

SUBSTANTIAL LIMITATIONS: REFLECTIONS ON THE ADA AAA

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INTRODUCTION

“[N]o matter how those who may not want to support this legislation attempt to distort its intent, no matter how many times these issues are raised on the Senate floor, they do not apply. The definitions are clear.”

~ Senator Edward Kennedy, on the Americans with Disabilities Act¹

“The road to enactment of this legislation was not easy. But in the process of reaching this goal, we have all learned something about the evils of discrimination in any form, and the importance of judging individuals by their abilities—not patronizing misconceptions, demeaning stereotypes, and irrational fears about their disabilities.”

~ Senator Edward Kennedy, on the Americans with Disabilities Act²

Senator Ted Kennedy will forever be remembered as a master architect of legislation who aimed to right societal inequities. He will also be remembered as a champion of those who lacked access and entrée to public life and all of its privileges, including employment. In the 1970s, his tireless efforts resulted in a large-scale overhaul of the federal sentencing guidelines and reform of the Federal Criminal Code.³ In 1985, he worked with Representative Patricia Schroeder to improve the lives of military families through a bill that facilitated government employment for military spouses, the proliferation of childcare programs for military families, and reduced costs for those programs.⁴ The senator noted that “everywhere I go, I find family issues on the top of the agenda—housing, permanent change of station, day care, spouse employment, education for the children The readiness and morale of our troops is critically dependent on the well-being of their family members.”⁵

1. 135 CONG. REC. S10772 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy), reprinted in 6 BERNARD D. REAMS JR. ET. AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336 (1992). Senator Kennedy’s quote was responding to a debate about whether HIV-positive individuals or AIDS carriers were covered under the bill as disabled. In the end, HIV-positive/AIDS patients were “included among the handicapped, gaining them the protection against discrimination that had been dropped from the 1988 AIDS bill.” ADAM CLYMER, EDWARD M. KENNEDY, *A BIOGRAPHY* 454 (1999).

2. NATIONAL COUNCIL ON DISABILITY, *EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 2* (1997) [hereinafter *EQUALITY OF OPPORTUNITY*].

3. BELLA ENGLISH ET AL., *LAST LION* 204 (Peter S. Canelos ed., 2009).

4. CLYMER, *supra* note 1, at 383–84 (1999).

5. *Id.*

Although Senator Kennedy cared deeply about the efforts to improve the lives of military families, it is his work on and in support of the Americans with Disabilities Act⁶ (ADA), one of the most sweeping and influential civil rights bills of the last century,⁷ that appears to have resonated most deeply with him on a personal level.⁸

Senator Kennedy was the youngest of nine children in what is probably the best-known political family in American history.⁹ He had a son who lost a leg to a rare form of cancer that required what in 1973 was considered “cutting edge therapy,”¹⁰ a wife who struggled with and was treated for alcoholism,¹¹ and a sister who was rendered severely disabled following a failed lobotomy.¹² According to a biographer, “[h]elping people with disabilities was a personal issue for Ted,” and the ADA was “an example of how Ted’s charm and intimidation could push through landmark bills . . . [and] a law that Ted considered one of the most important civil rights measures of his career.”¹³ Having made some strides toward strengthening the rights of the disabled prior to his work on the ADA, he “longed for something more sweeping: a federal law that would protect disabled Americans from job discrimination and guarantee them access to a long list of public and private facilities.”¹⁴

The senator set to work, inviting key players on the legislative landscape to his home, building bridges and support across the table at meals, and identifying potential foes of the legislation, so that he, in his usual style, could be proactive about eliminating obstacles to his goal and facilitate the legislation’s passage.¹⁵ Kennedy believed the bill could become “one of the great civil rights laws of our genera-

6. 42 U.S.C. §§ 12101–12213 (2006).

7. See NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA 36–37 (2004) [hereinafter RIGHTING THE ADA].

8. See ENGLISH ET AL., *supra* note 3, at 318 (“Helping people with disabilities was a personal issue for Ted.”).

9. *Id.* at 1.

10. *Id.* at 188.

11. *Id.* at 190.

12. *Id.* at 318–21; Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 33 (2000) (describing the beginnings of the ADA and discussing Senator Kennedy’s involvement, as well as briefly discussing how Senator Kennedy, as well as “[a]lmost everyone involved in the ADA had a close family member or friend who was disabled”).

13. ENGLISH ET AL., *supra* note 3, at 318.

14. *Id.* at 318–19; see also CLYMER, *supra* note 1, at 446 (“A 1973 law barred discrimination against the handicapped in programs with federal aid, but it lacked the broad protections against discrimination won by blacks and women.”).

15. ENGLISH ET AL., *supra* note 3, at 319–20.

tion,” and promoted the legislation as a “bill of rights” and “an emancipation proclamation” for people with disabilities.¹⁶

The legislation, however, was not without its problems and pitfalls. Almost twenty years after the ADA was enacted, President George W. Bush, the son of the president who had signed the ADA into law, signed into law the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).¹⁷ Its purpose was to afford broader protections to disabled workers and to correct the damage done by court rulings that had created too many loopholes and injustices.¹⁸ Yet the ADAAA, too, has its limitations and its omissions.

Although the ADAAA has made great strides in the direction of removing unnecessary barriers to employees’ coverage under the ADA,¹⁹ it has largely failed to address the ADA’s “reasonable accommodation”²⁰ mandate and to redress the damage done by courts’ ADA jurisprudence. Indeed, the body of reasonable accommodation analysis has suffered due to the large number of cases disposed of based upon coverage issues, the tendency of judges to be conclusory and furnish scant and opaque analyses, and the lack of guidance provided by the statute itself and by the Supreme Court.

This Article advocates several ways to reform the statute and its jurisprudence. It begins with the premise that the “otherwise qualified,” “reasonable accommodation,” and “undue hardship” analyses are questions that call for a focus on, respectively, the plaintiff at issue, the accommodation at issue, and the employer at issue. The article calls for the abolition of the need to demonstrate a major life activity limitation required for coverage under the statute in accommodation cases, noting that this has already effectively occurred in the context of the rest of the ADA’s antidiscrimination jurisprudence. It also suggests that the “otherwise qualified” analysis, derived from the

16. RIGHTING THE ADA, *supra* note 7, at 34 (“Senator Edward M. Kennedy termed the legislation a ‘bill of rights’ and ‘an emancipation proclamation’ for people with disabilities.”); CLYMER, *supra* note 1, at 454 (“In his opening speech, Kennedy said the bill could become ‘one of the great civil rights laws of our generation. . . . This legislation is a bill of rights for the disabled’”); *see also id.* at 452 (Opening a full committee meeting, Ted Kennedy “call[ed] [the bill] no more than ‘simple justice’ for 43 million Americans and reminded everyone again that ‘President Bush shares my commitment to integrating disabled Americans into the mainstream of our society’” and “emphasized how much of the bill was drawn from . . . other civil rights measures”).

17. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

18. *See id.* § 2(b)(3).

19. This Article focuses on the employment provisions of Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117 (2006).

20. *See* 42 U.S.C. § 12112(b)(5)(A).

statute, be given a stronger role in both the overall analysis and the screening of appropriate plaintiffs and cases. It further urges that the “essential functions” language in the statute’s definition of an “otherwise qualified” plaintiff be changed so as to evaluate the plaintiff’s possession of essential, necessary, or valued skills.

This Article aims to do this without the benefit of a wealth of case law that actually applies the ADAAA to existing jurisprudence, as the ADAAA is not retroactive.²¹ It proceeds, however, to honor the ideals, energy, and vision of Senator Kennedy, a steadfast advocate of implementing radical change to dismantle barriers and enable justice.

I.

BACKGROUND

The ADA’s legacy is enshrined in American society, and it goes far beyond the “[m]illions of access ramps, wheelchair-accessible restrooms, hand-operated amplifiers in movie theaters, and other accommodations,”²² which are most visible. It transformed attitudes, expectations, and the status quo to such an extent that the inclusion of the disabled in public life has become much more commonplace, rather than an extraordinary act. The statute represented “transition from a fragmented national disability policy, which often worked to the detriment of people with disabilities, to an affirmation of the basic civil rights of persons with disabilities”²³ Moreover, were it not for the extraordinary efforts of leaders in the disability community and champions of the legislation in Congress, like Senator Kennedy, the ADA likely would never have been enacted.²⁴

However, judicial resistance to the widespread relief the statute’s original champions intended to afford resulted in doctrines and interpretations of the ADA that thwarted, rather than advanced, its goals.²⁵

21. Courts have consistently held that the ADAAA is not retroactively applied. *See, e.g.*, *EEOC v. Agro Dist. LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009) (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (“Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the ‘corrective’ amendment must clearly appear.”)); *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009); *Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 939–42 (D.C. Cir. 2009); *Kieseteter v. Caterpillar, Inc.*, 295 F.App’x 850, 851 (9th Cir. 2009).

22. ENGLISH ET AL., *supra* note 3, at 321.

23. EQUALITY OF OPPORTUNITY, *supra* note 2, at xii.

24. *See id.* at xvii.

25. *See* Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7 (2000) (“As judicial opinions in Title I cases began to accumu-

The amendments were enacted to rectify this situation, expand coverage, and reaffirm the statute's mission.²⁶

A. *Senator Kennedy and the ADA*

In a nation where at-will employment is the background presumption atop which all employment discrimination legislation is written, outlining the contours of protective legislation becomes critically important. Absent protection specifically afforded to employees with disabilities, an employer could legally discriminate against, fail to accommodate, or even terminate an employee who is not deemed optimally “able” to perform his or her job within whatever constraints the employer imposes upon employees and utilizing only whatever tools or resources the employer sees fit to provide.²⁷

late, it became clear that the Act was not being interpreted as its drafters and supporters within the disability rights movement had planned.”); *see also* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 201 (2010) (“As a result of [the] restrictive interpretations of the ADA’s protected class, a 2007 study suggested that federal courts had effectively limited the ADA’s protected class to a category of persons that would have extreme difficulty demonstrating that they are qualified to work, even with the provision of ADA accommodations.”).

26. *See* Americans with Disabilities Act Amendments Act of 2008 § 2(a), Pub. L. No. 110-325, 122 Stat. 3553 (“Congress finds that—(1) in enacting the [ADA], Congress intended that the Act ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ and provide broad coverage; (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers; (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”).

27. The ADA prohibits, among other things: (1) “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity,” and (2) “denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.” 42 U.S.C. § 12112(b)(5)(A)–(B) (2006). *See generally* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996) (“[T]he ADA declares it illegal to deny an individual an employment opportunity by failing to take account of her disability when taking account of it—in the sense of changing the job or physical environment of the workplace—would enable her to do the work.”); Kelly Cahill Timmons, *Limiting “Limitations”*: *The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 323 (2005) (“Even though there may be a cost-benefit limit on the scope of the duty of reasonable accommodation, and even though

The ADA was enacted in 1990 in order to meet what Congress termed a “compelling need” for a “clear and comprehensive national mandate” to prevent discrimination against the disabled.²⁸ In furtherance of this end, the ADA prohibits discrimination against the disabled “in major areas of public life”²⁹ including employment (Title I),³⁰ public services (Title II),³¹ and public accommodations (Title III).³² This Article focuses on the employment title of the ADA (Title I). The ADA covers all individuals who are otherwise qualified to perform their jobs, meaning those who can perform the essential functions of their jobs with or without reasonable accommodation, but whose mental or physical impairments amount to disabilities within the meaning of the act, meaning that the impairments substantially limit one or more of their major life activities.³³

When the primary co-sponsor of the bill, Senator Lowell Weicker of Connecticut, was not re-elected to the Senate in 1988, Senator Kennedy and other staunch proponents of the legislation stepped in to champion it.³⁴ Senator Tom Harkin of Iowa, the bill’s chief supporter after Senator Weicker’s departure, worked to procure Senator Kennedy’s support, knowing that his support “could improve the possibility of a smooth and quick transition to the Senate floor.”³⁵ After he and Senator Harkin concluded that the bill needed to be rewritten to survive in the Senate, Senator Kennedy worked tirelessly to rewrite the ADA;³⁶ it would pass by a vote of 76–8 in the Senate in 1989 and a vote of 403–20 in the House of Representatives in 1990.³⁷ The senators employed what they called a “four pronged legislative strategy”: (1) nurturing support for the bill in the business community, the dis-

courts have held that some accommodations are unreasonable as a matter of law, it is important to recognize the significance of the duty and its utility to disabled employees. Outside the context of the ADA, employees generally must take jobs and workplaces as they find them.”).

28. H.R. REP. NO. 101-485, pt. 2, at 50 (1990).

29. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

30. 42 U.S.C. §§ 12111–12117 (2006).

31. *Id.* §§ 12131–12165.

32. *Id.* §§ 12181–12189.

33. *See id.* § 12102; *see also* *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418, 1429 (N.D. Cal. 1996) (“The individual must be able to perform the essential functions of the position either with a reasonable accommodation, if such an accommodation is necessary for the person to be able to perform the essential functions, or without reasonable accommodation, if accommodation is not necessary for the person to be able to perform the essential functions.”).

34. EQUALITY OF OPPORTUNITY, *supra* note 2, at 77–78.

35. *Id.* at 78.

36. *Id.* at 79.

37. *Id.* at xx.

bility community, Congress, and within the Bush administration; (2) facilitating compromises prior to the new bill's introduction so that it would pass Congress's scrutiny; (3) & (4) using and encouraging modesty and parity, meaning that the bill, rather than fostering drastic and immediate change, would engender "accessibility at some point in time."³⁸

Although Senator Harkin was the bill's Senate sponsor, Senator Kennedy, a senior senator and the chairman of the Senate Committee on Labor and Human Resources, took a lead role in the negotiation of the bill with the Bush administration.³⁹ According to one author, "[Senator] Kennedy's plan of attack was to get all parties into the same room and essentially stay there until all issues were resolved."⁴⁰ On August 2, 1989, his bipartisan committee approved the ADA unanimously, 16–0, in large part because so many potential issues had been proactively identified and dealt with and so many senators respected and thus deferred to Senators Harkin and Kennedy.⁴¹

The statute was ultimately enacted, as it recites, due to Congress's recognition that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination."⁴²

The ADA prohibits discrimination in employment against individuals with disabilities who are qualified to perform the essential functions of their jobs. It defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."⁴³ One is

38. *Id.* at 79.

39. *Id.* at 95.

40. *Id.*; see also CLYMER, *supra* note 1, at 452–53 ("Kennedy and Sununu [a significant opponent in the Bush administration] agreed to oppose any changes once they made a deal There were ten negotiating sessions in July [and] [t]he point was to see if all the remaining differences could be settled, or at least narrowed.").

41. EQUALITY OF OPPORTUNITY, *supra* note 2, at 97.

42. 42 U.S.C. § 12101(a) (2006).

43. *Id.* § 12111(8) ("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.").

disabled within the meaning of the statute if he or she has “a physical or mental impairment that substantially limits one or more of [his or her] major life activities,” “a record of such an impairment,” or is “regarded as having such an impairment.”⁴⁴

The dual mandates of the ADA are those of nondiscrimination and reasonable accommodation.⁴⁵ Under the statute, an employer must refrain from discrimination with respect to the terms and conditions of the employment of those deemed disabled, regarded as disabled, or with a record of a disability, as defined by the statute.⁴⁶ Under most circumstances, it is a discriminatory practice for an employer to fail to provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” unless the employer is able to show that the proposed accommodation would impose an undue hardship upon the operation of its business.⁴⁷

Under the ADA, a reasonable accommodation may include any kind of alteration to the workplace environment and may encompass:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restruc-

44. *Id.* § 12102(1). While the statute does not define “impairment,” the EEOC has given some guidance on what constitutes a physical or mental impairment:

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

29 C.F.R. § 1630.2(h) (2010); *see also* Kelly Cahill Timmons, *Accommodating Misconduct under the Americans With Disabilities Act*, 57 FLA. L. REV. 187, 190–93 (2005) (discussing what it means to be a qualified individual with a disability).

45. *See generally* Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (looking to debunk the idea that there is a major difference between the accommodation and antidiscrimination requirements of the ADA).

46. *See* 42 U.S.C. § 12112(a) (2006) (“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.”).

47. *Id.* § 12112(b)(5)(A)–(B) (“[D]iscriminat[ion] against a qualified individual on the basis of disability’ includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.”).

turing, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁴⁸

However, an employer need not provide what may otherwise be viewed as a reasonable accommodation if it “can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.”⁴⁹ When determining whether a particular accommodation would cause an undue hardship, the following factors are to be considered:

(1) The overall size of the [employer]’s program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the [employer]’s operation, including the composition and structure of the [employer]’s workforce; and (3) The nature and cost of the accommodation needed.⁵⁰

*B. Confusion in the Courts and Dissention among Scholars:
Problematic Cases and Scholarly Debates Surrounding
Reasonable Accommodation Cases in the Years
Leading up to the ADAAA*

There has been longstanding debate and confusion among courts as to the precise relationship between the “reasonable accommodation” and “undue hardship” analyses and as to the assignment of burdens of production and persuasion. Judge Calabresi of the Second Circuit observed in 1995 that:

“Reasonable” is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires an inquiry not only into the benefits of the accommodation but into its costs as well In short, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce.⁵¹

The Second Circuit has held that the plaintiff bears a modest burden of production to demonstrate that an accommodation is reasonable by “suggest[ing] the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.”⁵² Once this is

48. *Id.* § 12111(9).

49. *Id.* § 12112(b)(5)(A).

50. 28 C.F.R. § 42.511(c) (2010).

51. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995).

52. *Id.*

done, “the risk of nonpersuasion falls on the defendant,”⁵³ which is to say that “the defendant’s burden of persuading the factfinder that the plaintiff’s proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship.”⁵⁴ This analysis underscores Judge Calabresi’s belief that “in practice meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amount to the same thing.”⁵⁵

Thus, the relevant analysis, as envisioned by the Second Circuit, would go as follows:

First, the plaintiff bears the burden of proving that she is otherwise qualified; if an accommodation is needed, the plaintiff must show, as part of her burden of persuasion, that an effective accommodation exists that would render her otherwise qualified. On the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits District courts will not be required to instruct juries on how to apply complex economic formulae; a common-sense balancing of the costs and benefits in light of the factors listed in the regulations is all that is expected.⁵⁶

Other courts, however, have heavily criticized this approach. The Eleventh Circuit, for example, has stated that “[s]uch an approach confuses an element of the plaintiff’s case (reasonable accommodation) with an affirmative defense (undue burden) and effectively relieves the plaintiff of her obligation to prove her case.”⁵⁷

*US Airways, Inc. v. Barnett*⁵⁸ is the only Supreme Court decision that has interpreted the duty of reasonable accommodation.⁵⁹ In *Barnett*, the Supreme Court held that a proposed accommodation’s subversion of the operation of seniority rules will usually be adequate to demonstrate that as a matter of law, the accommodation is not reasonable, although the employer retains the ability to proffer evidence of circumstances that would render an exception to a seniority rule rea-

53. *Id.* (citing *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991)).

54. *Id.*

55. *Id.*

56. *Id.* at 139–40.

57. *Willis v. Conopco*, 108 F.3d 282, 286 (11th Cir. 1997).

58. 535 U.S. 391 (2002).

59. See generally Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans With Disabilities Act: Answers, Questions and Suggested Solution After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931 (2003) (discussing *Barnett* at length and analyzing the questions answered by the Court, as well as the questions left unanswered in the opinion).

sonable in a given case.⁶⁰ The Court also gave insights into how the reasonable accommodation/undue hardship analysis ought to be carried out. Specifically, the Court acknowledged that deciding whether the proposed accommodation was reasonable may be distilled down to the more fundamental question “of how the Act treats workplace ‘preferences.’”⁶¹

The Court rejected the defendant’s argument that the statute’s mandate was merely to even the playing field for the disabled, rendering them “equal” but not favored:

While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal. The Act requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot by itself place the accommodation beyond the Act’s potential reach The simple fact that an accommodation would provide a “preference”—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not “reasonable.”⁶²

The Court also rejected the notion that the term “reasonable accommodation” was merely a “redundant mirror image of the term ‘undue hardship.’”

The statute refers to an “undue hardship on the operation of the business.” . . . Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.⁶³

Thus, according to the Court, in order to defeat an employer’s motion for summary judgment, an ADA plaintiff “need only show that an ‘accommodation’ seems reasonable on its face, i.e., ordinarily or in the run of cases.”⁶⁴ Then, the defendant entity needs to point to “spe-

60. *Barnett*, 535 U.S. at 406.

61. *Id.* at 397.

62. *Id.* at 397–98.

63. *Id.* at 400–01.

64. *Id.* at 401.

cial (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”⁶⁵ This has been the most recent and most detailed guidance furnished to date by the Supreme Court as to how, precisely, the “reasonable accommodation” analysis should be conducted.

Despite the guidance furnished by the Supreme Court in *Barnett*, courts continue to struggle with and disagree over the correct way to evaluate whether certain proposed accommodations are reasonable accommodations or whether they confer an undue hardship upon employers. For example, courts continue to disagree on whether mandatory reassignments are reasonable accommodations.⁶⁶

Scholars and commentators, too, have grappled with the appropriate relationship between the reasonable accommodation analysis and the undue hardship analysis.⁶⁷ Professor Alex Long has urged judges to focus on the ramifications that a proposed accommodation could create for other employees.⁶⁸ Professor Mark Weber, for his part, argues that:

65. *Id.* at 402.

66. The courts of appeals have split on the issue of whether the ADA requires mandatory reassignment as a reasonable accommodation. Compare *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc) (requiring reassignment), and *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304–06 (D.C. Cir. 1998) (en banc) (requiring reassignment), with *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (“We . . . conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”), and *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000) (allowing an employer to choose to not reassign an employee). For additional discussion of the *Barnett* decision and the circuit split, see Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 457–67 (2009) (discussing the circuit split); Befort, *supra* note 59, at 931 (examining the *Barnett* decision, attempting to answer some unanswered questions left open by the Court); Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1083–86 (2000) (arguing that the ADA’s reasonable accommodation requirement differs significantly from conventional forms of affirmative action).

67. See, e.g., Steven B. Epstein, *Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 397, 399–400 (1995) (arguing that Congress’s adoption of a “vague standard [for undue hardship] was a serious mistake” and “urging that the ADA be amended to transform the presently vague undue hardship standard into one resembling the quantitative model [the author] propose[s]”); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1124 (2010) (arguing that reasonable accommodation and undue hardship are not separate tests).

68. Alex B. Long, *The ADA’s Reasonable Accommodation Requirement and “Innocent Third Parties”*, 68 MO. L. REV. 863, 866 (2003).

Reasonable accommodation and undue hardship are two sides of the same coin. The statutory duty is accommodation up to the limit of hardship, and reasonable accommodation should not be a separate hurdle for claimants to surmount apart from the undue hardship defense. There is no such thing as “unreasonable accommodation” or “due hardship.”⁶⁹

1. *Coverage and Plaintiffs Slipping through the Cracks: Sutton’s “Catch 22”*

From the Act’s inception, and that of its predecessor, the Rehabilitation Act of 1973,⁷⁰ courts have tended to construe the notions of a substantial limitation and of a major life activity narrowly, banishing countless plaintiffs from the ambit of the act’s protection. Though the Supreme Court proclaimed in *Bragdon v. Abbott*⁷¹ that the word “major” connotes “significance,” and admonished that the statute “addresses substantial limitations on major life activities, not utter inabilities,”⁷² this did little to stop lower courts from continually finding plaintiffs not to be disabled within the meaning of the act. Moreover, the Court subsequently limited the act’s coverage, holding that plaintiffs are to be evaluated in their medicated or remediated state only, and that a substantially limiting impairment is one that “prevents or severely restricts” the performance of a major life activity.⁷³ Such limiting interpretations have compounded the extant tension inherent in the act itself: demonstrating a substantial limitation and at the same time demonstrating that the limitation does not render one simply unqualified for the position at issue, or, as some scholars have called it, the “catch-22” that plaintiffs confront as they seek to establish the requisite ability and disabilities for protection under the Act.⁷⁴

69. Weber, *supra* note 67, at 1124.

70. 29 U.S.C. § 794 (2006). For a comprehensive discussion on the courts’ construction of these terms under the Rehabilitation Act of 1973, the 1974 Amendments to the Rehabilitation Act, and the ADA, see generally Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 98, 126 (2000).

71. 524 U.S. 624 (1998).

72. *Id.* at 638, 641.

73. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

74. See Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 WHITTIER L. REV. 355, 381–85 (2001); Timmons, *supra* note 27, at 318–19; see also *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 619 (1st Cir. 2009) (“Considering plaintiffs’ abilities to perform their jobs as evidence weighing against finding that they are disabled under the ADA would create an impossible catch-22 for plaintiffs: if their disabilities prevented them from doing their jobs altogether they would not be

Indeed, under Supreme Court jurisprudence prior to the passage of the ADAAA, a plaintiff who sought to show a substantial limitation in the major life activity of working might be deemed not “limited enough” to be considered disabled unless he or she were so limited as to be virtually incapable of working at all.⁷⁵ In the same vein, an employee could be discriminated against for what would be considered a disabling impairment despite showing no signs of limitation, and then told that he or she did not qualify as disabled precisely *because* he or she showed no sign of limitation.⁷⁶

Major life activities were traditionally limited to things like those listed in the Equal Employment Opportunity Commission’s regulations, such as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁷⁷ However, courts have been skeptical that one could be substantially limited in the major life activity of “working” while remaining “otherwise” qualified for one’s position.⁷⁸ As a further obstacle, to be considered

qualified individuals for the job under the ADA, and if they were able to work through their disabilities they would then not be considered disabled.”) (citing *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 24 (1st Cir. 2002)); *Oliva v. Pride Container Corp.*, 81 F. Supp. 2d 907, 911 (N.D. Ill. 2000) (“Ms. Oliva falls into this catch-22 situation faced by ADA plaintiffs, i.e. the difficult task of proving that they are sufficiently impaired to be considered disabled yet still able to perform the essential duties of the job.”); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1232 (2003) (“If an individual has a condition that is controlled by medication or is not extremely severe, the individual is unlikely to be deemed to have a disability under the courts’ contemporary interpretations. Yet, if a person has a severe condition that is impervious to medication, she may not be considered ‘qualified’ for the job. Thus, the window of opportunity for a plaintiff to be both disabled and qualified is quite narrow.”); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 122 (2006) (“There is a certain Catch-22 in the way courts have interpreted the ADA’s definition of disability, if not in the definition itself—the plaintiff is put to the task of showing both that an impairment is serious enough to substantially limit a major life activity and that it is not so serious as to render the individual unable to do the job.”).

75. See *Toyota Motor Mfg.*, 534 U.S. at 198 (“[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”).

76. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999) (holding that although the plaintiffs were impaired, there was no substantial limitation because their vision was fully corrected by glasses).

77. 29 C.F.R. § 1630.2(i) (2010).

78. See, e.g., *Sutton*, 527 U.S. at 492, *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (“[T]here may be some conceptual difficulty in defining ‘major life activities’ to include work . . .”). *But cf.* *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999) (“The inability to access the many opportunities afforded by working constitutes exclusion from many

substantially limited in the major life activity of working, a plaintiff must show that he or she is not only restricted from working in his or her own job, but in a broad class of jobs.⁷⁹

The result of this Supreme Court jurisprudence was to make it extremely difficult for one who wanted to demonstrate that he or she was otherwise qualified to perform the job at issue to make the necessary threshold showing that he or she was disabled within the meaning of the statute.⁸⁰

2. Adams v. Rice

In one particularly memorable district court case that preceded the ADAAA, *Adams v. Rice*,⁸¹ the plaintiff, who had been diagnosed and successfully treated for breast cancer during her application process, sought employment as a Foreign Service Officer.⁸² Having passed “rigorous written and oral examinations,” ranking seventh out of two hundred candidates, and despite the fact that her doctor reported that she was “cancer-free,” “[was] able to undertake a full schedule of work, travel, and vigorous sports, . . . ha[d] no job limitations whatsoever,” and “had been successfully treated for early stage breast cancer with an excellent prognosis,”⁸³ the plaintiff was told that she would not be offered the position because “only 53% of all Foreign Service posts had the professional and technical support required for her follow-up care.”⁸⁴ The plaintiff’s request for a waiver of the

of the significant experiences of life. Without doubt, then, working is a major life activity.”).

79. See, e.g., *Peters v. City of Mauston*, 311 F.3d 835, 843 (7th Cir. 2002) (“With respect to working [as a major life activity], the person must be significantly restricted in the ability to perform a class or broad range of jobs. . . . [W]e will consider the number and type of jobs from which a person is disqualified, the geographical area to which the person has reasonable access, and the individual’s job expectations and training.”); *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001), cert. denied, 534 U.S. 818 (2001) (“[It is] clear that whether an impairment substantially limits the major life activity of working depends primarily on the availability of jobs for which the impaired person qualifies.”).

80. See, e.g., Robert L. Burgdorf, Jr., “*Substantially Limited*” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 539 (1997) (“The restrictions on the term ‘disability,’ imposed in the name of reserving the protection of the statute for ‘the truly disabled,’ have caught many plaintiffs with serious, highly disabling conditions in their webs.”).

81. 484 F. Supp. 2d 15 (D.D.C. 2007), rev’d in part, 531 F.3d 936 (D.C. Cir. 2008).

82. *Id.* at 18.

83. *Id.* at 18, 19.

84. *Id.* at 19.

worldwide availability requirement imposed upon her was subsequently denied.⁸⁵

The district court adjudged her cancer to be neither long-term⁸⁶ nor an impairment that still afflicted her⁸⁷ and therefore held she was not disabled within the meaning of the ADA. As a result, there was no examination of whether she had been treated in comportment with the statute.⁸⁸

This case is illustrative of the many cases pre-dating the ADAAA in which plaintiffs with clearly disabling conditions, such as cancer and HIV, were foreclosed from bringing cases that challenged discrimination based undisputedly on their conditions, because they were not found to be “disabled” within the meaning of the statute and thus fell through the multiple “cracks” in the statute. Adding insult to injury, the district court in *Adams* rejected the alternate claim the plaintiff was forced to make due to the definition of “disability” in the ADA: “that plaintiff’s breast cancer treatment, as opposed to the cancer itself, is a physical impairment, or that the surgical treatment caused a mental impairment, and that such impairment limits plaintiff in the major life activity of sexual contact.”⁸⁹ The court answered that there was

no evidence, nor has plaintiff even alleged, that defendant was aware of any mental impairment of the plaintiff in the period in which it made the challenged employment decision. Nor is there any evidence that defendant made its employment decision on the basis of the surgical treatment plaintiff underwent to treat her cancer. Rather, all evidence shows that the decision was based solely on plaintiff’s need for follow-up care.⁹⁰

The district court also rejected the plaintiff’s additional argument that “as long as [the] defendant knew of plaintiff’s breast cancer and made its decision ‘because of her breast cancer,’ [it] can be held liable even if it was not aware of how the cancer substantially limited a major life activity of the plaintiff,”⁹¹ noting, without a hint of irony,

85. *Id.*

86. *Id.* at 20 (“Plaintiff was quickly treated for her cancer . . . recovered during several weeks after the surgery, and returned to work one month after surgery.”).

87. *Id.* at 20–21 (“[The] defendant did not make its revised medical clearance decision until . . . [the] plaintiff had fully recovered from her cancer. Thus, plaintiff’s cancer itself was not an impairment by the time the challenged employment actions subsequently took place and therefore cannot be the grounds for a discrimination claim.”).

88. *Id.* at 22.

89. *Id.* at 21.

90. *Id.*

91. *Id.*

that “this defendant made its employment decision upon information from plaintiff’s physician that she was cancer-free and had fully recovered except for the need for minimal follow-up care. . . . [P]laintiff’s breast cancer had been fully treated, and plaintiff’s need for follow-up care alone does not qualify as a disability.”⁹²

Indeed, the district court also explored and rejected the possibility that the plaintiff was either “regarded as” disabled or had a record of a disability:

The impairments reflected in this record were of a purely temporary nature, and thus are not impairments that substantially limit a major life activity. The recovery times following plaintiff’s surgeries consisted only of several weeks, hardly enough to qualify as a permanent or long-term impairment. Therefore, plaintiff cannot demonstrate that defendant relied upon a record of an impairment that substantially limits a major life activity, and thus cannot show that she satisfies the second prong of the Act’s definition of disability In order to be “regarded as” disabled, an employer must believe that the plaintiff had a substantially limiting physical impairment. If, however, the employer rejects a candidate because they have an extremely minor medical problem, then the candidate is clearly not “regarded as” disabled.⁹³

Finally, the district court rejected any argument that the plaintiff was regarded as limited in the major life activity of working:

Defendant admits that it was plaintiff’s required treatment that prevented her from obtaining employment with the Foreign Service. Defendant argues, however, that this is not a class of jobs sufficient to demonstrate that plaintiff’s impairment substantially limited her in the major life activity of working [J]obs requiring worldwide-availability are not a broad class of jobs sufficient to show that defendant regarded plaintiff as disabled. Accordingly, plaintiff cannot demonstrate that she satisfies the third prong of the Act’s definition of disability.⁹⁴

The district court ended its opinion—rife with “catch-22’s”—on a seemingly apologetic note and a plea that Congress intervene and amend the ADA:

The Court is not without sympathy for plaintiff’s predicament. Plaintiff was obviously extremely qualified for a position with the Foreign Service, and was struck by cancer at perhaps the most inopportune time. Moreover, defendant’s refusal to accept the recommendations of plaintiff’s physicians or otherwise accommodate her

92. *Id.*

93. *Id.* at 22–23 (internal citations omitted).

94. *Id.* at 23.

minor medical needs appears both callous and unreasonable. Nonetheless, the Court is bound by the law governing this situation.⁹⁵

On appeal, the Court of Appeals for the District of Columbia reversed the grant of summary judgment in light of its holding that a material issue of disputed fact existed over whether the plaintiff had a “record of” an impairment that substantially limited her major life activity of engaging in sexual relations.⁹⁶ It nonetheless found that the district court, applying the relevant law, had correctly found that she was neither actually disabled within the meaning of the statute,⁹⁷ nor was she “regarded as” having a disability,⁹⁸ nor substantially limited in her ability to care for herself or to work, despite this small victory on appeal.⁹⁹ The absurdity of a plaintiff discriminated against (justly or unjustly) because of her successfully treated breast cancer, and being forced to plead her inability to engage in sexual relations—something that clearly neither her employer nor the court had any legitimate interest in—in order to claim protection under the statute, showed the glaring holes and deficiencies in the statute and in the jurisprudence.

3. *Felix v. New York City Transit Authority*

In *Felix v. New York City Transit Authority*,¹⁰⁰ the Court of Appeals for the Second Circuit held that there must be a causal nexus between the precise major life activity or activities that are substantially limited by a disabling impairment and the objective of the requested reasonable accommodation.¹⁰¹ In that case, a New York City Transit worker, who sold subway tokens underground, sued her employer when she was denied her requested accommodation of a transfer to an above-ground job due to post-traumatic stress disorder (PTSD), which she developed after seeing a subway token booth set afire. The court, however, observed that plaintiff’s “disability” was the insomnia caused by her PTSD, which substantially limited her in the major life activity of sleeping.¹⁰² Thus, it reasoned, “an employer discriminates against an employee with a disability only by failing to

95. *Id.* at 23–24.

96. *Adams v. Rice*, 531 F.3d 936, 949 (D.C. Cir. 2008). For more discussion of *Adams v. Rice* and the impact of the court of appeal’s holding, see Malvina J. Hryniewicz, *The Definition of “Major Life Activity” Under Adams v. Rice is Not “Substantially Limiting”*, 20 GEO. MASON U. C.R. L.J. 417 (2010).

97. *Adams*, 531 F.3d at 944–45.

98. *Id.* at 945.

99. *Id.* at 944–45.

100. 324 F.3d 102 (2d Cir. 2003).

101. *Id.* at 107; accord *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003) (holding that a causal connection must exist).

102. *Felix*, 324 F.3d at 105.

provide a reasonable accommodation for the ‘disability’ which is the impairment of the major life activity.”¹⁰³ Moreover, the court found the plaintiff

fully able to work, just not in the subway. Her inability to work in the subway was related to her insomnia because they both stemmed from the same traumatic incident and resultant psychological disorder, the PTSD. But this common traumatic origin alone does not mean that the non-disability impairment is entitled to an accommodation.¹⁰⁴

Thus, because the plaintiff’s insomnia was “separate from her inability to work in the subway . . . even though both were caused by the subway firebombing and the resultant PTSD,” and the plaintiff claimed “that she could not work in the subway because she was ‘terrified of being alone and closed in,’” the court found that “the impairment for which Felix seeks accommodation does not arise ‘because of the disability.’”¹⁰⁵ The court noted that “[i]f the requested accommodation addressed a limitation caused by Felix’s insomnia, it would be covered by the ADA,” but that “impairments not caused by the disability need not be accommodated.”¹⁰⁶ Therefore, had the plaintiff requested an accommodation that would help her to sleep better, the court presumably would have found the requisite nexus. However, her requested accommodation, which would have enabled her to continue selling tokens for the transit authority while living with her PTSD, was found inappropriate under the statute.

There are numerous tensions built into the precarious balancing act of negotiating Congress’ goal of affording access and entrée into public life, and specifically employment, for the disabled,¹⁰⁷ and the courts’ admonition that the statute’s mandate is to level, but not tilt, the playing field for the disabled vis-à-vis the non-disabled.¹⁰⁸

103. *Id.*

104. *Id.*

105. *Id.* at 105, 107.

106. *Id.* at 107.

107. See 42 U.S.C. § 12101(a)(3) (2006); see also H.R. REP. NO. 101-485, pt. 2, at 22 (1990) (“The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life”); *id.* at 28 (“The Committee, after extensive review and analysis over a number of Congressional sessions, concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications.”).

108. See, e.g., *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (“We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.”); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196

The contours of the reasonable accommodation mandate have thus been hazy and have shifted over time, leading some scholars to argue that the causal nexus doctrine ought to be rejected because it unduly restricts the duty of providing reasonable accommodation and permits too many disabled individuals to fall through the cracks of an act intended to make the workplace accessible to them.¹⁰⁹ Moreover, scholars have argued that because plaintiffs are often exhorted or compelled to choose a qualifying major life activity “strategically”¹¹⁰ as they navigate the fine line between being insufficiently limited to be disabled and too limited to be qualified, the imposition of the causal nexus requirement can be at least debilitating and often fatal to one’s case.¹¹¹

(7th Cir. 1997) (“[T]he Americans with Disabilities Act does not command affirmative action in hiring or firing.”); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (“[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.”); see also Timmons, *supra* note 27, at 315 (“Interpreting the scope of the duty of reasonable accommodation too narrowly will thwart Congress’s goal of equal employment opportunity for individuals with disabilities. On the other hand, courts have frequently stated that the ADA’s requirement of reasonable accommodation should result in a level playing field for individuals with disabilities, rather than providing them an unfair advantage through preferential treatment.”).

109. See, e.g., Cheryl L. Anderson, *What Is “Because of the Disability” under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 346-47 (2006) (“[C]ourts may mistakenly tie the accommodation to the major life activity that is limited rather than the physical or mental impairment itself; take an unduly narrow view of what impairment is involved and thus find no causal connection between the disability and the requested accommodation; or divorce the person’s actions or conduct from the person’s disability, allowing the employer to refuse to accommodate the conduct.”); Timmons, *supra* note 27, at 315 (arguing that the rule set forth in *Felix* should be rejected, but that “the duty of reasonable accommodation should apply only when there is a substantial conflict between the individual’s disability-related limitation and the challenged workplace practice or structure”).

110. Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 WHITTIER L. REV. 335, 382 (2001); Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. J. 91, 145-46, 161 (2000).

111. See Anderson, *supra* note 109, at 379-80 (“The ‘because of’ causation cases are another practical fallout of a perceived incompatibility between reasonable accommodation and a civil rights paradigm built on principles of formal equality.”); Timmons, *supra* note 27, at 354 (“These barriers—which exist because standard workplace policies and structures developed based on a norm of a worker without physical or mental impairments—often exclude disabled individuals due to disability-related limitations that are not causally connected to a substantially limited major life activity.”).

Both the district court and the court of appeals' opinions in *Felix* have come under fire.¹¹² Specifically, commentators have noted that in contravention of the ADA's broad accommodation mandate, the district court appeared to intimate that "disabled individuals are entitled to reasonable accommodation only if they are substantially limited in the major life activity of working."¹¹³ Professor Kelly Cahill Timmons critiqued the Second Circuit's application of ADA law in the facts of *Felix* as follows:

[T]he appellate court decision . . . features questionable reasoning. The court repeatedly referred to the plaintiff's disability as insomnia. Certainly, if the plaintiff's disability was insomnia, her inability to work in the subway would not be a limitation caused by that disability, and the plaintiff would not be entitled to her requested accommodation. Determining a plaintiff's disability, however, must begin by identifying a physical or mental impairment The fact that insomnia is a short-hand term for a limitation on the major life activity of sleeping eased the Second Circuit's task in defining the plaintiff's disability as only the limitation on a major life activity, rather than, as the statute indicates, the "physical or mental impairment that substantially limits . . . [a] major life activit[y]." Given that the plaintiff's impairment, and thus her disability, was PTSD and not insomnia, does either the text of the ADA or precedent support the Second Circuit's holding that the law only entitles the plaintiff to accommodation for her sleeping difficulties?¹¹⁴

II.

THE AMENDMENTS AND WHAT WAS MISSED

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective January 1, 2009.¹¹⁵ Congress enacted the amendments because it found that the intent behind the original ADA was to provide broad coverage and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabili-

112. See Timmons, *supra* note 27, at 330 (noting that the *Felix* nexus requirement made no sense, especially in light of the fact that "[w]hen an employer intentionally discriminates against an individual with an actual disability because of that disability, courts do not require the plaintiff to prove that the employer was motivated by—or even knew about—the plaintiff's substantially limited major life activity," and a departure from this thinking in the case of a requested accommodation is senseless).

113. *Id.* at 326 (citing *Felix v. N.Y.C. Transit Auth.*, 154 F. Supp. 2d 640, 661, 662 (S.D.N.Y. 2001)).

114. *Id.* at 328–29.

115. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12102–12213 (2006 & Supp. 2009)).

ties.”¹¹⁶ Congress found that although it had “expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation ha[d] not been fulfilled” due to Supreme Court and other jurisprudence and administrative regulations that unduly constricted the scope of the ADA’s protection.¹¹⁷

Congress thus explicitly declared its purpose in enacting the amendments to be the reinstatement of a broad scope of coverage under the act, as well as the concomitant rejection of the holdings in cases like *Sutton v. United Air Lines, Inc.*¹¹⁸ and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*;¹¹⁹ and the resurrection of the thinking in cases like *School Board of Nassau County v. Arline*,¹²⁰ which had articulated a broad construction of the definition of a handicap under the Rehabilitation Act of 1973.¹²¹

*A. While the Amendments Effected a Good Deal of Reform
Regarding Coverage, They Left Issues Surrounding the
Reasonable Accommodation Analysis
Virtually Untouched*

1. The Amendments Drastically Extended the Act’s Coverage

The amendments dramatically expanded coverage under the act by doing several things. First, they increased the number and variety of major life activities, the substantial limitation of which would qualify a plaintiff as disabled within the meaning of the act. Substantively, a disability is still defined as “a physical or mental impairment that

116. ADA Amendments Act of 2008 § 2(a)(1).

117. *Id.* § 2(a)(3).

118. 527 U.S. 471, 482 (1999) (holding that impairments must be evaluated in their mitigated state in determining if an individual has a disability for purposes of the ADA).

119. 534 U.S. 184, 197 (2002) (holding that “disability” definition is to be strictly construed); see also Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009) (noting that the ADAAA addressed judicial interpretations of the ADA); Weber, *supra* note 67, at 1164 (citing Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008)).

120. 480 U.S. 273, 284–85 (1987) (construing 29 U.S.C. § 794 (2006)).

121. ADA Amendments Act of 2008 § 2(b)(3) (“The purpose[] of this Act [is] . . . to reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.”).

substantially limits one or more major life activities of such individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment.”¹²² However, following a list of major life activities including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” the amendments added the proviso that “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹²³

Notably, the amendments mandated that the definition of the term disability “be construed in favor of broad coverage of individuals under th[e] Act, to the maximum extent permitted by the terms of th[e] Act.”¹²⁴ In addition, they amended the operative coverage principles to specify that plaintiffs being assessed for a disability would be evaluated in their unmitigated, rather than in their mitigated states. Setting its sights on *Sutton*, Congress drafted the amendments to state that when determining whether a plaintiff is disabled within the meaning of the act, no weight or regard is to be given to

the ameliorative effects of mitigating measures such as—(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.¹²⁵

Significantly, however, “ordinary eyeglasses or contact lenses,” the mitigating measures at issue in *Sutton*, were expressly excepted from this mandate.¹²⁶ Nonetheless, the ADAAA removes the essential “catch-22” predicament in which *Sutton* had placed so many plaintiffs. Specifically, suits by plaintiffs who can prove that they are being

122. ADA Amendments Act of 2008 sec. 4(a), § 3(1).

123. *Id.* sec. 4(a), § 3(2)(B).

124. *Id.* sec. 4(a), § 3(4)(A); accord Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008) (discussing how the Supreme Court had established demanding standards under the ADA, and how the amendments eliminated those demanding standards).

125. ADA Amendments Act of 2008 sec. 4(a), § 3(4)(E)(i).

126. *Id.* sec. 4(a), § 3(E)(i)(I).

discriminated against because of their impairments are no longer precluded simply because their impairments are successfully treated by mitigating measures. By declaring that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,”¹²⁷ the amendments put a stop to cases in which the technical fact that a non-minor, non-temporary impairment is not actively impeding a plaintiff’s functioning at a given moment precludes that plaintiff from being adjudged disabled, even where the impairment is stigmatized, engendering the very discrimination of which the plaintiff complains.

Additionally, the amendments explicitly rejected the restrictive interpretation that the Supreme Court in its jurisprudence and the EEOC in the promulgation of its regulations had accorded the term “substantially limits,” noting that the restrictive interpretation was inconsistent with congressional intent.¹²⁸ Further, the amendments directed the EEOC to revise its regulations so that the term “substantially limited” would no longer be defined as “significantly restricted,” which was not in agreement with congressional intent.¹²⁹

Perhaps most significantly, the ADAAA essentially dropped the *de facto* requirement that an ADA plaintiff actually be substantially limited in a major life activity by revisiting and reforming the definition of one who is “regarded as” disabled.¹³⁰ The amendments provided that a plaintiff is properly adjudged to be “regarded as” disabled whenever she shows that a prohibited action has occurred due to a real *or perceived* non-transitory, non-minor physical or mental impairment, irrespective of whether the impairment limited or was perceived as limiting a major life activity.¹³¹ This represented a drastic change

127. *Id.* sec. 4(a), § 3(4)(D).

128. *Id.* § 2(a)(7)–(8).

129. *Id.* § 2(b)(6) (“[T]he Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.”).

130. *Id.* sec. 4(a), § 3(3)(A); *see also* Cox, *supra* note 25, at 203 (explaining why the effects or perceived effects of an impairment are no longer relevant to whether a plaintiff is part of the ADA’s protected class).

131. ADA Amendments Act of 2008 sec. 4(a), § 3(3)(A) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”); *see also* Cox, *supra* note 25, at 202–03 (“The ADAAA [amends] the ADA’s ‘regarded as’ provision, which was originally designed to permit plaintiffs to establish membership in the ADA’s protected class based on their employer’s perception—whether accurate or not—that they had a disability.”).

from courts' previous interpretations of the ADA and their conclusion that a plaintiff not perceived as actually being substantially limited in at least one major life activity was precluded from being deemed "regarded as" disabled.¹³² Prior to the enactment of the amendments, courts had construed the act to deny coverage to plaintiffs who were clearly being discriminated against because of their impairment, for the simple and highly illogical reason that they could not show contemporaneous, actual, or perceived substantial interference with a major life activity.¹³³ Hence, they were not "disabled," and no discrimination against them could violate the ADA. Under the amendments, any non-minor impairment, so long as it has an actual or projected duration of more than six months, that is shown to have engendered discrimination, will bring a plaintiff within the statute's protection.¹³⁴

The amendments' changes to the ADA's "regarded as" prong,¹³⁵ and their call for a more expansive reading of the definition of "disability,"¹³⁶ will surely aid numerous plaintiffs who, while irrefutably demonstrated to be victims of discrimination based on their impairments, do not actually manifest the requisite impediment—the substantial interference with a major life activity.¹³⁷ Once a plaintiff is

132. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

133. See Cox, *supra* note 25, at 201 (citing Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 7 (2007) ("As a result of these restrictive interpretations of the ADA's protected class, a 2007 study suggested that federal courts had effectively limited the ADA's protected class to a category of persons that would have extreme difficulty demonstrating that they are qualified to work, even with the provision of ADA accommodations.")).

134. ADA Amendments Act of 2008 sec. 4(a), § 3(3)(B) ("A transitory impairment is an impairment with an actual or expected duration of 6 months or less."); see also Cox, *supra* note 25, at 202 ("While the original ADA required all plaintiffs to demonstrate a substantial limitation of a major life activity, the ADAAA provides that when a plaintiff is not requesting a reasonable accommodation, she must prove only that she experienced discrimination due to a physical or mental impairment (whether actual or perceived) that is not 'transitory and minor.'").

135. ADA Amendments Act of 2008 sec. 4(a), § 3(3).

136. *Id.* sec. 4(a), § 3(1) ("As used in this Act: (1) Disability—The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).").

137. *Id.* sec. 4(a), § 3(4)(E)(i) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures"); see also Cox, *supra* note 25, at 202–03 ("Whether 'the impairment limits or is perceived to limit a major life activity' is no longer relevant to whether a plaintiff alleging discrimination . . . qualifies for membership in the ADA's protected class."); Long, *supra* note 124, at 224 ("[A]n ADA plaintiff no longer faces the difficult task of proving that a defendant's misperception of his or her

adjudged to be disabled or regarded as disabled, courts will be able (forced, in fact) to proceed to the rest of an ADA analysis. That is, the court must now proceed to evaluate whether anything, such as a safety rationale or a public policy or third party interest,¹³⁸ justified or otherwise excused the discrimination. Barring such a finding, the plaintiff will now win her case, irrespective of whether there is any relationship between the major life activity she named to attain coverage and the actual discrimination itself. A plaintiff seeking to be adjudged actually (as opposed to regarded as or having a record of being) “disabled” must only show substantial interference with at least one major life activity, and the amendments are explicit that “[an] impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”¹³⁹ Having shown the requisite interference with one major life activity, the plaintiff is ushered under the umbrella of the ADA’s coverage, and discrimination targeted at her because of her *impairment*—not because of her execution of any major life activity—will be actionable under the ADA.¹⁴⁰

2. *The Amendments Did Almost Nothing to Revise or Clarify the Reasonable Accommodation Analysis*

While under the amendments more plaintiffs than ever before will qualify as disabled and be able to maintain cases that allege a failure to accommodate, the amendments have done virtually nothing to revise or otherwise clarify the reasonable accommodation analysis that has confused, divided, and stymied courts.¹⁴¹ Due to courts’ pre-

condition was so severe as to amount to a belief that the condition substantially limited a major life activity.”).

138. See generally Long, *supra* note 68 (addressing a method of dealing with accommodation issues, focusing on the effect that the accommodation would have on other employees and third parties).

139. ADA Amendments Act of 2008 sec. 4(a), § 3(4)(C); accord Long, *supra* note 124, at 222 (noting that the Amendments make several changes to the concept of major life activities including “clarif[ying] what has always been implicit” and “reject[ing] the Supreme Court’s ‘demanding standard’”).

140. See Cox, *supra* note 25, at 202–03 (“Whether ‘the impairment limits or is perceived to limit a major life activity’ is no longer relevant to whether a plaintiff alleging discrimination (other than the denial of a reasonable accommodation) qualifies for membership in the ADA’s protected class.”).

141. See Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 540 (2008) (“[B]y including greater numbers of individuals in the protected class, the [AD]AAA will likely focus more attention on whether accommodations impose an undue hardship on an employer.”); cf. Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009) (“In fact, if the

ADAAA tendency to dispose of cases because a plaintiff did not meet the statute's definition of "disabled," the reasonable accommodation analysis has been performed relatively infrequently and not uniformly.

The only alteration that the ADAAA makes to the reasonable accommodation analysis is to indicate that one who is merely "regarded as" disabled, rather than one who is actually "disabled" within the meaning of the statute, is not entitled to a reasonable accommodation. Prior to the enactment of the ADAAA, some courts had taken the statute's words literally and held that plaintiffs who did not have any substantially limiting impairment, but who were "regarded as" having one and were therefore "regarded as" being disabled were entitled to a reasonable accommodation under the ADA.¹⁴² The ADAAA thus amended the "regarded as" prong of the statute in an attempt to reverse the effects of those decisions. To the extent that Congress was moved by the commonsense notion that one ought not merit an accommodation that one does not actually require, this revision clearly has some surface appeal. However, someone who actually does require an accommodation in order to successfully perform her job and who is properly viewed as disabled, but cannot meet the requirement of demonstrating substantial interference with a major life activity, will now, under current law, be denied that accommodation.¹⁴³

Moreover, because the amendments made no other attempt to alter the reasonable accommodation analysis, the problems seen under the previous regime are likely to persist.¹⁴⁴ Under the amendments, a plaintiff who can only show that he was "regarded as" disabled and who alleges discrimination need only show: (1) the fact of the (non-temporary, non-minor) impairment;¹⁴⁵ and (2) a causal nexus between

ADAAA succeeds in its primary objective of shifting litigation focus away from scrutinizing whether an individual is or is not disabled, and toward the issue of whether employers have fulfilled their reasonable accommodation obligations, the ADAAA actually may reinvigorate the backlash as the accommodation mandate becomes more visible and more contested.").

142. See, e.g., *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc).

143. See ADA Amendments Act of 2008 sec. 4(a), § 3(1)(A); see also Long, *supra* note 124, at 225 (discussing the change).

144. See Travis, *supra* note 141, at 320 ("In fact, if the ADAAA succeeds in its primary objective of shifting litigation focus away from scrutinizing whether an individual is or is not disabled, and toward the issue of whether employers have fulfilled their reasonable accommodation obligations, the ADAAA actually may reinvigorate the backlash as the accommodation mandate becomes more visible and more contested.").

145. See ADA Amendments Act of 2008 sec. 4(a), § 3(3)(B) ("A transitory impairment is an impairment with an actual or expected duration of [six] months or less.").

the impairment and discrimination forbidden by the statute.¹⁴⁶ That is all. However, even after the enactment of the amendments, the “*Felix* problem” persists when it comes to cases that allege a failure to accommodate. On the one hand, if a plaintiff deemed covered by the statute has alleged discrimination whereby her terms and conditions of employment have been altered because of her disability or the perception of her disability—if, for example, she is demoted or fired—her case has been made. On the other hand, because pursuant to the amendments, reasonable accommodations need not be provided by employers to those merely “regarded as” disabled, only through a demonstration that one or more major life activities were substantially interfered with will one merit a reasonable accommodation.¹⁴⁷ Thus, ADA plaintiffs seeking a reasonable accommodation, even post-amendments, will still face the “*Felix* problem.” Courts will parse out a plaintiff’s disabilities to determine whether or not the reasonable accommodation requested specifically furthers a major life activity put at issue by the disability claim.¹⁴⁸

3. *Clarification Regarding the Reasonable Accommodation Analysis is More Important Now than Ever*

Clarifying the reasonable accommodation analysis is more important in the wake of the ADAAA’s passage than it ever was before. The persistence of unresolved issues from the previous regime, compounded with certain changes effected by the amendments, make reasonable accommodation a topic that warrants further attention.

146. See 42 U.S.C. § 12112(a) (“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.”).

147. The ADAAA provided that employers “need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets” the “regarded as” definition. ADA Amendments Act of 2008 sec. 6(a)(1), § 501(h); see also Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1289 (2009) (noting that “the third prong of the definition of disability was modified to eliminate the substantial limitation requirement,” but that “[i]ndividuals asserting disability under that prong . . . will not be entitled to reasonable accommodations”); Long, *supra* note 124, at 225 (noting that prior to the amendments, courts were divided on whether a plaintiff “regarded as” disabled could receive accommodations, and that the ADAAA took “the side of the defendants in this instance”).

148. See Long, *supra* note 124, at 229 (“The amendments leave a host of reasonable accommodation issues unresolved, such as whether an employer must, as part of its duty of reasonable accommodation, reassign an individual with a disability to a vacant position when there is another, more qualified applicant and whether there should be a presumption that allowing an employee to work from home is not a reasonable accommodation.”).

First, increased coverage under the statute means that more cases will now survive the argument that the plaintiff is not “disabled” within the meaning of the statute. Therefore, more cases will actually proceed to the analysis of whether a proposed accommodation is, in fact, a reasonable accommodation or whether it confers an undue hardship upon the employer. In addition, under the “causal nexus” doctrine promulgated in several circuits, numerous plaintiffs whose disabilities are covered by the ADA may be denied accommodations that they truly need in order to work, because they cannot link their need for an accommodation, which pertains directly to the way in which their impairment affects their ability to work, with the major life activity that is substantially limited. Moreover, it will not be possible for plaintiffs to get reasonable accommodations when they fall through the cracks because they are merely “regarded as” disabled, despite the fact that they endure disability discrimination based upon a real or perceived disability and are unable to perform their jobs without reasonable accommodation.

Because of the skepticism with which the major life activity of “working” is viewed by courts and litigants alike,¹⁴⁹ the idea that a reasonable accommodation will aid the plaintiff in the major life activity of working, as most accommodations ultimately do, becomes irrelevant. As scholars have pointed out, the ADA’s language “does not state that, to be accommodated, limitations must be causally connected to the plaintiff’s substantially limited major life activity.”¹⁵⁰ Despite this contention—premised on this plain language, legislative history

149. See, e.g., *Murphy v. UPS*, 527 U.S. 516, 523 (1999) (requiring that in order to have working be considered a major life activity, the individual establish that she was regarded as unable to perform either a class of jobs or a broad range of jobs when compared with the average person having comparable training, skills, and abilities); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493 (1999) (concluding that plaintiffs were not substantially limited in the major life activity of working because their visual impairment only precluded them from holding the single job of global airline pilot); *Squibb v. Mem’l Med. Ctr.*, 497 F.3d 775, 782–83 (7th Cir. 2007) (declining to find substantial limitation in the major life activity of working where the plaintiff failed to “submit[] [any] evidence of the range of jobs available in her geographic area that would fall within her physical restrictions”); see also James M. Carroll, *The Causal Nexus Doctrine: A Further Limitation on the Employer’s ADA Duty of Reasonable Accommodation in the Seventh Circuit*, 91 MARQ. L. REV. 839, 849 (2008) (observing that “the [*Sutton*] Court’s skeptical remarks regarding working as a major life activity show the Court construing the ADA more narrowly in *Sutton* than it had in *Bragdon*.”); Long, *supra* note 124, at 226 (“As a result of this rule, ADA plaintiffs have had great difficulty establishing that they were actually disabled when working was the major life activity in question.”); Timmons, *supra* note 27, at 318 (“Claims based on the major life activity of working also rarely succeed, due to the difficulty of proving inability to work in a broad class of jobs.”).

150. Timmons, *supra* note 27, at 330.

and intent, and other provisions within the statute that, contrary to the holding in *Felix*, “the duty of reasonable accommodation applies to an individual’s impairment, provided that the impairment satisfies the definition of disability, not to an individual’s substantially limited major life activity,”¹⁵¹—the amendments have done nothing to correct the *Felix* “causal nexus” doctrine.

Finally, as discussed previously, courts and scholars alike disagree as to precisely how the reasonable accommodation analysis ought to be done and how burdens should be conceptualized and assigned in its adjudication. This disagreement signals that the issue of how to execute the reasonable accommodation analysis warrants immediate and close attention.¹⁵² The remainder of this paper suggests how the reasonable accommodation analysis might be best revisited, altered, and clarified in light of this pressing need, and in addition suggests how the statute as a whole might benefit from some additional overhaul.

III.

PROPOSALS

A. *The Requirement that a Plaintiff Alleging a Failure to Accommodate Demonstrate that She is Substantially Limited in One or More Major Life Activities Should be Removed*

Although at first it might appear to be a bold and drastic move, the purposes of the ADA would be best served if plaintiffs alleging an employer’s failure to provide a reasonable accommodation did not have to demonstrate any substantial limitation of a major life activity. There are several reasons for this.

The ADA Amendments Act of 2008 effectively removed the “major life activity” barrier to coverage under the act for those plaintiffs who experience an affirmative act of discrimination.¹⁵³ Although the act retained its cen-

151. *Id.*

152. See Michael Ashley Stein et. al., *Cause Lawyering for People With Disabilities*, 123 HARV. L. REV. 1658, 1700 (2010) (reviewing SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)) (“The moment is ripe for disability cause lawyers to identify a plaintiff with an unquestionable disability (say a blind individual) who sought a fairly uncontroversial accommodation (say, a screen magnifier) whose cost would not satisfy the criteria for an undue hardship defense under the ADA.”).

153. See ADA Amendments Act of 2008 sec. 4(a), § 3(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures”); see also Cox, *supra* note 25, at 203 (“Whether ‘the impairment limits or is perceived to limit a major life

tral definition of a disability as a physical or mental impairment that substantially limits a major life activity, the amendments did several things that obviated the need for the plaintiff to demonstrate a nexus between the major life activity and the discrimination alleged. The amendments even ensured that a plaintiff alleging discrimination who could not show any interference with a major life activity could still warrant coverage under the right circumstances. Specifically, in addition to broadening the definition of “major life activity,” the ADAAA allows an individual with an impairment in remission or whose major life activity interference occurs only sporadically to be considered disabled even when the interference is not active.¹⁵⁴ The amendments prohibited courts from considering any mitigating measures other than “ordinary eye glasses or contact lenses” when deciding whether or not an impairment is “substantially limiting.” Thus, even if one had no interference with a major life activity at the time of the discrimination, one could nonetheless establish that the discrimination was due to the overall presence of the impairment without linking it to a major life activity in any way. No nexus needs to be shown. Moreover, the ADAAA instructed the EEOC to revisit its regulations to define “substantially limits” broadly, in comportment with the act’s objectives.¹⁵⁵

Most significantly, however, the ADAAA expanded the definition of the term “regarded as” disabled.¹⁵⁶ Post-amendments, an individual may be properly deemed “regarded as” having an impairment despite the fact that her employer does not perceive that she is substantially limited in one or more major life activities. She is “regarded as” disabled so long as the impairment is non-minor and non-transitory and she “establishes that . . . she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment.”¹⁵⁷ In other words, merely having an actual or perceived impairment causing the prohibited discrimination is enough

activity’ is no longer relevant to whether a plaintiff alleging discrimination (other than the denial of a reasonable accommodation) qualifies for membership in the ADA’s protected class.”).

154. ADA Amendments Act of 2008 sec. 4(a), § 3(4)(D) (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”).

155. *Id.* § 2(b)(6) (“The purposes of this Act are . . . to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.”).

156. *Id.* sec. 4(a), §3(3); *see also* Long, *supra* note 124, at 223–24 (detailing the expansion of the definition).

157. ADA Amendments Act of 2008 sec. 4(a), § 3(3).

to extend coverage to a plaintiff. Whether a major life activity is impeded need not even enter into the coverage equation.¹⁵⁸

However, the analysis is different if a plaintiff alleges a failure to accommodate. The ADAAA's only revision to the reasonable accommodation mandate was that a plaintiff who is merely regarded as disabled is not entitled to a reasonable accommodation.¹⁵⁹ The surface appeal of such a denial is clear; to the extent that one's disability creates no limitations requiring accommodation, no duty to accommodate need be engendered based upon a mere (mis)perception. On the other hand, where a non-minor, non-transitory impairment prevents an individual from working at the job that she has or desires, the employer's duty to accommodate pursuant to the statute will not take hold if she is merely regarded as disabled; she must show substantial interference with a major life activity.¹⁶⁰

The major life activity interference requirement for individuals who seek reasonable accommodations under the act is unwarranted.¹⁶¹ This is not to say that a threshold demonstration ought not be required of those seeking coverage under the act for the purpose of procuring an accommodation. However, if one has an impairment that is non-minor, non-transitory, and which thus renders one covered under the act for the purpose of insulating one from workplace discrimination that stems from the disability or the perception of the disability, that individual ought to be considered within the ambit of the statute's protection. Such a plaintiff should be seen as one deemed by Congress as likely to be denied access and entrée to aspects of public life, includ-

158. See *id.*; Cox, *supra* note 25, at 202–03; see also H.R. REP. NO. 110-730, pt. 1, at 16 (2008) (“[T]he emphasis in questions of disability discrimination [should be] on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is even a ‘person with a disability’ with any protections under the Act at all.”).

159. ADA Amendments Act of 2008 sec. 6(a)(1), § 501(h); see also Long, *supra* note 124, at 225 (“The ADAAA takes the side of defendants in this instance. The Act provides that employers and other covered entities ‘need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets’ the ‘regarded as’ definition.”).

160. See ADA Amendments Act of 2008 sec. 6(a)(1), § 501(h) (“A covered entity under title I . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) [being regarded as having such an impairment] of such section.”).

161. See generally Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (looking to debunk the idea that there is a major difference between the accommodation and the antidiscrimination requirement of the ADA, stating that accommodation seeks to serve the same fundamental interests as the antidiscrimination requirements).

ing gainful employment, due to societal stigmatization, prejudice, and intolerance. That plaintiff ought to be entitled to a reasonable accommodation that would allow her to satisfactorily perform her job.

The reason for this is simple. Employees do not necessarily require workplace accommodations in order to enable them to perform major life activities. Take, for example, a blind attorney who requires voice-activated software in order to draft memoranda. His major life activity of sight is substantially interfered with by his impairment, but no accommodation will enhance or enable his sight. The voice-activated software will enable him to exhibit an essential and valued ability—the ability to draft memoranda that a judge can read. Disabled employees require accommodations in order to exhibit essential and valued abilities. The only purpose the major life activity element of the reasonable accommodation analysis served was to help designate who was entitled to coverage under the statute; it served a gate-keeping function. However, with the abolition of the major life activity requirement for plaintiffs alleging affirmative discrimination, it seems as though there are better ways of screening plaintiffs to determine who can obtain relief under the statute.

1. Rationales for Dropping the Major Life Activity Requirement for Coverage under the ADA

a. The Requirement has Already Been Abandoned under the ADA's Anti-Discrimination Mandate

One of the best reasons for dropping the major life activity requirement for coverage under the ADA is that in effect, it has already been abandoned for plaintiffs who allege affirmative discrimination under the statute.¹⁶² In light of the revisions to what it means to be “regarded as” disabled, any employee with a non-minor, non-temporary impairment who suffers discrimination based on that impairment, whether from the way it is perceived or from the toll it actually takes, is covered under the statute. Although she may or may not ultimately succeed, a plaintiff who is discriminated against on the basis of her being “regarded as” disabled is thus entitled to an analysis as to whether the discrimination violates the statute or is somehow justified, because, for example, the plaintiff poses a threat to the safety of others, or some other viable defense is set forth by the employer. The

162. See ADA Amendments Act of 2008 sec. 4(a), § 3(3)(A) (“An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”).

reasoning for this is clear: those who suffer from non-minor, non-temporary impairments, whether or not such impairments actually affect any “major life activities,” are members of a protected class of individuals who have historically and systematically been denied access and opportunity in the workplace and elsewhere.¹⁶³ Thus, under the ADAAA any unlawful discrimination that a member of this group experiences is actionable, irrespective of the individual’s actual specific impairments or her specific ability to perform any number of major life activities. To the extent that an individual with a non-minor, non-temporary impairment also has the inability to, for example, reproduce, it likely has no bearing on the discrimination or stigmatization that she faces on the job.¹⁶⁴ Congress, for its part, apparently sees no further use in imposing a requirement upon this person that she plead and establish her inability to reproduce or any particular limitation to merit the ADA’s protection.

This should also be the case with those alleging an employer’s failure to accommodate.¹⁶⁵ Anyone with a non-minor, non-temporary impairment remains identifiable as an individual that Congress has decided is vulnerable to discrimination in the workplace and elsewhere. Such discrimination may take the form of an unlawful firing. It may also take the form of a refusal to provide a reasonable accommodation that will permit that individual to commence or continue working for that particular employer. Insofar as one who is deemed a member of a protected class, arguably subject to discrimination and the multitude of barriers that it erects, is barred from his or her employment by a refusal to furnish a reasonable accommodation, that individual is denied access, entrée, and inclusion to the same extent as one whose impairment causes him or her to be denied a promotion or fired.

163. *See id.* § 2(a)(2) (“[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.”).

164. *See id.* sec. 4(a), § 3(2)(B) (“[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”).

165. *See generally* Timothy J. McFarlin, Comment, *If They Ask for A Stool . . . Recognizing Reasonable Accommodation for Employees “Regarded As” Disabled*, 49 St. Louis U. L.J. 927 (2005) (arguing that courts should hold employers liable for failing to reasonably accommodate “regarded as” disabled employees).

b. *There is no Basis for Requiring the Articulation of Substantial Interference with a Major Life Activity under the ADA's Reasonable Accommodation Entitlement, Nor under its Anti-Discrimination Mandate*

However, a question arises: Isn't there a difference between requiring an employer to refrain from affirmative discrimination and requiring it to actively cede resources, such as time, money, or other assistance, toward accommodations? Moreover, didn't the major life activity limitation requirement afford the ADA an effective screen through which floodgates could be regulated?

The fact is, however, that a higher barrier in the form of a major life activity limitation requirement is not needed in the case of a failure to accommodate claim.¹⁶⁶ To the extent that the dual mandates of the ADA—that employers refrain from discrimination and that they afford reasonable accommodations to those deemed disabled—are distinct, when it comes to requiring that a major life activity interference be shown, it is a distinction without a difference. One might argue that that there is a difference between the two, warranting different coverage requirements because the anti-discrimination mandate protects the disabled from irrational discrimination and that the reasonable accommodation requirement protects them from rational discrimination. One might similarly argue that there are no costs to forcing employers to refrain from discriminating against the disabled in hiring, retaining, and promoting employees, while furnishing reasonable accommodations comes at a cost that warrants a greater barrier to coverage. But this is simply not the case.

Hiring, retaining, and promoting the disabled, even without affording any special accommodations, is not without its costs. Costs are exacted through increased efforts that it may take to train or employ a disabled person that may not amount to an accommodation (or at least one that the employer will not contest). Costs also arise in the form of externalities like customer preference for non-disabled workers and co-worker discrimination, both of which may erode corporate resources, goodwill, and productivity. Moreover, even though a disabled person may be able to perform her job duties with no specified accommodation, that person may not be able to “train up” in the same manner as a non-disabled person, such that the training invested in him

166. See generally Bagenstos, *supra* note 161 (arguing that the costs associated with reasonable accommodations cannot be meaningfully distinguished from those imposed by antidiscrimination requirements).

generates optimal efficiency and benefits as he moves up the ranks of employment. These reasons notwithstanding, the ADA mandates that because of the societal value of the inclusion of the disabled in public life, including employment, these costs must be borne so that disabled workers may both find and keep jobs.¹⁶⁷

This is also the case when accommodating disabled workers who have already found employment. Once employed, the ADA mandates that workers with disabilities be afforded reasonable accommodations for the same reason and in furtherance of the same purpose that underlies the statute's anti-discrimination mandate: employers are being asked to pay costs and to take measures in amounts and in ways deemed reasonable so that both irrational and rational prejudice are combated and the disabled are permitted not only to function, but to remain and thrive in the workplace.

The fact is that those who need reasonable accommodations to obtain or retain employment come from the same population of people as those who need the protection of the anti-discrimination mandate. They are people with non-minor, non-temporary impairments who face a variety of impediments in their goal of holding down gainful employment. These impediments may include, but are not limited to, others' perception of them or their abilities, actual limitations that may not be "major life activities" but nonetheless impair their abilities to do the jobs they have or desire, and actual limitations on major life activities. Whatever the limitations, these are all people from a group that has been identified by Congress as vulnerable to bias (rational or not), exclusion from opportunity, and denial of entrée into various veins of public life, employment not the least among them. Merely pointing to a major life activity—something "that the average person in the general population can perform"¹⁶⁸—and saying it is substantially limited should not be talismanic. It ought not automatically designate one as warranting protection under the statute. The concerns that Congress expressed about those whom it intended to protect with the legislation do not correlate with such a mechanistic determination.

167. See 42 U.S.C. § 12101(a) (2006) (setting forth findings including a long history of unjustified discrimination and the value of including the disabled in public life).

168. See 29 C.F.R. § 1630.2(j)(1)(i) (2010) (stating that "substantially limits" means "[u]nable to perform a major life activity that the average person in the general population can perform").

- c. *It is Not Necessarily Absurd to Mandate the Reasonable Accommodation of Those Deemed Merely “Regarded As” Disabled Where the Accommodation is Truly Needed Because of a Non-Minor, Non-Transitory Impairment*

It should be reiterated here that the anti-discrimination mandate of the statute now protects those without a limitation on a major life activity, but who are still “regarded as” disabled. Entitling such individuals to a reasonable accommodation may seem problematic in that technically, the accommodation is being afforded to someone who is merely perceived to have a disability, but is not actually disabled. This is, however, merely a problem of semantics. To the extent that the protections of the anti-discrimination mandate of the statute fully apply to one who has a non-minor, non-temporary impairment, it does not matter how that person is classified under the statute. The rationale for affording that person an accommodation is no less compelling than the rationale for ensuring that one who is perceived as being a member of the disabled community, although she is not limited in the performance of a major life activity, does not suffer adverse actions that impact employment.

Labeling a person “regarded as” disabled does little to explain why the person would not warrant the full protection of the statute; it merely serves to make affording an accommodation to that person appear futile or even absurd. The fact remains, however, that the person is the same irrespective of whether she comes to court seeking a discrimination-free workplace or a reasonable accommodation. She has been afflicted with an impairment that is more than minor and projected to be long-term. Even without a discernible major life activity limitation, the person may very well need a reasonable accommodation to become or remain employed in a job that would make sense for him or her. In any event, the person will require, and is entitled to, an environment free of discrimination.

Mandating that an accommodation be afforded to one who does not need one is pointless indeed, but entitling one who needs an accommodation to that accommodation even if she is deemed “regarded as” disabled is not. It is simply a matter of seeing through nomenclature to afford the same group of people everything that the statute promises, because they are the group that warrants its protections. Congress has already recognized that those who would be deemed disabled but for their lack of a major life activity limitation would, without the statute’s coverage, surely be discriminated against in contravention of the statute’s goal of affording access. Congress must

also realize that this same group of people will be denied relatively simple accommodations where it is reasonable, based upon the skills and qualifications of the individual, the nature of what is requested, and the specifics of the employer's resources and circumstances, to grant them the accommodation. In either case, a qualified individual will not be able to obtain or retain a job that will enable him or her to earn a living and to participate in public life.

d. The Major Life Activity Requirement is not Necessary to Ensure Adequate Screening of Meritorious Cases Meant to be Reached by the Statute

Although the major life activity limitation requirement may be trumpeted as serving a screening function, the core of the reasonable accommodation query—which is also capable of serving a screening function—is the relevant tripartite otherwise qualified/reasonable accommodation/undue hardship analysis.¹⁶⁹ Irrespective of whether or not an individual has a major life activity limitation that may or may not correlate to a needed accommodation, one will *only* be entitled to a requested accommodation to the extent that: (1) the individual is otherwise qualified for the position; (2) the accommodation is reasonable; and (3) the accommodation does not impose an undue hardship on the employer.¹⁷⁰ A plaintiff bringing a lawsuit under the ADA is not entitled to her preferred accommodation; she is only entitled to an accommodation adjudged reasonable.¹⁷¹ Insofar as the relevant analysis is strengthened and attuned to ensuring that employers retain their core prerogative to hire the most talented employees, this analysis alone, without the major life activity analysis, will serve as an effec-

169. For articles relating to the relationship between “undue hardship” and “reasonable accommodation,” see, for example, Anderson, *supra* note 109; Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123 (2003); James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1 (2005); John E. Matejkovic & Margaret E. Matejkovic, *What is Reasonable Accommodations Under the ADA? Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67 (2009); Helen A. Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917 (2006); Weber, *supra* note 67.

170. 42 U.S.C. § 12112(b)(5)(A) (2006) (Discrimination includes “not making *reasonable accommodations* to the known physical or mental limitations of an *otherwise qualified* individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity”) (emphasis added).

171. See, e.g., EEOC v. Agro Distribution, LLC, 555 F.3d 462, 471 (5th Cir. 2009); Johnson v. Cleveland City Sch. Dist., 344 F. App'x 104, 112–13 (6th Cir. 2009).

tive screen for cases that should not succeed. This is the second major part of what this Article proposes.

e. The Best Reason of All: There is Simply no Wholesale Connection between Substantial Interference with One's Major Life Activities and Either the Discrimination that One Faces Due to One's Impairment, or One's Proposed Reasonable Accommodation

The main rationale for dropping the major life activity requirement from the statute's imposition of the duty to accommodate, and for dropping it from the statute itself, is that the inability to perform a commonly performed, "basic" activity like digestion or reproduction has no significant connection to either the discrimination that employees face in the workplace or to the nature of the accommodations that they require in order to perform their jobs. There are those who are blind, and whose prospective employers would rather not hire them and take on the obligation of accommodating them in the office precisely because they cannot see, but there are also those with AIDS, whose stigmatization has little to nothing to do with the fact that they cannot, say, reproduce with ease. There are those who need extra time to complete tasks because they are substantially limited in the major life activity of walking, and thus slower to get around the workplace, but there are also individuals like Denise Felix who suffer from a syndrome like PTSD that may impair major life activities that are not traditionally done on paid work time,¹⁷² like eating and sleeping, but who may only require a *de minimus* expenditure of resources, like an above-ground transfer (to the extent that one is available) in order to retain their jobs.

When all is said and done, any reasonable workplace accommodation is actually needed and granted in furtherance of the same ultimate purpose: to get or keep an employee in a position that she holds or desires. It is not needed to aid in the execution of a major life activity; the employee may remediate her inabilities or deficiencies that she has as she will, without permission from or resort to an employer, but the accommodation almost always functions to enable the employee to retain her employment despite her impairment. For example, an employee who requires aid in the actual execution of a major life activity will typically take it upon herself to procure a cane, hearing aid, or medication that aids in digestion. It is only for a workplace

172. See *Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102, 103–04 (2d Cir. 2003).

accommodation—a grant of extra time to complete work, a flexible schedule to work while receiving treatment, or extra assistance in any form with work—that an employee must typically resort to her employer, and ultimately, to the law of the ADA. There is simply no reason to retain the arbitrary requirement that the employee point to a limitation of a major life activity that may or may not be implicated or otherwise aided by an accommodation.

A cancer patient's limited ability to reproduce or to fight off infection is likely of limited concern to her employer as long as she reports to work and performs well. However, what may be of concern is the looming prospect that her cancer may return and that the employer will not be able to rely on her continued health and progress at work. The law has already recognized that even if she cannot yet point to an extant limitation on her major life activities, she should enjoy protection from the bias that her disease conjures up. It should also acknowledge that if she needs a flexible work schedule in order to receive treatment, and if such a change is a reasonable accommodation under the circumstances, her employer is likely denying her the request out of the same desire to evade the cost and inconvenience that the employer shows if it refuses to hire or retain her in the first place. No greater or additional purpose is served by withholding the reasonable accommodation from an employee who is protected under the anti-discrimination mandate.

Further, no benefit is derived by adhering to the fiction that a given reasonable accommodation should always aid the employee in better performing a major life activity (such as with Denise Felix¹⁷³) or being a better employee (flexible scheduling, for example, enables the employee to *stay* employed while treating the impairment, but it may or may not affect the employee's work performance). The true purpose of the reasonable accommodation provision is to help ensure that an otherwise qualified individual deemed worthy of inclusion within the statute's protection is given the assistance that he or she needs to obtain, perform, or retain the job that she holds or desires.

2. *A Final Note in Light of the ADAAA's Expansion of the Law's Conception of a Major Life Activity*

Since the ADAAA now includes major bodily functions and episodic impairment, even if the impairment is in remission, in its defini-

173. See *Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102, 105 (2d Cir. 2003) (reading the reasonable accommodation requirement to require a connection to an impairment of a major life activity).

tion of “major life activities,” a large number of individuals who would have been adjudged either “regarded as” disabled or even not disabled at all will be found to be disabled within the meaning of the act. Fewer people for whom the legislation was originally passed will now fall through the proverbial cracks. That said, the major life activity requirement is still unnecessary, and it will likely continue to unfairly and needlessly screen out plaintiffs who merit a reasonable accommodation, as well as many of those to whom the *Felix*/causal nexus requirement applies. The unambiguous goal of the ADAAA was to expand coverage under the ADA; this is evident from its plain language, as well as from its legislative history.¹⁷⁴ It therefore makes no sense for the ADA to retain its language requiring the substantial limitation of a major life activity in order for a plaintiff to warrant coverage. The best way to ensure that cases the ADA was *not* intended to reach are screened and foreclosed is to properly execute and employ the relevant analysis for determining whether someone covered by the statute is otherwise qualified for the position at issue, whether the proposed accommodation is reasonable, and whether or not it confers an undue hardship upon the employer.

B. The “Otherwise Qualified”/“Reasonable Accommodation”/“Undue Hardship” Analysis Should be Re-Conceptualized

Once it is determined that someone is presumptively covered by the ADA by having a non-minor, non-temporary impairment, the following analysis should aim to capture those scenarios where Congress contemplated protecting plaintiffs and to screen out non-meritorious cases. In other words, the statute’s application should level the playing field, so that qualified, valuable, but disabled employees may be successfully integrated into American workplaces, while employers are permitted to retain and exercise their prerogative to select the most valued and skilled employees for their businesses. In order to achieve this result, the overall analysis, of which the courts have left the substance and framework less than certain, should be re-conceptualized, and the requirement that an otherwise qualified employee be able to

174. See ADA Amendments Act of 2008 sec. 4(a), § 3(4)(A) (“The definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”); see also Long, *supra* note 124, at 229 (“Although there are still numerous issues that remain unresolved, many of the changes that Congress did make were long overdue and are likely to provide greater coverage at the initial stage of determining whether an individual has a disability than existed previously under the Act.”).

perform all of the job's essential functions with or without accommodation should be changed to require that she be able to demonstrate all of the necessary job skills without any accommodation.

Even if the major life activity limitation requirement is eliminated, there should still be several junctures in the analysis to screen for plaintiffs whose cases should survive summary judgment. Under the existing reasonable accommodation analysis,¹⁷⁵ a tripartite query takes place whereby the court ascertains whether a disabled plaintiff is an otherwise qualified individual, whether the proposed accommodation is reasonable, and whether or not the proposed accommodation confers an undue hardship on the employer. As stated, jurists, scholars, and practitioners differ sharply as to the relationship and interplay among the three. For the most part, before the enactment of the ADAAA, the "otherwise qualified" analysis was subsumed and even eclipsed by the disability/coverage analysis, as discussed above. The other two pieces of the puzzle—the reasonableness analysis and the undue hardship analysis—have been alternately described as two sides of the same coin,¹⁷⁶ mirror images with their respective burdens conferred on the respective parties,¹⁷⁷ and wholly distinct and independent from one another.¹⁷⁸ It is surprising, given the state of confusion of the law on this very crucial point, that the ADAAA did not address it. This is especially confounding considering that the ADAAA's ex-

175. See generally Matejkovic & Matejkovic, *supra* note 169 (discussing how the ADA's accommodation requirement remains underdeveloped).

176. See Weber, *supra* note 67, at 1124 ("Reasonable accommodation and undue hardship are two sides of the same coin.").

177. See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 12–13 (1996) ("The distinction between reasonable accommodation and undue hardship survives mainly in the procedural form of allocating the burden of proof between the disabled individual and the employer. The plaintiff bears the burden of showing that reasonable accommodation is possible. Once such an accommodation is identified, the employer bears the burden of showing that it would result in undue hardship."). But see *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (indicating that "reasonable accommodation" is not a mirror image of "undue hardship").

178. See Jean Fitzpatrick Galanos & Stephen H. Price, *Title I of the Americans with Disabilities Act of 1990: Concepts & Considerations for State & Local Government Employers*, 21 STETSON L. REV. 931, 948 (1992) ("It is therefore important to note the distinction between undue hardship and reasonable accommodation: Undue hardship is a defense to, rather than an aspect of, reasonable accommodation."); Jason Zarin, Note, *Beyond the Bright Line: Consideration of Externalities, the Meaning of Undue Hardship, and the Allocation of the Burden of Proof Under Title I of the Americans with Disabilities Act*, 7 S. CAL. INTERDISC. L.J. 511, 534 (1998) ("If undue hardship is treated simply as the failure of an accommodation to be reasonable, then any distinction between the tests is eviscerated, rendering the undue hardship language of the ADA superfluous. Thus, to give effect to Congress's intent, reasonable accommodation and undue hardship need to be given independent meanings.").

pansion of coverage will effectively push the question of what is and is not a reasonable accommodation to the forefront in many more cases, necessitating a more workable construction and framework.

It is thus the case that the “otherwise qualified” analysis should be given more centrality in the reasonable accommodation analysis, and Congress should proceed to revisit the terminology for defining that which an otherwise qualified plaintiff must be able to do.

1. Background on the “Otherwise Qualified” Analysis

The “otherwise qualified” analysis asks whether a disabled plaintiff can perform the essential functions of the job that he has or desires with or without a reasonable accommodation. This analysis has been largely ignored by courts and scholars, but it ought to be a much more integral part of a reasonableness analysis.

A few courts, however, have recognized that when identifying and defining essential functions for a given position, “[p]recision is critical, as the level of generality at which the essential functions are defined can be outcome determinative.”¹⁷⁹ Although the term “essential functions” is not defined in the ADA, it has been defined in the statute’s implementing regulations, promulgated by the EEOC as the “fundamental job duties of the employment position the individual with a disability holds or desires,” not including “the marginal functions of the position.”¹⁸⁰ The regulations set forth three nonexclusive reasons as to why a job function may be considered essential: (1) the position exists for “the purpose of performing the function;” (2) there are a “limited number of employees available among whom responsibility for the function can be distributed;” and/or (3) the function is “highly specialized” and the incumbent was hired for his or her expertise or ability to perform it.¹⁸¹

Courts that have spent time on the otherwise qualified analysis have traditionally dealt with the complexity of discerning what is and is not an essential function by recognizing that the analysis “involves fact-sensitive considerations and must be determined on a case-by-

179. *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 75 (1st Cir. 2010) (citing *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 27–28 (1st Cir. 2002); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 280–81 (3d Cir. 2001)).

180. 29 C.F.R. § 1630.2(n)(1) (2010).

181. *Id.* Courts adjudicating ADA cases and interpreting the statute often look to the EEOC Interpretive Guidance, which was published as an appendix to the regulations implementing Title I of the Act. *See* EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 56 Fed. Reg. 35,726, 35,739 (July 26, 1991) (to be codified at 29 C.F.R. § 1630).

case basis.”¹⁸² Under the regulations, the kinds of evidence that ought to inform the analysis are:

- [1] The employer’s judgment as to which functions are essential;
- [2] Written job descriptions prepared before advertising or interviewing applicants for the job;
- [3] The amount of time spent on the job performing the function;
- [4] The consequences of not requiring the incumbent to perform the function;
- [5] The terms of a collective bargaining agreement;
- [6] The work experience of past incumbents in the job; and/or
- [7] The current work experience of incumbents in similar jobs.¹⁸³

Moreover, “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.”¹⁸⁴ While the plaintiff retains the burden of establishing that she is an otherwise qualified individual with a disability, the burden is on the employer to proffer evidence that a given function is essential. Courts are charged with walking a very fine line between deferring to the legitimate managerial prerogative of employers to structure positions and run operations as they see fit and refusing to accept wholesale a self-serving job description from an employer seeking to thwart and evade the ADA’s application.¹⁸⁵ Moreover, courts have acknowledged that a function may be “necessary,” and thus “essential,” even if it is not “primary,”¹⁸⁶ meaning that an employee may still need to perform a function in the run of her employment even if that function is not one of the primary things that the employee was hired to do or something that must be done frequently or for a long time.¹⁸⁷

182. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 25 (1st Cir. 2002).

183. 29 C.F.R. § 1630.2(n)(3) (2010).

184. 42 U.S.C. § 12111(8) (2006).

185. *See Gillen*, 283 F.3d at 25 (“The purpose of these provisions is not to enable courts to second-guess legitimate business judgments, but, rather, to ensure that an employer’s asserted requirements are solidly anchored in the realities of the workplace, not constructed out of whole cloth,” though “the employer’s good-faith view of what a job entails, though important, is not dispositive.”).

186. *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 78 (1st Cir. 2010) (“The essential functions of a position are not limited to the ‘primary’ function of the position.”).

187. *See, e.g., Kvorjak v. Maine*, 259 F.3d 48, 56, 58 (1st Cir. 2010) (finding that a claims adjudicator needed to be able to furnish advice to other employees despite the fact that the “core function” of the position was adjudicating claims); *Frazier v. Simmons*, 254 F.3d 1247, 1259–61 (10th Cir. 2001) (finding that a criminal investigator needed to be able to restrain violent people despite the fact that the primary functions of the investigator position required no physical exertion).

2. *How the Analysis Should be Positioned, Structured, and Worded*

This overlooked piece of the reasonable accommodation analysis ought to be the threshold query, and it ought to screen cases more carefully than it currently does. Inasmuch as the major life activity limitation requirement is dropped and no longer serves an artificial screening function, the otherwise qualified analysis ought to be strengthened and should be seen as serving a legitimate screening function. The major life activity limitation requirement can, as previously discussed, unjustly prevent certain plaintiffs from basic consideration under the statute. The elimination of the major life activity requirement may therefore be seen as shifting the screening function from whether a plaintiff who has a non-minor, non-temporary impairment is disabled within the meaning of the statute to the question of whether that plaintiff is properly deemed otherwise qualified for the position in question. The otherwise qualified analysis should assess whether a given plaintiff is viable for a given position and valuable to the employer despite requiring an outlay of resources by the employer in order to remain employed.

The otherwise qualified analysis should be first and primary among the tripartite strands of consideration that comprise the otherwise qualified/reasonable accommodation/undue hardship analysis. In fact, a close look at the otherwise qualified provision of the statute shows that it actually implicates the other two strands of the analysis already by defining an otherwise qualified employee as one who, with or without a reasonable accommodation, can perform the essential functions of the position that she has or desires. However, designating one who is “otherwise qualified” as one who can perform a job’s essential functions with a reasonable accommodation effectively subsumes and bypasses the question of whether an accommodation is reasonable, and by extension, whether it confers an undue hardship on an employer.¹⁸⁸

The rule should instead be that when a non-minor, non-transitory impairment that is the but-for cause of one’s need for a reasonable accommodation in order to become or remain employed, an accommodation is warranted where the employee is otherwise qualified,

188. *But see* W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls’s Concept of Social Justice*, 22 N.M. L. REV. 295, 298 (1992) (“[T]he inflexibility of the essential-functions test is perhaps the major legal barrier to the achievement of equality unimpeded by such disabilities.”).

meaning that he or she already possesses the necessary job skills prior to receiving any employer-furnished accommodation.

This formulation separates out the three strands of the analysis and organizes them so that the “reasonable accommodation” analysis becomes distinct from others and directly addresses the accommodation itself. The undue hardship analysis should focus on the specifics of the employer and anything about it—its size, resources, or location, for example—that might render an otherwise reasonable accommodation unreasonable. The otherwise qualified strand, however, should focus entirely on the plaintiff: specifically, whether she is competitive for the position from the employer’s view, with respect to necessary skills, before any accommodation enters the analysis.

This emphasis on necessary skills accomplishes several things. First, it recognizes and respects the employer’s natural desire to hire the candidates and retain the employees who emerge as most qualified for a position because, at a basic level, they possess the skills that the employer seeks and values for the position. Second, it ensures that the reasonable accommodation will be one that helps an employee to exhibit, demonstrate, or utilize the necessary skills and talents sought, rather than obviating the need for them to do so. Finally, it comports with the goal of the ADA’s reasonable accommodation mandate, which is to ensure that qualified people who are protected under the statute and need a reasonable modicum of help to perform their jobs satisfactorily get the aid that they need.

The fact is that employees are not valued or valuable (that is, they are not hired, retained, and promoted) because of their abilities to perform certain major life activities. One would be hard-pressed to find an employer who specifically placed value on an employee’s ability to, for example, sleep, eat, or reproduce. However, employees are also not valued merely to attain desired results through any means possible. Thus, for example, an employee who could only accomplish something that she was hired to do by requesting that someone else do it is not proving valuable. Only an employee with the skills valued by an employer as the means by which to get to a desired end result should be deemed “otherwise qualified” by the statute; the employee’s ability to perform major life activities and her ability to attain desired results via any potential means are equally irrelevant.

For an illustrative example, take a blind attorney in a wheelchair.¹⁸⁹ His disabilities impair his major life activities of seeing and

189. Cf. Bruce M. Familant, Comment, *The Essential Functions of Being A Lawyer with A Non-Visible Disability: On the Wings of A Kiwi Bird*, 15 T.M. COOLEY L. REV.

walking. Just as obviously, one of the functions his employer desires from him is the production of excellent legal briefs. The necessary skills, however, that this or any other attorney would need in order to be considered a competitive candidate for employment, retention, or promotion, are neither the major life activities of seeing or walking, nor are they the ultimate generation of the desired end product. Rather, they are the underlying skills needed to craft a good legal brief: sound analytical research and drafting abilities. To the extent that the attorney possesses these valued or essential abilities, he establishes himself as a valuable candidate or employee who, but for bias due to his need for accommodation, would likely be hired, retained, and promoted by the employer. Similarly, to the extent that he lacks the ability to physically access the building without the reasonable accommodation of an accessible entranceway, this inability is not the lack of a valued or necessary *skill* that a lawyer ought to possess, and it should not render him anything other than otherwise qualified.

On the other hand, just as a blind bus driver lacks the necessary ability to drive a bus because he cannot see, so does a lawyer who lacks research, analytical, and, depending on the nature of the job, perhaps interpersonal skills, lack the necessary skills for his or her job. “Otherwise qualified” should thus be defined in terms of the skills or abilities that the employee already possesses prior to the receipt of an employer-furnished accommodation, rather than as it is currently defined: the ability to perform the essential functions of the job at issue, with or without reasonable accommodation.¹⁹⁰ This reform would both remove the confusing, unhelpful concept of the “essential function” and dislodge the related, but distinct, reasonable accommodation question from the otherwise qualified analysis.

The confusion that courts evince when executing the “otherwise qualified” analysis illustrates the deficiencies of its current composition and state. The problem with the “essential function” element of the “otherwise qualified” analysis¹⁹¹ is that it is too vague to capture the notion that a plaintiff may be truly “qualified” for the position, and have the skills the employer seeks, but, due to a disability, requires reasonable aid to do anything ranging from physically accessing the

517, 520–21 (1998) (discussing the essential functions of being a lawyer and addressing why public policy should mandate reasonable accommodations for lawyers with non-visible disabilities).

190. 42 U.S.C. § 12111(8) (2006) (“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.”) (emphasis added).

191. *See id.* § 12111(8).

workplace to performing required tasks. Defining an “essential function” as the end “function” that needs to be performed can beg the question implicated because with enough help (say, getting someone else to perform the function for the employee), virtually anyone can perform any function. The question will boil down to whether the accommodation proposed is, in fact, a reasonable one—which is supposed to be the focus of the next part of the analysis.

Take, for example, *Tobin v. Liberty Mutual Insurance Co.*,¹⁹² a 2009 case involving an insurance salesman whose

bipolar disorder affected his ability to do his job in a variety of ways. His focus and concentration were impaired, and he had difficulty prioritizing and completing work. Most tasks took him longer than in the past to accomplish, and he had difficulty transitioning from one task to the next. Multiple witnesses testified about the jumble of papers that typically covered his desk. Stress tended to worsen his problems in managing his workload. [His] limitations made it difficult for him to find prospective customers in sufficient numbers to meet the company’s sales goals. Although [he] had accumulated a large “book” of business over the years—insurance policies that renewed and continued to bring in significant profits in annual premiums—by the early 1990s he began to routinely fall short of annual quotas for new policy sales.¹⁹³

Tobin requested an accommodation in the form of increased support staff to respond to customer service calls, and an assignment to manage a “Mass Marketing” (MM) account.¹⁹⁴ Such an account, however, was highly desired by all of the sales people who worked for the defendant.¹⁹⁵ Nonetheless, Tobin argued that with an MM account, “he would have been able to overcome the difficulties caused by his disability, *and could have met his quotas.*”¹⁹⁶ With this argument, however, Tobin almost appeared to be defining an “essential function” of his job as “meeting quotas” rather than exhibiting the requisite and valued skills that a salesperson needs in order to accomplish that goal.¹⁹⁷ Although the court evaluated whether the proposed accommodation “would have compensated for the disadvantages caused by his disability without altering the essential functions of his job,”¹⁹⁸ this is

192. 553 F.3d 121 (1st Cir. 2009), *aff’d*, No. 01-11979, 2007 WL 967860 (Mar. 29, 2007).

193. *Id.* at 126.

194. *Id.* at 127.

195. *Id.*

196. *Id.* (emphasis added).

197. *Id.*

198. *Id.*

not equivalent to a proper analysis as to whether Tobin could exhibit the *necessary skills* needed to perform the job, such that with an accommodation, he could accomplish the tasks and goals required. The “otherwise qualified” test should embody this latter analysis, and it is this analysis through which unmeritorious cases should be screened, rather than the artificial “major life activity” requirement for those with serious impairments seeking reasonable accommodation under the ADA.

Tobin produced evidence to show that “he had difficulty finding prospective clients, but that he had good closing skills once he was engaged in a sales call,”¹⁹⁹ even as his employer argued that finding prospective clients was a central challenge that made making quota difficult and was therefore an “essential function.”²⁰⁰ The defendant, Liberty Mutual, also argued that it allocated MM accounts, almost like rewards, “on the basis of merit to sales representatives who were actively pursuing other such accounts and who otherwise were meeting their sales quotas.”²⁰¹ Even the court acknowledged that Tobin’s request for an MM account was made “in the belief that the logistical convenience of such accounts would offset the deficits in his performance that were attributable to his disability.”²⁰²

By raising the stress-management, organizational, and time-management skills needed to handle an MM account, the company tried to demonstrate that the plaintiff could not have done the job even if he were given the accommodation of an MM assignment.²⁰³ However, if the “essential function” of the sales job were not conceived of as the end game of making quota and handling the account, but as exhibiting the necessary skills of a successful sales person who recruits and keeps business before special accounts are allocated, as the defendant initially urged,²⁰⁴ the defendant would not even have had to go this far.

The First Circuit ultimately found that “[a]mple evidence supports the conclusion that Tobin’s illness significantly impaired his ability to meet his sales goals,” but it did not explain in detail how or why this was so.²⁰⁵ The district court in *Tobin* had initially granted summary judgment to the defendant because, among other reasons,

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 137.

203. *Id.* at 127.

204. *Id.* at 127–28.

205. *Id.* at 137.

“more mass marketing accounts would likely have led to increased sales for any sales representative, whether disabled or not [A]ssignment of mass marketing accounts would, therefore, have been functionally equivalent to altering job performance requirements and quotas, which the ADA does not require of employers.”²⁰⁶ The First Circuit, however, found there to be a triable issue of fact as to whether giving Tobin MM accounts would have changed the essential functions of his position, namely “prospecting” new accounts.²⁰⁷ It found that because the defendant had come forward with no evidence to support its argument, whereas Tobin had proffered the discretion that the defendant afforded itself in assigning MM accounts, there were material issues of fact in dispute “as to how MM accounts were assigned, and, ultimately, as to the nature of Tobin’s essential job requirements.”²⁰⁸ The court sent the case to a jury, and Tobin emerged victorious.

The court noted that an accommodation request for a benefit is not unreasonable merely because the employee has not met the benefit’s stated eligibility requirements, noting that “[s]uch a conclusion would turn the ADA’s accommodation requirement on its head.”²⁰⁹ This observation in the context of the *Tobin* case, however, misses the mark, because the court’s observation, like the statute itself, does not elaborate upon or clarify ambiguous terms like “eligibility requirements” or “essential functions.” Employers need to retain the ability to select the most skilled and “competitive” candidates for employment while simultaneously refraining from discriminating against an individual due to that individual’s disability. Under the statute’s scheme, an employer’s failure to afford a reasonable accommodation is a type of discrimination against someone who is otherwise qualified, but is not enumerated alongside the ADA’s antidiscrimination mandate.²¹⁰

206. *Tobin v. Liberty Mut. Ins. Co.*, No. Civ.A.01-11979, 2004 WL 1922133, at *10 (D. Mass. Aug. 30, 2004).

207. *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108 (1st Cir. 2005).

208. *Id.*

209. *Tobin*, 533 F.3d at 137 (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397, 398 (2002)).

210. 42 U.S.C. § 12112(b)(5)(A)–(B) (2006) (“‘[D]iscriminat[ion] against a qualified individual on the basis of disability’ includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.”).

This underscores the fact that only when a failure to accommodate is properly seen as discrimination against someone with the necessary skills and talents to acquire the job is that failure actionable under the statute.

Moreover, the level of screening provided by the proposed “otherwise qualified” analysis is sensitive to the legitimate desires of employers to hire and retain those with the most competitive underlying skill set without having to focus on the ambiguous reference to the job’s essential functions. For example, is physically accessing the workplace an essential function? Is making a sales quota an essential function—in the abstract and irrespective of how it is made? In addition, it does not unduly insinuate a reasonable accommodation analysis into what should be an examination of the plaintiff. The shift of the screen from the almost irrelevant major life activity limitation analysis to a (now) more restrictive otherwise qualified analysis ensures that employers’ legitimate prerogatives are honored while the essential antidiscrimination mandate of the ADA remains in full force. In this way, the ultimate goal of the statute is best met.

Without an interpreter, a deaf salesperson cannot deploy his valued skills and meet his sales goals. A salesperson who lacks valued, essential skills, like the ability to get along well with others and good interpersonal skills, however, is not similarly situated, and the “otherwise qualified” analysis should bring out this fact if it is to be effective. Thus, while hearing is the major life activity that is impeded by the salesperson’s disability, and making a sales quota is the end result, based on the tenets and goals underlying the ADA, it should be clear that the valued, necessary skills described should be the criteria for deeming the salesman “otherwise qualified” for the position.

On the other hand, however, a defendant who can show that a salesman lacks the time management and “people skills” valued, and indeed, necessary to make sales, ought to be able to establish that the plaintiff is not “otherwise qualified.” This is comparable to a defendant being asked to accommodate a blind bus driver. The court in *Tobin*, however, refused to hold that he was, as a matter of law, not “otherwise qualified,” seeming to conflate that issue with the issue of whether the proposed accommodation was reasonable. Even though the court conceded that “[t]he record supports Tobin’s belief that MM accounts were a fertile source of new sales,”²¹¹ it refused to hold that

211. 553 F.3d at 137 n.18.

Tobin, unable to make quota without the MM account benefits, was not otherwise qualified.²¹²

If the statute and its regulations had led the *Tobin* court to focus on the essential or necessary abilities of a salesman who worked for the defendant, instead of the tasks he was expected to ultimately accomplish, the court would likely have been able to use the “otherwise qualified” analysis to prevent the case from getting to a jury. Instead, the employer’s reservation of discretion for itself prevented it from refusing to excuse the plaintiff’s lack of valued, necessary skills. If the law prompted the defendant to establish why the very skills that Tobin was found to lack—such as focus, concentration, and prioritization and completion of work—were essential and necessary, and why his proposed accommodation obviated the need for him to exhibit them rather than aiding him in attaining them, the defendant would have prevailed easily, before it got to trial. The focus never should have been, as it ultimately was, on how rewards were meted out, but rather on the core abilities needed by a valued employee, let alone a rewarded one.

Thus, where a talented, blind attorney requests that her employer provide her with Braille books, the essential function of the job should not be defined as seeing (the major life activity), nor should it be defined as winning cases (the ultimate objective). Rather, what is “essential” is the ability to perform legal research and write well-researched and -written briefs. After all, if the essential function is defined as seeing, the plaintiff will never be able to attain it, with or without accommodation;²¹³ and if it is defined as winning, one might posit that bribing a judge or hiring another attorney to do that attorney’s job could bring about a victory. The otherwise qualified analysis is best executed by carefully defining what aspects of the job are needed and valued in terms of the input required from the employee, and not the accomplishment of the ultimate goals assigned.

Once a plaintiff has been deemed otherwise qualified, courts may evaluate whether the proposed accommodation is reasonable, and then evaluate whether it confers an undue hardship on the employer.

CONCLUSION

This Article, in the spirit of Senator Kennedy and his crusade to help the disabled attain societal equality, has evaluated the ADAAA’s effects and likely impact. It has also, with the goals of the ADA, the

212. *Id.* at 139–40.

213. *See* 42 U.S.C. § 12111(8) (2006) (defining a “qualified individual”).

ADAAA, and Senator Kennedy in mind, made suggestions for further reform of the statute—specifically, it has suggested that the major life activity limitation requirement be eliminated from the statute, but that the otherwise qualified analysis be strengthened by supplanting the query into a job’s “essential functions” and whether an employee can perform them with or without reasonable accommodation with a query into whether an employee comes into the workplace with the necessary skills that the employer seeks when hiring, retaining, or promoting employees. If plaintiffs are required to display these skills with no accommodation by the employer, the focus of the otherwise qualified query will change. Instead of implicating the larger question of what would constitute a reasonable accommodation, the query would simultaneously compel inclusion of the disabled in the workplace and ensure that employers were only required to hire, retain, and accommodate those who, but for their impairment, would be truly competitive for the positions at issue.

For many years, the structure, wording, and application of the question of whether the ADA had been violated served to foreclose plaintiffs with viable cases from proceeding. The underlying goals of the statute and its architects, like Senator Kennedy, were thwarted and obfuscated. The ADAAA should be heralded as a huge legislative accomplishment, but opportunities for further reform should not be overlooked.

The elimination of the major life activity requirement from the statute’s coverage requirements may seem drastic at first blush, but upon a review of the jurisprudence and goals of the ADA, it becomes apparent that it need not play a role in restricting the statute’s protections to those within the contemplation of Congress when it drafted and then revised the legislation. To the extent that the requirement has functioned as a screen of sorts for the legislation, this function would be better served by strengthening and reconceptualizing the “otherwise qualified” query posed by the statute. This revised inquiry, as proposed in this paper, would work to effectively screen out cases in which recognizing plaintiffs’ rights would not further the goals of the statute or take into account the countervailing goals and interests of employers, as recognized by the ADA. Thus, in the process of removing the major life activity limitation requirement as a barrier to inclusion under the statute, defendants should not be threatened with the loss of their core prerogative to require certain skills and abilities of employees.

Ideas for reforming disability discrimination legislation and jurisprudence should be developed in furtherance of the goals envisioned

by the architects of protective legislation like Senator Kennedy. It is only by continually revisiting the legislation and jurisprudence that surrounds this and other compelling societal issues that the setbacks and loopholes the case law has engendered over decades may be overcome and closed. It is only with the creativity, audacity, and concern for all interests that Senator Kennedy displayed during his epic career that such effective reform can begin to take place.