provide absolute or substantial deference to an employer's job description in determining essential functions.[177] The court held that a fact finder must determine whether a function is essential on a case-by-case basis.[178] Thus, there is a developing emphasis on the essential functions inquiry among the courts, a burgeoning split on interpreting the requirements of the "qualified individual" analysis, and a dispute pertaining to just how much deference is owed to an employer's judgment regarding essential job functions. On one end of the spectrum is the Seventh Circuit, which presumes that those functions listed in an employer's job description are essential;[179] at the other end of the spectrum are courts like the Sixth

169. *Id.* at 1202.

170. *Id.* at 1197, 1202.

171. *Id.* at 1198–99.

172. *Id.* at 1202.

173. *Id.* at 1202 (noting that the average hours that a Florida-based FedEx technician test drives is 3.71 hours per year, an insignificant portion of their time).

174. *Id.* at 1201 (citing Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1258 (11th Cir. 2007)).

175. *Id.* at 1206 (Hill, J., dissenting).

176. *Id.*

177. EEOC v. LHC Grp., Inc., 773 F.3d 688, 697–98 (5th Cir. 2014).

178. *Id.* at 698.

179. *See* Feldman v. Olin Corp., 692 F.3d 748, 755 (7th Cir. 2012); *see also* discussion of *Shell v. Smith*, *supra* Part III.A.3.

Circuit in *Rorrer v. City of Stow*, which eschew rigid reliance on the employer's judgment because of the possibility that this will lead to circumvention of the purposes of the ADA.[180]

C. Workplace Policies as Essential Functions: Attendance and Leave Policies

Finally, and intertwined with the above discussion, workplace policies concerning attendance and leaves of absence are likely to be found essential functions of a position, because regular attendance may be necessary for a variety of reasons, such as building team morale or because the job requires being physically on-site.[181] This may be true even where the employer has successfully modified or restructured a particular job to allow the employee to continue working remotely.[182] For instance, courts have held that "on-site regular attendance" is an essential function of a variety of jobs, such as a nurse in the neonatal intensive care unit.[183] Such courts hold that "irregular attendance" can directly compromise essential job functions.[184] In *McMillan v. City of New York*, the Second Circuit reversed a lower court grant of summary judgment where an eleven-year veteran of the City of New York diagnosed with schizophrenia was unable to arrive "on-time" to work because his "morning medications ma[de] him 'drowsy' and 'sluggish.'"[185] At some point in 2008, after the employee had worked for the city for a decade, the employee's supervisor decided that she would enforce the city's policy of instituting progressive disciplinary action for "late arrivals."[186] In overturning the district court's decision, the Court of Appeals held that the "district court . . . relied heavily on its assumption that physical presence is 'an essential requirement of virtually all employment' and on the City's representation that arriving" by 10:15 in the morning was an essential function of the position.[187] Looking to the employee's actual job performance and the city's own policies, the court concluded that a genuine issue of fact existed with regard to whether arriving at a certain time was an essential function of the job.[188] Specifically,

180. Rorrer v. City of Stow, 743 F.3d 1025, 1051 (6th Cir. 2014).

181. Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237–38 (9th Cir. 2012).

182. *See, e.g.*, Minnihan v. Mediacom Commc'ns Corp., 987 F. Supp. 3d 918, 934–35 (S.D. Iowa 2013) ("From a labor-management policy standpoint, it would be perverse to *discourage* employers from accommodating employees with a temporary breathing space during which to seek another position with the employer . . . . An employer does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation, nor thereby acknowledge that the burden associated with a permanent accommodation would not be unduly onerous.").

183. *Samper*, 675 F.3d at 1238.

184. *Id.* at 1237.

185. 711 F.3d 120, 123 (2d Cir. 2013).

186. *Id.* at 124.

187. *Id.* at 126.

188. *Id.*

McMillan's supervisors approved or acquiesced to his late arrivals for a period of nearly ten years, and "the City's flex-time policy [that] permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential."[189] The court noted that "this case highlights the importance of a penetrating factual analysis."[190] Looking to this case as an example, other courts should similarly focus on whether such changes *can* be made, because it is only then that entrenched workplace norms will be challenged and courts will reach the question of whether such changes pose an undue hardship—a feature of the statute that courts do not presently reach with any predictability.[191]

Both pre- and post-ADAAA case law invoke the belief that attendance is generally an essential function of a job.[192] However, this outcome threatens protection under the ADAAA because people with disabilities may often require leaves of absence or flexible scheduling for medical care.[193] Moreover, a blanket attendance policy contravenes the demands of an individualized assessment under the ADAAA.[194]

When an employer changes their attendance policy to accommodate a person with disabilities, courts have improperly treated that as a "restructuring" of the position that has no bearing on whether attendance is *actually* an essential function. In *Minnihan v. Mediacom Communications Corp.*, the court granted summary judgment in favor of the employer, who had attempted to accommodate the plaintiff by rearranging her work schedule to allow her to avoid particular tasks.[195] The court found that "[t]o rule otherwise would discourage employers from making such undertakings."[196] However, under the plain language of the statute, the primary inquiry is whether the *reasonable accommodation* poses an *undue*

189. *Id.*

190. *Id.*

191. *See* 42 U.S.C. § 12111(10) (2015) (defining "undue hardship" and factors that courts should consider in determining whether an accommodation imposes an undue hardship).

192. *See* SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 171 (2002) ("Many courts have decided a variety of very different ADA claims with the simple assertion that regular, predictable attendance at work is an essential element of the job as a matter of law, and an employee who cannot fulfill that requirement is not otherwise qualified for employment. These decisions have been made without the benefit of further factual inquiry or a trial."); *see also* EEOC v. Ford Motor Co., 782 F.3d 753, 762–63 (6th Cir. 2015) (en banc) (holding that attendance is an essential function as a matter of law for "most jobs"); *id.* ("[It is better] to follow the commonsense notion that non-judges (and to be fair to judges, our sister circuits) [and] hold: Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.").

193. STEFAN, *supra* note 192, at 172.

194. 29 C.F.R. § 1630.2(j)(1)(iv) (2015) ("The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.").

195. Minnihan v. Mediacom Commc'ns Corp., 987 F. Supp. 2d 918, 934 (S.D. Iowa 2013).

196. *Id.*

hardship.[197] The court appears to conclude that because an employer *deems* a function essential such restructuring is unreasonable, and therefore, it never addresses whether the accommodation imposes an undue hardship.

Arguably, where the employer makes a restructuring of a workplace policy, especially for an extended period of time, this *is* evidence that the position can be restructured *regardless* of whether it impacts the likelihood that employers will willingly make such changes. Courts give a "significant degree of deference to an employer's business judgment about the necessities of a job,"[198] even when the inquiry should be what *is a necessary* or *fundamental function*. This allows employers to circumvent "a central purpose of the ADA, which is to prohibit employers from requiring disabled employees to perform certain tasks that the law deems nonessential."[199]

In *Kallail v. Alliant Energy Corp. Services*,[200] the Eighth Circuit held that working a rotating shift was an essential function of working at a dispatch center. The plaintiff, who suffered from diabetes, had requested to work permanent day shifts because working rotating shifts caused her to experience "erratic changes in blood pressure" that ultimately put her at risk of "diabetic complications and death."[201] In holding that "working a rotating shift" was an essential function, the court reasoned "[i]t is not the province of the court to . . . determine what is the most productive or efficient shift schedule for a facility."[202]

The Seventh Circuit,[203] as well as the Fourth, Fifth, Sixth, Ninth, and Tenth Circuits,[204] have all held that attendance or similar policies are an essential function of a job. Recently, the Seventh Circuit went even further by holding that "attendance" was an essential function of a job, despite (1) evidence that the employer allowed employees to work from home, (2) no evidence indicated that being on-site was critical to the job in question, and (3) evidence that the employer required attendance purely so that employees could be evaluated for human resources purposes.[205] By contrast, the D.C. Circuit (like the Second Circuit in *McMillan*) recently held that a "penetrating factual analysis" is required to determine whether

197. *See* 42 U.S.C. § 12112 (b)(5)(A) (2015).

198. Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 88 (1st Cir. 2012) (citing Jones v. Walgreen Co., 679 F.3d 9, 14 (1st Cir. 2012)).

199. Rorrer v. City of Stow, 743 F.3d 1025, 1043 (6th Cir. 2014).

200. 691 F.3d 925 (8th Cir. 2012).

201. *Id.* at 928.

202. *Id.* 928–31.

203. Basden v. Prof'l Transp. Inc., 714 F.3d 1034, 1037 (7th Cir. 2013) (holding that that "an employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance").

204. *See*, *e.g.*, Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012); *see also* Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004) (collecting cases).

205. Taylor-Novotny v. Health Alliance Med. Plans Inc., 772 F.3d 478, 490 (7th Cir. 2014).

physical presence, or "a 'regular and reliable schedule' is an essential element of a" particular position.[206] According to the D.C. Circuit, an essential function of a position is a question of fact, and thus, attendance cannot, as a matter of law, be deemed an essential function of any position a priori.[207]

One scholar, Michael C. Subit, suggests that the problem identified here is traceable to the confusion created in differentiating "essential job functions" and "qualification standards."[208] In Subit's view, courts should be finding that various requirements, such as attendance, are *qualification* standards and not *functions* of a job at all.[209] Applying this distinction makes all the difference, because if a discriminatory qualification standard were at issue, the burden shifts to the employer to demonstrate that the qualification standard is job-related and consistent with business necessity.[210] Subit's argument is a textual one—while essential job functions are "fundamental job *duties*,"[211] the statute separately prohibits using qualification standards to "screen out an individual with a disability or a class of individuals with disabilities unless the standard . . . is shown to be job-related . . . and is consistent with business necessity."[212] Moreover, qualification standards under the regulation are defined, separately from essential functions, as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired."[213]

As an example, Subit points to *Samper v. Providence St. Vincent Medical Center*,[214] a case in which the Ninth Circuit held that attendance was "an essential function of a neo-natal emergency room nurse."[215] According to Subit, the court incorrectly held attendance to be a job *function*, as opposed to an ongoing job qualification.[216] On this view, courts "short-circuit" the analysis required under the statute, in favor of employers, by identifying a qualification standard as an essential function

206. *See* Solomon v. Vilsack, 763 F.3d 1, 10 (D.C. Cir. 2014) (citing and quoting McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 34–35 (1st Cir. 2000)).

207. *Id.*; *see* EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014) (finding that because of "the advance of technology in the employment context" "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location").

208. *See generally* Subit, *supra* note 126.

209. *See id.* at 19.

210. 42 U.S.C. § 12112(b)(6) (2015).

211. 29 C.F.R. § 1630.2(n)(1) (2015) (emphasis added).

212. 42 U.S.C. § 12112(b)(6).

213. 29 C.F.R. § 1630.2(q).

214. Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012).

215. Subit, *supra* note 126, at 14.

216. *Id.*

of the job because a standard is not something that an employee "does."[217] Thus, in *Samper*, the plaintiff's skills and experience allowed her to perform the essential functions of the job, so the appropriate question was whether requiring attendance in the way the hospital did was an unlawful *qualification standard* as outlined in a separate portion of the statute.[218]

In *EEOC v. United Parcel Service, Inc.*,[219] the Northern District of Illinois correctly applied this qualification standard inquiry. UPS had a "100%-healed" policy, under which employees who had been on a disability leave of absence for twelve months were administratively separated from employment.[220] The court found that UPS's policy for returning to work was not an "attendance policy," and thus was not an "essential function."[221] Rather, it was a "medical requirement," which would be a qualification standard.[222] Although the court acknowledged that the Seventh Circuit considered attendance to be an "essential function" of a job,[223] it distinguished essential function precedent by focusing on how the EEOC "framed" the issue as a qualification standard and not a job function, allowing the claim to proceed.[224]

The *UPS* case is an outlier, and ultimately could signal that the issue of "essential functions" bogging down ADAAA claims is simply an issue of pleading standards. Contrary to Subit's suggestion that this issue is solely the fault of the courts,[225] *UPS* demonstrates that some of the confusion is, in part, the result of plaintiffs failing to plead that the job qualification standards are discriminatory. However, plaintiffs alleging a failure to accommodate will still face the essential functions inquiry. Thus, courts will often deny plaintiffs' claims on the qualified individual prong. Moreover, employers may list a number of requirements in their job descriptions—for instance, that a person must be available for eighty hours in a workweek. Thus, a defendant-employer could argue that *attending* is something an employee *does*, and thus is an essential job function, just as *working* eighty hours per week is something an employee does.[226]

Assuming that Subit's statutory interpretation is correct, this Note's identification of the essential functions inquiry as an increasingly present hurdle in post-ADAAA case law is indicative of the courts' failure to

217. *Id.* at 16.
218. *See supra* Part I.A.
219. EEOC v. United Parcel Serv., Inc., No. 09 C 5291, 2014 WL 538577 (N.D. Ill. Feb. 11, 2014).
220. *Id.* at *2.
221. *Id.*
222. *Id.*
223. *Id.* (citing EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948–49 (7th Cir. 2001)).
224. *Id.*
225. *See* Subit, *supra* note 126.
226. *Id.* at 17–18.

address entrenched workplace norms that the ADA intended to challenge. Thus, only by addressing these norms head-on and allowing failure to accommodate claims to move beyond the essential functions inquiry, will courts begin to utilize the reasonable accommodation framework and force changes in the norms the ADA and ADAAA intended to challenge.[227]

IV. Remedying the Problem with Essential Functions

As this Note has demonstrated, some courts continue to interpret the ADA in an extremely restrictive fashion. Even in light of the ADAAA, these courts foreclose plaintiffs' claims on the basis of the essential functions inquiry, without ever reaching the reasonable accommodation analysis. This Part proposes potential legislative responses to remedy the narrowed protections of the statute. Alternatively, it argues that Congress intended the ADAAA to change entrenched workplace norms, and thus, courts should interpret the essential functions inquiry in a way that gives less deference to the employer's judgment about such functions.

A. The Third Time's the Charm: Amending the ADA (Again)

Several legislative remedial solutions for this problem exist. First, Congress could require courts to give greater evidentiary weight to how often the employees (or similarly situated individuals) actually perform a specific job function. Second, Congress could amend the definition of "qualified" in the statute to emphasize the importance of duties that are actually central to the position; basically, shift the courts' focus to the employers' accommodations[228] rather than the employees' abilities. As an alternative to these proposals, Congress could clarify that it did not intend courts to defer to an employer's judgment. Related to the first two suggestions, and perhaps in conjunction with them, Congress could clarify its intent that the EEOC has authority to issue regulations with the force of law. Finally, Congress could require that an employer be obligated to provide accommodations if they "knew or should have known" that the employee was disabled, rather than the current system which requires that the employer have *actual* knowledge of the disability before they can be held liable.

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227. *See, e.g.*, 42 U.S.C. § 12101(a)(5) (2015) ("[I]ndividuals 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.").

228. Alternatively, courts could assess this when considering the business necessity defense, if the employee did not allege a failure to accommodate.

1. *Give Greater Evidentiary Weight to Actual Job Performance*

Currently, the qualified individual portion of the ADA includes the following statement:

> For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[229]

Because an employer may invoke job descriptions as evidence of an essential job function, courts—as this Note has shown—may give the employer deference without looking to the functions *actually performed*. An amendment to the statutory language focusing on *actual performance*, as some courts have acknowledged is required by current EEOC regulations,[230] may be critical to ensure that the purposes of the ADA are carried out. This will remedy one concern expressed during the consideration of the original ADA[231]: that the essential function requirement was unworkable because employers would simply be "rewriting job descriptions and defining what [constitutes an] essential job function[] . . . in the morning, noon and night."[232] Indeed, under the ADAAA, this is what employers are being advised to do.[233]

2. *Amend the Definition of "Qualified" in the ADA to Focus on Central Job Functions*

Another potential amendment is for Congress to clearly define the term "qualified" so that courts focus on the skills of plaintiffs, rather than limitations. Specifically, Congress ought to require proof that the function was central to position, and *not* a marginal or infrequently performed function. At present, courts may use the qualified individual analysis as a proxy for unfamiliarity, animus, or ableism by simply deferring to the employer's job description.[234] Without accommodations, employers are asking people with disabilities to perform their job duties

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229. 42 U.S.C. § 12111(8).

230. *See, e.g.*, Hennagir v. Utah Dep't of Corr., 587 F.3d 1255, 1262 (10th Cir. 2009) ("To determine whether POST certification is an essential job function, we begin by deciding 'whether [the employer] *actually* requires all employees in the particular position to satisfy the alleged job-related requirement.'" (emphasis added)).

231. *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the S. Comm. on Labor & Human Res. and the S. Subcomm. on the Handicapped*, 101th Cong. 51 (1989) (statement of Lawrence Z. Lorber, Counsel, Am. Society of Pers. Admin.).

232. *Id.*

233. *See Revamping Job Descriptions: It's Like Christmas, Only Better!*, 23 ALA. EMP'T LAW LETTER, no. 4, 2012, at 3 ("[G]ive some thought to 'hidden' essential functions that you may have overlooked. For instance, if overtime is required in all your production positions, make sure that is stated in each job description for every production position.").

234. *Id.*

on an uneven playing field.[235] Unlike proving one's qualified status in the Title VII context, where the employee's skills or education are at issue, the "qualified" issue in the ADA context inquires into the physical and mental capabilities of the plaintiff.[236] While this inquiry is important in determining what a reasonable accommodation is or whether such an accommodation can be made, courts may infrequently reach the reasonable accommodation question because they find the plaintiff is unqualified for the position and therefore not entitled to an accommodation.

An instructive example of the way in which the "qualified" issue takes away from a focus on the possibility for accommodation is *Neely v. PSEG Texas, Limited Partnership*.[237] There, the Fifth Circuit held that the ADAAA did not remove the requirement that an employee prove she is qualified for the job in order to establish a prima facie case of discrimination; and therefore, the district court did not err in approving jury instructions that asked whether the plaintiff was a "qualified individual with a disability."[238] Early drafts of the ADAAA omitted the term "qualified" under the Act.[239] Legislative history suggests that Congress left the word "qualified" in the definition of discrimination because it was concerned that removing the term would call into question the burden-shifting framework under *Texas Department of Community Affairs v. Burdine*.[240] At least one commentator has taken issue with the burden being on an employee because litigation will focus almost exclusively on the limitations of the individual and rarely ask how the employer could attempt to accommodate the disability.[241] In *Neely*, the trial court instructed the jury to focus on the limitations of the plaintiff in deciding whether the plaintiff was qualified.[242] Thus, the focus remained on the question "what can this person *not do* and does this disqualify the person from employment?" To the extent the qualified status of the plaintiff is at issue, fact finders will remain focused on the limitations of persons with disabilities.

3. Require That the Employer "Knew or Should Have Known" of the Disability

One author has suggested dispensing with the requirement that an employer have *actual* knowledge of a disability, proposing instead that

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235. Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 110 (2009).

236. *See* Interpretive Guidance on Title 1 of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(m) (2015).

237. Neely v. PSEG Tex., Ltd. P'ship, 735 F.3d 242 (5th Cir. 2013).

238. *Id.* at 247.

239. *See* H.R. REP. No. 110-730, pt. 1, at 16 (2008).

240. *Id.*; *see* 450 U.S. 248, 252–56 (1981).

241. Knapp, *supra* note 100, at 733.

242. *Neely*, 735 F.3d at 244.

liability result when the employer *knew or should have known* that the employee was disabled.[243] According to the EEOC, reasonable accommodations are changes "to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position."[244] As discussed above, a plaintiff who experiences discrimination will have difficulty reaching the reasonable accommodation inquiry because she must first show that she is a "qualified individual" under the statute.[245]

First, courts have been inconsistent in asking whether a reasonable accommodation has been wrongfully denied. For instance, some courts hold that an employee is required to prove that she is a qualified individual *before* the employer has a duty to accommodate,[246] while others hold that the interactive process of requesting a reasonable accommodation itself is designed to determine whether she is qualified.[247] This inconsistency arises from the murky link between the essential functions analysis and the reasonable accommodation inquiry.

Second, courts are also split on whether an employee must disclose the need for an accommodation or whether an employer may be put on constructive notice. The Second Circuit requires that the employer knew or should have known of the employee's disability.[248] However, the Eleventh Circuit, like most other circuits, requires actual knowledge of an employee's disability in order for the employee to be able to proceed with a failure to accommodate claim.[249] As a result, courts rarely reach the question of whether any change to the workplace would result in an undue hardship on the employer and thus whether discrimination has occurred—one of the central questions the ADAAA intended courts to reach.[250]

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243. Knapp, *supra* note 100, at 736.

244. 29 C.F.R. § 1630.2(o)(ii) (2015).

245. *See infra* Part III.A.

246. *See, e.g.*, Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 15 n.13 (D.D.C. 2000); Smith v. Blue Cross Shield of Kan., 894 F. Supp. 1463 (D. Kan. 1995).

247. *See, e.g.*, *Rorrer*, v. City of Stow, 743 F.3d 1025, 1040 (6th Cir. 2014).

248. *See* Glaser v. Gap Inc., 994 F. Supp. 2d 569 (S.D.N.Y. 2014); *see also* Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008) ("Indeed, a situation in which an employer perceives an employee to be disabled but the employee does not so perceive himself presents an even stronger case for mitigating the requirement that the employee seek accommodation. In such situations, the disability is obviously known to the employer, while the employee, because he does not consider himself to be disabled, is in no position to ask for an accommodation. A requirement that such an employee ask for accommodation would be tantamount to nullifying the statutory mandate of accommodation for one entire class of disabled (as that term is used in the ADA) employees. We therefore hold that an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled.").

249. Howard v. Steris Corp., 550 F. App'x 748 (11th Cir. 2013).

250. *See* 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008).

Finally, in reaching the reasonable accommodation analysis, the requirement that the employer has actual knowledge of an employee's disability may constrain an employee's claim. In *Howard v. Steris Corp.*, the employer fired an employee who suffered from a "lifetime of daytime sleepiness," though virtually all of his 250 coworkers recognized him as having a sleep disorder.[251] After termination, the employee was formally diagnosed as having obstructive sleep apnea.[252] The Eleventh Circuit affirmed summary judgment in favor of the employer, holding that under the statute, employers are required to provide reasonable accommodation only to *known* disabilities.[253] The court held that discrimination is "about actual knowledge . . . not constructive knowledge and assumed intent."[254] However, lowering the actual knowledge requirement would motivate employers to accommodate people with disabilities more broadly.

Given that the "qualified" inquiry focuses on a wide array of job duties, which are deemed by employers as essential functions, the law should require employers to attempt to provide an accommodation where employers have constructive knowledge of disability. Under this model, the employer would be liable for failing to reasonably accommodate the employee if:

> (1) the employer knew or should have known about the employee's disability; (2) the employer did not make a good faith effort to discuss with the employee the essential functions of the job and to assist the employee in seeking accommodations; and (3) the employee could have been reasonably accommodated had the employer made a good faith effort to do so.[255]

Under prong (1), the problem faced in *Howard* would be rectified—employers on constructive notice of a disability would be required to engage the employee in the interactive process.[256]

One commentator has suggested that it would be economically efficient for employers to engage in the interactive process early on if they believe an employee may have a disability—this approach could avoid the expense and time involved in litigation over failure to accommodate claims, even if the employer would ultimately prevail on summary judgment.[257] Thus, both from an employer's perspective *and* with the goal of reaching the reasonable accommodation analysis, the reasonable accommodation requirement should be an earlier and more

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251. *Howard*, 550 F. App'x at 749.

252. *Id.* at 750.

253. *Id.*

254. *Id.* at 751 (citing Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1183 (11th Cir. 2005)).

255. Knapp, *supra* note 100.

256. *See* Katherine Bouton, *Quandary of Hidden Disabilities: Conceal or Reveal?*, N.Y. TIMES, Sept. 20, 2013, at BU8 (describing the problems facing employees who must make the decision to disclose that they have a disability).

257. Knapp, *supra* note 100.

robust process. That is, constructive knowledge should be sufficient to initiate the duty to reasonably accommodate. Another reply, discussed in more detail below, is simply that sensitivities towards the disabled community in the workplace must change. The purpose of the ADA and the ADAAA is to emphasize that an individual's right to participate in society does not diminish simply by virtue of her disabilities.[258]

4. Explicitly Delegate Substantive Rulemaking Authority to the EEOC

Congress delegated rulemaking authority to the EEOC in interpreting the definition of "disability" under the ADA.[259] The original version of the ADAAA, however, would have delegated authority to interpret all provisions of Title I of the ADA to the EEOC.[260] The wording of this provision, providing that all ADA regulations issued by the EEOC were "entitled to deference," was rejected as running contrary to the Court's *Chevron* jurisprudence.[261] Congress had *intended*, by this provision, to clarify that courts should give deference to agency regulations and interpretive guidance, *including* the terms "disability,"[262] which indicates that Congress had intended greater deference to *all* properly issued EEOC regulations. Moreover, because the "qualified individual" analysis is specific to Title I and is not present in the general definitional section that applies to all titles[263]—whereas "disability" is defined in a trans-agency section of the statute—it is a fortiori less problematic, from a regulatory perspective, to delegate this authority to the EEOC when the specific provision is not transsubstantive.[264] Indeed, the Supreme Court based its rejection of EEOC ADA regulations precisely on the fact that the regulations would apply across agencies and the fact that the EEOC did not have authority or expertise outside of the employment context.[265] Moreover, the EEOC regulations as *currently* drafted provide no deference to the employer's job description or judgment, but rather, it is one among several factors the EEOC asks courts to consider.[266] Giving the force of law to EEOC regulations through explicit delegation of rulemaking authority, therefore, could

258. *See* 42 U.S.C. § 12101 (2015).

259. 42 U.S.C. § 12205a.

260. *See* H.R. 3195, 110th Cong. § 7 (2007) ("[D]uly issued Federal regulations . . . *including* provisions implementing and interpreting the definition of disability, shall be entitled to deference . . . ." (emphasis added)).

261. *Id.* (referring to Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

262. *Id.*

263. *See* 42 U.S.C. § 12102(2).

264. *See id.* § 12111(8).

265. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 479 (1999) ("No agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA.").

266. *See supra* note 98 and accompanying text.

have some impact on the courts' interpretation of the "qualified individual" inquiry.

Ultimately, however, any future amendments to the ADA ought to do much more than instruct the courts to interpret the language of the statute to provide broader protection to persons with disabilities.[267] Kate Webber argues that the ADAAA intends to instruct courts how to interpret the existing language and to foreclose reliance on prior court precedent, what she and Widiss call "shadow precedents."[268] Webber posits that such instructional amendments in the ADAAA are not sufficient, in part because a conservative court will find ways to narrowly construe other parts of the statute to override congressional intent.[269] She explains, for instance, that courts would remain free to narrowly interpret the term "'substantially limits' . . . so long as it is arguably lower than the *Toyota* standard."[270] While this particular point is arguable because Congress was clear about "expansive coverage" and lower courts have generally followed this mandate,[271] this Note provides evidence that her ultimate conclusion was correct: where no precise instruction exists on how to construe particular provisions, courts continue to narrowly interpret the ADAAA.[272] Thus, the goal of a third round of amendments is to "say enough with sufficient precision"[273] so that courts will finally effectuate Congress' intent to focus on *discrimination*, and not whether a particular employee is a qualified individual with a disability.

B. The Ideal Worker Norm

Returning to the idea of the ideal worker, it is now evident from the case law on the essential functions inquiry that workplaces are not universally required to create a level playing field for persons with disabilities. In order to carry out Title I of the ADA, courts should take a more robust role in enforcing changes in workplace norms. In part, courts could achieve this role by understanding the background against which the ADA and the ADAAA operate. The idea of the ideal worker traces back to the Industrial Revolution:

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267. With the ADAAA, Congress delegated to the EEOC interpretive authority over the definition of disability and its rules of construction. Clarifying the authority of the EEOC to issue regulations with regard to the essential functions inquiry may assist in ensuring due deference to the EEOC's current position that deference to an employer's judgment as to an essential function is not absolute. *See* EEOC v. LHC Group, Inc., 773 F.3d 688, 698 (5th Cir. 2014); *see also* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(n) (2015).

268. Webber, *supra* note 32, at 345; Widiss, *supra* note 57, at 515–16.

269. Webber, *supra* note 32, at 346.

270. *Id.*

271. *See infra* Part II.

272. *See infra* Part I.

273. Webber, *supra* note 32, at 351.

> [P]eople with disabilities were measured against benchmarks of productivity. The modern factory not only caused disabilities, but it mass-produced notions of difference as inferior and impairments as damning. It is from this period that many modern conceptions of ideal or normal workers were drawn. Current oppression of people with disabilities is thus connected all the way back to the birth of the modern American workplace.[274]

In order to carry out the goals of the ADAAA, courts should address these norms directly and should not obfuscate them with the qualified individual analysis. As one example of how courts could directly address these norms, the court in *McMillan* stated:

> [W]hile it may be essential in many workplaces that all tasks be performed by employees who are both physically present and supervised, these requirements are not invariably essential. Thus, depending on the requirements of the position, an employee might need to be physically present and supervised only for certain tasks. By way of example, and without expressing any view on the question, it might be necessary for a supervisor to be present when McMillan meets with clients in the office, but not when he fills out forms. *The district court appears to have simply assumed that McMillan's job required at least seven hours of work each day* and that the work could not be successfully performed by banking time on some days to cover tardiness on others, while working a total of at least 35 hours each week. A fact-specific inquiry, however, requires consideration of this possibility on remand.[275]

Despite the fact that employees, such as those in *Knutson*, *Shell v. Smith*, and *Picture People*,[276] performed the essential functions of their positions, the courts still found in favor of the employers. These cases demonstrate that courts have not required employers to accommodate employees in cases where they were otherwise qualified.

The essential functions inquiry is a bar to plaintiffs' claims under the ADA. Perhaps more disturbing, as the dissent in *Federal Express* demonstrated,[277] courts often do not articulate *any* rationale for deferring to employers when performing the essential functions inquiry, often because of normative assumptions underlying the inquiry.[278] Additionally, if they do articulate such a rationale, it takes the form of a generalized concern about impinging on the employer's business judgment.[279] Dismissing plaintiffs' claims at this initial stage without engaging in the reasonable accommodation analysis allows normative assumptions about the workplace to go unchallenged. Indeed, the ideal worker is one who performs the job in the *precise* way that the employer has mandated,

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274. Basas, *supra* note 235, at 97.

275. McMillan v. City of New York, 711 F.3d 120, 126 n.3 (2d Cir. 2013) (emphasis added).

276. *See supra* Part III.A.1.

277. *See supra* Part III.A.1.

278. Samson v. Fed. Express Corp., 746 F.3d 1196, 1206 (11th Cir. 2014).

279. *See, e.g.*, Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 88 (1st Cir. 2012) (citing Jones v. Walgreen Co., 679 F.3d 9, 14 (1st Cir. 2012)).

even if there are other ways of accomplishing this task that do not impose an undue hardship on the employer. But this ideal worker is the very norm the ADA intended to challenge.

CONCLUSION

The ADAAA, while clearing the way for courts to find more plaintiffs to be disabled, has not succeeded in its goal of ensuring that people with disabilities are protected from discrimination. Instead, courts now use the "qualified individual" inquiry as a new bar to claims of discrimination, and the courts' general reluctance to impinge on an employer's business judgment can explain this trend, at least in part.[280] This Note has suggested that the judicial failure to utilize the language and the burden shifting associated with qualification standards is not so much a matter of confusion as it is symptomatic of hostility to claims brought under the ADA.[281] Congressional intent may be carried out by clarifying the meaning of an "essential function" to avoid undue deference to an employer. Specifically, Congress should provide, as members of Congress intended (as demonstrated in the congressional record), that there is no presumption in favor of the employer's judgment with regard to essential job functions. Moreover, Congress should clarify the interpretive authority of the EEOC with respect to all aspects of Title I of the ADA, and not merely with regard to the definition of disability.[282]

Ultimately, if courts are not willing to enforce the purpose of the statute in light of the congressional history, then Congress must provide a more detailed statute to prevent the unduly narrow conception of discrimination protection that is emerging. Webber's analysis indicates that simply providing instructional amendments to override Supreme Court precedent is not enough, for ideologies like the ideal worker norm will drive narrow interpretations of the statute, even in areas where Congress has explicitly attempted to override the courts. Webber concludes that the "key factor may be for the legislature to say enough, with sufficient precision."[283] Although Congress will not likely take a third swing anytime soon,[284] courts can effectuate congressional intent by interpreting the "qualified individual" prong in light of congressional

280. *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(n) (2015).

281. *See* Webber, *supra* note 32, at 351. ("Ultimately, however, judicial resistance to protecting the disabled and other minorities may only change if and when the Supreme Court's ideological balance shifts and a majority of Justices support the protection of employment equality.").

282. *See* 42 U.S.C. § 12102(2)(A) (2015).

283. Webber, *supra* note 32, at 351.

284. *See* Jonathan Weisman, *Underachieving Congress Appears in No Hurry to Change Things Now*, N.Y. TIMES, Dec. 2, 2013, at A14 (describing the 113th Congress as the "least productive" in history).

purposes by avoiding a presumption in favor of the employer's judgment as to essential job functions.

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