

OVERCOMING BARRIERS TO EMPLOYMENT: THE MEANING OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP IN THE AMERICANS WITH DISABILITIES ACT

JEFFREY O. COOPER†

INTRODUCTION

Individuals with disabilities have long faced substantial barriers in the job market. Although a large majority of Americans with disabilities would like to have jobs, two-thirds of disabled individuals between the ages of sixteen and sixty-four are unable to find employment.¹ This discrepancy results not so much from active hostility on the part of the nondisabled population as it does from deeply ingrained, often unconscious assumptions about the limits imposed by disability. Simple neglect and, to a certain extent, fear of individuals who are different also contribute to this discrepancy.² Individuals with disabilities also suffer from a lack of educational opportunities available to them, which further limits their employment opportunities.³ Although education of individuals with disabilities has improved in recent years, education of the general public about disabilities has not. As a result, the barriers of myth and ignorance that make employers reluctant to hire individuals with disabilities remain in place. The consequences are substantial economic hardship and a disproportionate dependence on government aid.⁴ The inability to find work also extracts a high personal cost. In a society that largely defines people by their occupations, refusing to hire individuals or relegating them to entry-level jobs on the basis of their disabilities makes a social statement that these individuals are considered less than fully human.⁵

† A.B. 1986, Harvard University; J.D. 1991, University of Pennsylvania. I would like to thank Professor Susan Sturm for her thoughtful criticism of an early draft. This Comment is dedicated to my parents.

¹ See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 32, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 314.

² See *id.* at 32-33, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 314; UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 23-27 (1983) [hereinafter ACCOMMODATING THE SPECTRUM].

³ See Peck, *Employment Problems of the Handicapped: Would Title VII Remedies Be Appropriate and Effective?*, 16 U. MICH. J.L. REF. 343, 354 (1983).

⁴ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 43, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 325.

⁵ See *id.* at 41-42, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 323-24; Peck, *supra* note 3, at 356.

Congress first addressed the barriers to employment facing individuals with disabilities in sections 501, 503, and 504 of the Rehabilitation Act of 1973.⁶ Section 501(b) requires federal agencies to implement affirmative action plans to ensure sufficient employment opportunities for individuals with handicaps.⁷ Section 503 imposes a similar affirmative action requirement on holders of government contracts in excess of \$2500.⁸ Section 504 requires that recipients of federal funds not discriminate against the handicapped in any of their programs.⁹ Although the textual provisions of the Rehabilitation Act give little guidance regarding the duties created by the Act, regulations implemented under the Act's 1978 amendments placed some substance on the bare frame of the Act's provisions. First, the regulations read into the affirmative action requirements of sections 501 and 503 a requirement that the federal government and government contractors not discriminate against the handicapped in their hiring practices.¹⁰ Second, the regulations refined the definition of discrimination against the handicapped, including as discrimination failure to make reasonable accommodation to the known limitations imposed by an individual's handicap, unless making such accommodation would cause the employer undue hardship.¹¹

The Rehabilitation Act represented a significant advance for individuals with disabilities. Nevertheless, three aspects of the Act limited its ability to open the doors to employment for large numbers of individuals with disabilities. First, the broad language of the Act and the relatively limited legislative history for its employment provisions, especially section 504, left unclear the precise nature of the burden Congress intended to impose. Section 504, in particular, was open-ended; its provisions applied not merely to employment, but to all aspects of the programs run by recipients of federal funds. It therefore failed to take into account concerns

⁶ 87 Stat. 355, 390-94 (1973) (codified as amended at 29 U.S.C. §§ 791, 793-94 (1988)).

⁷ See 29 U.S.C. § 791(b) (1988).

⁸ See *id.* § 793.

⁹ See *id.* § 794.

¹⁰ See 29 C.F.R. § 1613.703 (1990) (implementing § 501); 41 C.F.R. § 60-741.4 (1990) (implementing § 503).

¹¹ See 29 C.F.R. § 1613.704 (1990) (EEOC regulations implementing § 501); *id.* § 32.13 (Department of Labor regulations implementing § 504); 45 C.F.R. § 84.12 (1990) (Department of Health and Human Services regulations implementing § 504); see also *infra* notes 33-40 and accompanying text (discussing reasonable accommodation as a form of nondiscrimination).

uniquely relevant to the employment context.¹² Second, although the regulations implementing the Act offered substantial guidance, many courts were reluctant to give the regulations a broad reading, perhaps fearing that the regulations exceeded the scope of congressional intent. This narrow reading led, in particular, to a very narrow interpretation of the duty of reasonable accommodation under section 504.¹³ Third, the Act's reach was explicitly limited. Because the Act applied only to the federal government, federal contractors, and recipients of federal funds, broad areas of the private sector remained unaffected.¹⁴

After considering numerous proposals throughout the 1980s, Congress finally responded to the limitations of the Rehabilitation Act by passing the Americans with Disabilities Act of 1990.¹⁵ Intended "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,"¹⁶ the ADA preserves the fundamental approach to discrimination on the basis of disability first formulated in the Rehabilitation Act regulations while overcoming that Act's most basic limitations. The ADA's employment provisions prohibit discrimination on the basis of disability in all aspects of employment, including hiring, promotion, discharge, job training,

¹² For example, an employer, unlike a public education institution, must consider its ability to derive benefit from an individual's work. See ACCOMMODATING THE SPECTRUM, *supra* note 2, at 126-27. Although the regulations take into account the different considerations applicable in different contexts, the agencies received little guidance from the text of § 504.

¹³ See *infra* notes 71-99 and accompanying text.

¹⁴ See Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845, 850. Section 503, applying to federal contractors, contained an additional significant limitation: it did not provide for a private cause of action; rather, it could be enforced only through administrative proceedings. See, e.g., *Hodges v. Atchison, Topeka & Santa Fe Ry.*, 728 F.2d 414, 416 (10th Cir.) (holding that the Rehabilitation Act does not provide for a private cause of action), *cert. denied*, 469 U.S. 822 (1984).

¹⁵ Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991)). The ADA's employment provisions become effective on July 26, 1992, two years after the passage of the act. See *id.* § 108, 104 Stat. at 337. The Rehabilitation Act remains in force with regard to federal employers, federal contractors, and recipients of federal funds. See 42 U.S.C.A. § 12201(b) (West Supp. 1991) (stating that the ADA does not preempt other federal or state laws providing greater or equal protection); Pub. L. No. 101-336, § 512, 104 Stat. at 376-77 (amending the Rehabilitation Act's treatment of drug users).

¹⁶ S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989).

compensation, and benefits.¹⁷ The ADA also adopts the Rehabilitation Act's concept of reasonable accommodation.¹⁸ Most importantly, the ADA is considerably more comprehensive than its predecessor because its provisions apply to virtually all employers with a workforce of fifteen or more employees.¹⁹

Although Congress clearly relied upon the regulations implemented under the Rehabilitation Act in drafting the ADA,²⁰ the ADA's statutory language and extensive legislative history suggest that Congress intended to modify the Rehabilitation Act's approach to employment discrimination in subtle but significant ways. This Comment will argue that if the courts are to take seriously Congress's expressed intent to provide equal employment opportunities for individuals with disabilities, the courts must not apply Rehabilitation Act precedent to the ADA uncritically, but instead must recognize the ways in which Congress's expressed intent differs from the approach taken by the courts under section 501, and especially section 504, of the Rehabilitation Act. This Comment focuses on the ADA's duty of reasonable accommodation, since that requirement most sharply differentiates discrimination on the basis of disability from other forms of employment discrimination that are covered by Title VII or other statutes. Part I examines the meaning of nondiscrimination against individuals with disabilities, distinguishing the approach that Congress has adopted in the ADA from both the approach taken in Title VII and affirmative action. It then analyzes the approaches to reasonable accommodation taken by the courts under sections 501 and 504 of the Rehabilitation Act. It argues that, although the courts have assumed that section 501 imposes a more substantial burden than does section 504, the fundamental approach to reasonable accommodation under both sections has been the same. Therefore, courts interpreting the ADA should look to both sections 501 and 504 for guidance in determining the extent of the duty of reasonable accommodation. Part II analyzes the substantive content of the ADA's definitions of reasonable accommodation and undue hardship, and proposes a yardstick against which courts may measure an employer's proposed

¹⁷ See 42 U.S.C.A. § 12112(a) (West Supp. 1991).

¹⁸ See *id.* § 12112(b)(5).

¹⁹ See *id.* § 12111(5)(A).

²⁰ See, e.g., H.R. REP. NO. 485, *supra* note 1, pt. 2, at 62, 67, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 344, 349-50 (acknowledging that the ADA's definitions of reasonable accommodation and undue hardship are based on the regulations implementing §§ 501 and 504 of the Rehabilitation Act).

accommodation or claim of hardship. Part III examines the procedures that employers should follow in determining whether reasonable accommodation is possible and concludes that the ADA is intended to impose a procedural duty, as well as a substantive duty, on employers covered by the Act.

I. THE CONCEPT OF REASONABLE ACCOMMODATION IN THE AMERICANS WITH DISABILITIES ACT

A. *The Meaning of Nondiscrimination Against Individuals with Disabilities*

Although individuals with disabilities have long faced discrimination in the workplace, they are not protected by Title VII.²¹ During the late 1970s and early 1980s, there were proposals to bring discrimination on the basis of disability under the umbrella of Title VII.²² These proposals were ultimately rejected, however, in favor of an approach that addresses the unique difficulties faced by individuals with disabilities. Although much of the language of the ADA is superficially similar to that of Title VII, the similarities mask a conceptual shift in the meaning of discrimination and the means to remedy it. If courts are to apply the ADA consistently with Congress's intent, they must appreciate the difference between discrimination on the basis of disability and other forms of discrimination, as well as the different means that Congress has chosen to address that discrimination.

To a certain extent, individuals with disabilities face the same disparate treatment and disparate impact barriers that confront the groups protected by Title VII. Discrimination on the basis of disability, like discrimination on the basis of race, sex, religion, or national origin, may be caused by social bias, an assumption or misconception about the protected group that is in no way related to that group's ability to perform.²³ As under Title VII, a law

²¹ Title VII prohibits discrimination on the basis of race, sex, religion, or national origin. See 42 U.S.C. § 2000e-2 (1988).

²² See, e.g., H.R. 1200, 98th Cong., 1st Sess., 129 CONG. REC. H289-90 (daily ed. Feb. 2, 1978); S. REP. NO. 316, 96th Cong., 1st Sess. (1979).

²³ See Peck, *supra* note 3, at 349-50; Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1001 (1984). Social bias need not take the form of active hostility, but may appear as ignorance, indifference, and misconceptions about the abilities of the protected group. See ACCOMMODATING THE SPECTRUM, *supra* note 2, at 24-25. In either case, however, the result would be defined under Title VII as impermissible

prohibiting employment discrimination against individuals with disabilities should eliminate this kind of disparate treatment, prohibiting employers from making decisions on the basis of social bias. Likewise, facially neutral elements may have a disparate impact on individuals with disabilities.²⁴ For example, a written test for a position that requires neither reading nor writing will have a disparate impact on persons with dyslexia, for reasons completely unrelated to their ability to accomplish the tasks required by the job.²⁵ As construed by the Supreme Court, Title VII provides a remedy whenever facially neutral employment criteria have a disparate impact on an employer's workforce,²⁶ unless the "challenged practice[s] serve[], in a significant way, the legitimate employment goals of the employer."²⁷ A law prohibiting discrimination against individuals with disabilities could be modeled on this Title VII standard, thus forbidding the use of standards and criteria that have a disparate impact on individuals with disabilities, unless these criteria can be justified by business necessity.

A law that went this far and no further, however, would only partially address the significant barriers to employment faced by individuals with disabilities. Unlike race, sex, religion, or national origin, which are rarely if ever relevant to an individual's ability to perform a given job,²⁸ a disability may indeed be directly relevant to an individual's capabilities.²⁹ Under a Title VII approach, an employer might easily put forth the burden of making accommodations as an acceptable excuse to avoid hiring individuals with

disparate treatment discrimination.

²⁴ See Peck, *supra* note 3, at 348-49; Note, *supra* note 23, at 1001.

²⁵ See, e.g., *Stutts v. Freeman*, 694 F.2d 666, 669 (11th Cir. 1983) (holding invalid an employment decision based on a dyslexic applicant's poor performance on a written test).

²⁶ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²⁷ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

²⁸ By allowing a defense of bona fide occupational qualification (bfoq), Title VII recognizes that in limited circumstances sex, religion, and national origin may be legitimate considerations in establishing job qualifications. See 42 U.S.C. § 2000e-2(e)(1) (1988). The statute excludes race from the bfoq defense, however, implicitly stating that race may never be a bfoq. See *id.* Moreover, even where it applies, the bfoq defense is to be construed very narrowly. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

²⁹ See ACCOMMODATING THE SPECTRUM, *supra* note 2, at 143; Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 429 (1984); Note, *supra* note 23, at 1001-02; Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 883 (1980).

disabilities. The prohibition on disparate treatment merely requires the use of employment criteria that are not tainted with bias; criteria that involve an individual's ability to perform the job in question cannot in any obvious way be said to be so tainted.³⁰ Likewise, the disparate impact standard, as defined by the Supreme Court in *Griggs v. Duke Power Co.*,³¹ permits the use of facially neutral criteria that have a disparate impact on the protected class if those criteria meet the standard of business necessity.³² There may well be a legitimate connection between an individual's disability and her ability to perform a job; an employment criterion that has a disparate impact on individuals with disabilities is far more likely to meet the business necessity standard than would be the case under a Title VII claim.

To take this reality into account, while preserving protection for individuals with disabilities from unnecessary barriers to employment, the ADA modifies the Title VII definition of discrimination. While the goal of the ADA, like Title VII, is to provide not merely equal treatment or equal impact, but equal opportunity, the means of reaching this goal is different.³³ The ADA seeks to reconcile the fact that disability may genuinely render an individual incapable of performing a job with the fact that disability is frequently not as significant an obstacle as it may first appear. An individual with a disability is not necessarily unable to perform a job merely because of her disability. She may, however, be forced by her disability to perform the job in an unconventional manner.³⁴ Thus, a hearing-impaired individual whose job requires communication on the telephone may not be able to use a standard telephone, but may function well using a TTY keyboard designed for the hearing

³⁰ See Note, *supra* note 23, at 1005; Note, *supra* note 29, at 895.

³¹ 401 U.S. 424 (1971).

³² See Note, *supra* note 29, at 895 n.69.

³³ See 42 U.S.C.A. § 12101(a)(8) (West Supp. 1991). The House Report states: "[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed." H.R. REP. NO. 485, *supra* note 1, pt. 2, at 65, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 347-48; see also Rule Implementing Executive Order 11914, 43 Fed. Reg. 2,134 (1978) (stating that "it is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory"); Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 176 (1980) (discussing equal opportunity as the goal of § 504).

³⁴ See ACCOMMODATING THE SPECTRUM, *supra* note 2, at 90.

impaired. The workplace, however, is structured to facilitate performance by nondisabled workers rather than workers with disabilities. The structure of the workplace, therefore, may stand as a barrier to the individual's employment.³⁵

This barrier superficially resembles a barrier that produces disparate impact under Title VII, and like a disparate impact barrier it may be removed by requiring the employer to modify its practices so as to eliminate the disparate impact. Because the difficulty lies in the structure of the employer's workplace, however, the prevention of discrimination of individuals with disabilities may require the employer to take remedial action above and beyond that typically required by Title VII. In enacting the ADA, Congress sought to resolve this difficulty through the concept of reasonable accommodation.³⁶ Under the ADA, as under the regulations implementing sections 501 and 504,³⁷ if the employer could create an accommodation that allows the individual to perform the job and that does not impose an undue hardship, but refuses to do so, the employer's decision should be treated as discrimination on the basis of disability.³⁸ By requiring reasonable accommodation, the statute clearly contemplates that employers take affirmative steps in hiring the disabled,³⁹ steps that are not required in hiring members of protected classes under Title VII.⁴⁰

³⁵ See *id.* at 99; Comment, *Employment Discrimination—Analyzing Handicap Discrimination Claims: The Right Tools for the Job*, 62 N.C.L. REV. 535, 535 (1984); Note, *supra* note 29, at 884; Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 722-23.

³⁶ See 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1991). For the substance of the reasonable accommodation requirement, see *infra* notes 100-25 and accompanying text.

³⁷ For § 504 regulations, see 29 C.F.R. § 32.13 (1990) (Office of the Secretary of Labor); 34 C.F.R. § 104.12 (1989) (Office for Civil Rights, Education); 45 C.F.R. § 84.12 (1989) (Department of Health and Human Services). For § 501 regulations, see 29 C.F.R. § 1613.704 (1990) (Equal Employment Opportunity Commission).

³⁸ See, e.g., *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305 (5th Cir. Unit A Nov. 1981) (stating that a refusal to accommodate a job applicant may constitute illegal "surmountable barrier" discrimination under §§ 501 and 504).

³⁹ See Note, *supra* note 35, at 724 (stating that to meet the nondiscrimination requirement of § 504, recipients of federal funds must take affirmative steps to accommodate the handicapped).

⁴⁰ Title VII does impose a limited duty of reasonable accommodation in the area of religion, requiring an employer to reasonably accommodate an employee's religious practices unless doing so would constitute an undue hardship. See 42 U.S.C. § 2000e(j) (1989). The Supreme Court has interpreted this provision to require that the employer bear only a *de minimis* cost in accommodating the employee. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). As will be discussed, however, the requirement of reasonable accommodation under the ADA and the Rehabilitation

B. *Reasonable Accommodation vs. Affirmative Action*

At first glance, the requirement of reasonable accommodation under the ADA resembles affirmative action, in that it requires the employer to take steps for the protected group that the employer does not take for nonprotected employees. Reasonable accommodation and affirmative action do stem from a common belief, namely that "in order to treat some persons equally, we must treat them differently."⁴¹ Despite their superficial similarity, however, the two concepts differ both in terms of theory and implementation. Affirmative action is remedial in character; it rests on a belief that groups that have been victims of discrimination require favorable treatment to overcome the effect of past wrongs.⁴² Affirmative action involves more than merely allowing the members of a protected class to compete on equal terms with others; rather, it affords the protected class the advantage of different selection criteria with the explicit goal of increasing the participation of the protected class.⁴³ Thus, for example, an employer might engage in special recruiting efforts targeted at the protected group, might set a lower test score threshold for members of the group, or might set aside a certain number of positions for members of the group.⁴⁴ In any of these three instances, the individual's membership in the protected group serves as a "plus" that increases her chances of being hired;⁴⁵ implementation of the plan may result in the hiring of an individual who, according to the employer's standard evaluative criteria, is "less qualified" than other applicants.

In contrast to affirmative action, reasonable accommodation is in theory not remedial. Instead of looking to overcome the effects of past discrimination, it focuses on overcoming present obstacles to employment.⁴⁶ Similarly, in practice, reasonable accommoda-

Act imposes a significantly greater burden on employers than does the Title VII provision. See *infra* notes 100-46 and accompanying text.

⁴¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

⁴² See, e.g., *ACCOMMODATING THE SPECTRUM*, *supra* note 2, at 156 (stating that the purpose of affirmative action is to overcome the effects of prior discrimination); Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 338-39 (1990) (stating that remedial purpose is essential to a valid affirmative action plan).

⁴³ See Note, *supra* note 33, at 185; Note, *supra* note 29, at 885-86.

⁴⁴ See *ACCOMMODATING THE SPECTRUM*, *supra* note 2, at 156.

⁴⁵ See Brooks, *supra* note 42, at 335.

⁴⁶ See *supra* notes 33-40 and accompanying text.

tion does not require the employer to alter its legitimate selection criteria.⁴⁷ Rather, it requires the employer to recognize the disabled individual's abilities and, if she would be able to meet the employer's standards in an unconventional manner, to make modifications that allow her to do so. If no accommodation would allow the individual to meet the employer's legitimate standards, or if the only sufficient accommodations would impose an undue hardship on the employer, then the employer is under no obligation to lower its standards or otherwise modify its program in order to hire the employee.⁴⁸ Moreover, when confronted with two equally qualified job applicants, only one of whom is disabled, the employer is under no obligation to select the applicant with a disability merely because of her disability.⁴⁹ Although reasonable accommodation is intended to increase access to employment for individuals with disabilities, it does not mandate that the individual's disability weigh in her favor in the hiring decision.

Congress explained this distinction in the legislative history: if an employer seeking a typist has two applicants, one with a disability who can type 50 words per minute and one without a disability who can type 75 words per minute, the employer may hire the faster typist.⁵⁰ Hiring the applicant with a disability would constitute affirmative action, because, by doing so, the employer would be

⁴⁷ See Note, *supra* note 33, at 178.

⁴⁸ See, e.g., *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3rd Cir. 1983) (invoking the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), as support for the conclusion that an accommodation is unreasonable "if it would necessitate modification of the essential nature of the program" or if it would subject the employer to "undue burdens, such as extensive costs").

⁴⁹ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 56, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 338. The fact that reasonable accommodation does not require employers to modify qualification standards or to give preference to the protected class is the crucial distinction between affirmative action and reasonable accommodation. The distinction is not uniformly recognized by either courts or commentators, however. See, e.g., *Whitlock v. Donovan*, 598 F. Supp. 126, 130 (D.D.C. 1984) (describing the duty of reasonable accommodation under § 501 as part of the federal employer's "affirmative-action obligation"), *aff'd mem. sub nom. Whitlock v. Brock*, 790 F.2d 964 (1986); Comment, *supra* note 35, at 551 (discussing reasonable accommodation as a form of affirmative action).

⁵⁰ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 56, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 338. This conclusion assumes, of course, that no reasonable accommodation would allow the applicant with a disability to achieve a typing speed of 75 words per minute. If such accommodation were possible, the situation would parallel the example given next in the text. The employer need not hire the disabled applicant in the hope that, eventually, she will be able to achieve 75 words per minute, however.

adjusting its standards in order to ensure the participation in the workforce of individuals with disabilities. If, on the other hand, the two applicants are both capable of typing 75 words per minute, but one is hearing-impaired and requires the use of an amplified headset in order to use the telephone, the employer may not hire the nondisabled applicant merely because hiring the hearing-impaired applicant would mean incurring the additional expense of purchasing the amplified headset.⁵¹ Since the hearing-impaired applicant is able, with reasonable accommodation, to perform the essential functions of the position as capably as the nondisabled applicant, refusal to hire the hearing-impaired applicant on this basis would be discrimination on the basis of disability.⁵²

Supreme Court cases interpreting section 504 have noted the delineation between affirmative action and reasonable accommodation. In *Southeastern Community College v. Davis*,⁵³ the Court's first case under section 504, the plaintiff, who was hearing impaired, had been rejected by the defendant's nursing program. In rejecting the plaintiff's discrimination claim, the Court asserted that Congress did not intend section 504 to include an affirmative action requirement.⁵⁴ Rather, section 504 protected only those handicapped individuals who were "otherwise qualified," which the court interpreted to mean "able to meet all of a program's requirements in spite of [their] handicap[s]."⁵⁵ Because Davis's hearing impairment would have prevented her from participating safely in the school's clinical training program, she could not meet all of the program's requirements, and therefore was not otherwise qualified.⁵⁶

The fact that the *Davis* Court required the plaintiff to be able to meet all of the program's requirements in spite of her handicap, however, did not mean that no accommodation was necessary under section 504. The Court recognized that technology might assist

⁵¹ See *id.*

⁵² See 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1991). This situation creates obvious problems of proof: if the hearing-impaired applicant is not selected, how is the employee to disprove, or the employer to prove, that the decision represented a permissible choice between two qualified applicants rather than an impermissible refusal to offer reasonable accommodation? While burdens of proof are discussed *infra* notes 225-38 and accompanying text, the more difficult issue presented by this question is beyond the scope of this Comment.

⁵³ 442 U.S. 397 (1979).

⁵⁴ See *id.* at 411.

⁵⁵ *Id.* at 406.

⁵⁶ See *id.* at 406-07.

some individuals with disabilities in overcoming the barriers they faced, and that such technology might be available at a cost that would not impose undue financial or administrative hardship.⁵⁷ "Thus," the Court concluded, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."⁵⁸ In the Court's view, the facts before it did not present such a situation. The plaintiff suggested several possible accommodations that would have allowed her to participate in the nursing program, including constant close supervision during the clinical program and a curricular change to replace the clinical program with additional coursework. The Court rejected these, however, as requiring "substantial modifications" in the program, which would amount to a form of affirmative action not contemplated in section 504.⁵⁹

Although *Davis* discussed both accommodation and affirmative action, the Court's opinion was hardly a model of clarity,⁶⁰ and commentators sharply criticized the Court for failing to appreciate sufficiently the distinction between the two.⁶¹ The Court responded to this criticism in its next case under section 504, *Alexander v. Choate*.⁶² The Court narrowed its prior assertion that section 504 did not require affirmative action, by stating that section 504 did not require recipients of federal funds to make substantial modifica-

⁵⁷ See *id.* at 411 n.10.

⁵⁸ *Id.* at 412-13.

⁵⁹ See *id.* at 413.

⁶⁰ The Court stated that the Rehabilitation Act distinguished between "evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome" disability, and that "Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.* at 410-11. This language strongly suggests that the Court equated accommodation with affirmative action. Yet later the Court acknowledged that failure to modify a program might be discriminatory. See *id.* at 412-13. Although the distinction between accommodation and affirmative action is present in the Court's analysis, the opinion suffers from imprecise terminology.

⁶¹ See Note, *supra* note 33, at 185; Note, *supra* note 29, at 885-86. One contemporary commentator has interpreted the *Davis* opinion as recognizing the line between affirmative action and reasonable accommodation. See Miller, *Hiring the Handicapped: An Analysis of Laws Prohibiting Discrimination Against the Handicapped in Employment*, 16 GONZ. L. REV. 23, 52 (1980) ("[R]egardless of the level of accommodation required by the Rehabilitation Act, the Act does not require an employer to lower relevant standards This is the key to understanding what Justice Powell means by 'evenhanded treatment' in *Davis*.").

⁶² 469 U.S. 287 (1985).

tions or "fundamental alteration[s] in the nature of a program."⁶³ *Davis*, the Court maintained, did not preclude a requirement of reasonable accommodation under section 504.⁶⁴ If any doubt remained, the Court resolved it in *School Board of Nassau County v. Arline*.⁶⁵ There, the Court described an employer's duty under section 504 not as affirmative action, but as "an affirmative obligation to make a reasonable accommodation for a handicapped employee."⁶⁶

The distinction between reasonable accommodation and affirmative action may appear counterintuitive at first glance, and opponents of the ADA have criticized the reasonable accommodation requirement as a form of affirmative action.⁶⁷ The Supreme Court itself has recognized that the distinction between affirmative action and reasonable accommodation may not always be clear.⁶⁸ But the confusion that exists arises largely from a misapplication of concepts developed under Title VII to discrimination on the basis of disability.⁶⁹ Whereas the nondiscrimination mandate under Title VII may be implemented through equal treatment, the orientation of the workplace toward individuals who are not disabled means that mere equal treatment will leave in place substantial barriers to equal opportunity.⁷⁰ By including a reasonable accommodation requirement in the ADA, Congress has clearly stated its position that reasonable accommodation is not the equivalent of affirmative action, but rather is an integral part of the ADA's nondiscrimination mandate.

⁶³ *Id.* at 300 n.20 (quoting *Davis*, 442 U.S. at 410).

⁶⁴ *Id.*

⁶⁵ 480 U.S. 273 (1987).

⁶⁶ *Id.* at 289 n.19.

⁶⁷ See, e.g., *Americans With Disabilities Act, 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 42-44 (1989) [hereinafter *Senate Hearings*] (statement of Lawrence Z. Lorber) (arguing that reasonable accommodation requires more than nondiscrimination and amounts to affirmative action). But see *id.* at 46 (statement of Arlene B. Mayerson) (responding that reasonable accommodation falls within the ADA's nondiscrimination mandate).

⁶⁸ See *Davis*, 442 U.S. at 412.

⁶⁹ See generally, ACCOMMODATING THE SPECTRUM, *supra* note 2, at 147-58 (discussing the difficulty of importing Title VII discrimination concepts into the area of discrimination on the basis of disability).

⁷⁰ See *supra* notes 33-40 and accompanying text.

C. *Reasonable Accommodation and Affirmative Action Under the Rehabilitation Act: Reconciling Sections 501 and 504*

In drafting the Americans With Disabilities Act, Congress consciously drew on the law that developed under the Rehabilitation Act of 1973,⁷¹ and the legislative history of the ADA indicates that reasonable accommodation is to be interpreted consistently with the regulations implemented under sections 501 and 504.⁷² Courts may therefore look to Rehabilitation Act precedent for guidance in interpreting the ADA. If the courts apply Rehabilitation Act precedent uncritically, however, there is a substantial danger that they will understate the burdens that Congress intended to impose on employers in the ADA. The source of this difficulty is the text of the Rehabilitation Act itself. Section 504(a), which applies to recipients of federal funds, imposes a duty of nondiscrimination: it provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"⁷³ Section 501(b), in contrast, imposes a duty of affirmative action: it requires all executive departments and agencies to submit affirmative action plans containing "sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps."⁷⁴ Because of this distinction, the courts have consistently interpreted section 501 as imposing a more stringent requirement on federal employers than section 504 imposes on recipients of federal funds.⁷⁵ Because section 501 goes beyond both section 504's and the ADA's requirement of nondiscrimination to impose an affirmative action requirement on federal employers,⁷⁶ federal employers clearly could be required under section

⁷¹ See, e.g., *Senate Hearings*, *supra* note 67, at 54 (statement of Senator Harkin) ("To the extent possible that this legislation can track settled law, settled Supreme Court interpretations, settled regulations, that is what we are going to do.").

⁷² See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 62, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 344.

⁷³ 29 U.S.C. § 794(a) (1988).

⁷⁴ *Id.* § 791(b).

⁷⁵ See *Mantolette v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985); *Joyner v. Dumpson*, 712 F.2d 770, 775 n.7 (2d Cir. 1983); *American Fed. of Gov. Employees, Local 51 v. Baker*, 677 F. Supp. 636, 638 (N.D. Cal. 1987); *Dexler v. Tisch*, 660 F. Supp. 1418, 1426 (D. Conn. 1987).

⁷⁶ See *supra* text accompanying note 7.

501 to make substantial modifications in their programs to ensure sufficient participation by individuals with disabilities.⁷⁷ In fact, federal employers do implement affirmative action programs under section 501, and courts have addressed their adequacy on several occasions.⁷⁸ Reasonable accommodation, however, is not a part of these programs. Under the regulations implementing section 501, federal employers have two separate and distinct duties: the duty of affirmative action,⁷⁹ and the duty of nondiscrimination, which includes the duty of reasonable accommodation.⁸⁰ The reasonable accommodation provisions of the section 501 regulations very closely parallel the provisions in the section 504 regulations;⁸¹ the affirmative action requirement, in contrast, is unique to section 501, imposing a burden above and beyond that required by section 504. While cases involving reasonable accommodation under section 501 are relevant to interpretation of the ADA, cases involving affirmative action are not, since the ADA does not require affirmative action.

While reasonable accommodation and affirmative action are distinct concepts under section 501, courts interpreting those regulations have not always recognized the distinction. Instead, courts have repeatedly construed section 501's affirmative action requirement as imposing a more stringent standard of reasonable accommodation than does section 504.⁸² This creates the poten-

⁷⁷ See Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781, 801-02 (1989).

⁷⁸ See, e.g., *Allen v. Heckler*, 780 F.2d 64, 65-69 (D.C. Cir. 1985) (holding that employees hired under a § 501 affirmative action plan must at some point be able to achieve the benefits available to employees who were competitively hired); *Shirey v. Devine*, 670 F.2d 1188, 1189 (D.C. Cir. 1982) (holding that an employer may not permanently deny job tenure protection to employees hired under a § 501 affirmative action plan solely because of that employee's handicap).

⁷⁹ See 29 C.F.R. § 1613.703 (1990). Under 5 C.F.R. §§ 213.3101(a) and under 213.3102(t)-(u) (1991), individuals with severe disabilities may be hired without having to undergo the ordinary civil service application process. This affirmative action program is subject to the requirements of § 501. See *Shirey*, 670 F.2d at 1200 (stating that a court evaluating an affirmative action program "should make an independent appraisal as to whether a federal employer acted unlawfully because the terms of its affirmative action program do not meet the standard of Section 501.")

⁸⁰ See 29 C.F.R. § 1613.704 (1990).

⁸¹ Compare *id.* (setting forth the reasonable accommodation requirements under § 501) with 45 C.F.R. § 84.12 (1989) (setting forth the reasonable accommodation requirements under § 504 for programs under the Department of Health and Human Services).

⁸² See *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1077 (6th Cir. 1988); Davis

tial for substantial confusion in interpreting the ADA, because a court reading section 501 precedent uncritically could conclude that, since section 501, unlike the ADA, requires affirmative action, reasonable accommodation cases under section 501 are inapplicable to the ADA. To overcome this confusion, courts must recognize that, although the section 501 cases do make reference to affirmative action, their interpretation of the burden of reasonable accommodation under section 501 is generally consistent with the burden Congress intended to impose under the ADA. In enforcing the duty of reasonable accommodation under section 501, the courts have not required "substantial modifications" or required federal employers to adjust their selection criteria in any way.⁸³ Rather, the courts have required that the would-be beneficiary of section 501 accommodation be able to perform all of the essential functions of a position as capably and efficiently as their nondisabled coworkers.⁸⁴ In rejecting substantial modifications to accommodate employees with disabilities under section 501, the courts have engaged in the same undue hardship analysis that is applied under section 504. Courts have rejected proposed accommodations for reasons of cost,⁸⁵ safety,⁸⁶ and failure of the accommodation to enable the individual to perform the essential functions of the job.⁸⁷ While continuing to insist that section 501

v. United States Postal Serv., 675 F. Supp. 225, 231 (M.D. Pa. 1987); *Dexler v. Tisch*, 660 F. Supp. 1418, 1425-26 (D. Conn. 1987); *Dancy v. Kline*, 44 Fair Empl. Prac. Cas. (BNA) 380, 383 (N.D. Ill. March 23, 1987).

⁸³ In taking this approach, the courts have followed the regulations implementing § 501, which require "reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee" 29 C.F.R. § 1613.704(a) (1990). A qualified handicapped person under the regulations is an individual who, with or without reasonable accommodation, can safely perform the essential functions of the job and who either meets the employer's requirements or qualifies for an affirmative action program. *See id.* § 1613.702(f). It is important to recognize, however, that the regulations explicitly separate affirmative action from reasonable accommodation: an individual does not become eligible for reasonable accommodation unless she can perform the essential functions of the job. *See id.* The duty of reasonable accommodation is thus best characterized, not as part of the federal employer's duty to implement an affirmative action plan, but as part of the duty of nondiscrimination that the EEOC has read into § 501.

⁸⁴ *See, e.g., Dexler*, 660 F. Supp. at 1428-29 (holding that reasonable accommodation does not require the Postal Service to exempt the plaintiff from certain job requirements, and that no reasonable accommodation was possible in this case because, even with accommodation, the plaintiff would be unable to perform as efficiently as other workers).

⁸⁵ *See Gardner v. Morris*, 752 F.2d 1271, 1284 (8th Cir. 1985).

⁸⁶ *See id.* at 1282.

⁸⁷ *See Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250-51 (6th Cir. 1985);

imposes a heavier burden of reasonable accommodation than does section 504, courts have in essence adopted the section 504 approach.⁸⁸ In short, despite their repeated invocations of section 501's affirmative action requirement, the courts have treated reasonable accommodation not as a form of affirmative action, but in a manner consistent with the nondiscrimination mandate of the ADA.

Moreover, the courts have applied section 504 precedent to cases arising under section 501. This application of section 504 precedent is most notable in cases in which an employee with a disability is no longer able to perform her position and seeks a reassignment to which the employee would not be entitled under the employer's standard procedures. If the duty of reasonable accommodation under section 501 required the federal employer to make substantial modifications, or even merely to make accommodations above and beyond those required by section 504, then the courts could reasonably require reassignment to a position for which the employee was qualified, rather than permitting the employee's discharge.⁸⁹ Reassignment is, after all, an inexpensive accommodation. Moreover, if the federal employer is to be a "model employer" of individuals with disabilities as required in the regulations,⁹⁰ reassignment is certainly preferable to outright discharge and will maintain or increase the participation of individuals with disabilities in the federal workforce.⁹¹ Yet in

Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir. 1983); *Dancy v. Kline*, 44 Fair Empl. Prac. Cas. (BNA) 380, 384 (N.D. Ill. March 23, 1987); *Carty v. Carlin*, 623 F. Supp. 1181, 1186-87 (D. Md. 1985).

⁸⁸ Kathryn Tate agrees that the courts applying § 501 have limited federal employers' duties to reasonable accommodation using a standard substantially identical to that under § 504. See Tate, *supra* note 77, at 813, 819. Her argument, however, is that those courts must do what they profess to do. Because § 501 includes an affirmative action requirement, "courts must set the test for the mandated 'reasonable' accommodation under section 501 at a higher level of effort than that required under section 504." *Id.* at 801-02. This Comment argues that such an interpretation not only would create a hopeless muddle, in which reasonable accommodation could have three different meanings depending on the context in which it arose, but confuses the duty of reasonable accommodation, which arises under a mandate of nondiscrimination, with a duty of affirmative action, which goes beyond mere nondiscrimination. Because the ADA requires only nondiscrimination, not affirmative action, it is crucial to the consistent interpretation of the ADA that the distinction between reasonable accommodation and affirmative action be maintained.

⁸⁹ See *id.* at 845-46.

⁹⁰ See 29 C.F.R. § 1613.703 (1990).

⁹¹ See *Rhone v. United States Dep't of the Army*, 665 F. Supp. 734, 744-45 (E.D. Mo. 1987); Tate, *supra* note 77, at 820-21.

recent years several courts, citing *Arline*,⁹² have held that section 501 does not require reassignment.⁹³ By citing *Arline*, which involved only section 504, the courts have implicitly stated that, despite section 501's affirmative action requirement, the analysis of reasonable accommodation under section 501 and section 504 is identical.⁹⁴

Section 501 precedent concerning reasonable accommodation is relevant to the ADA because some courts have taken a grudging approach to reasonable accommodation under section 504, describing it as less than an affirmative duty. Indeed, a few courts have either failed to recognize the duty of reasonable accommodation at all under section 504,⁹⁵ or have interpreted the section 504 standard applicable to nonfederal employers as requiring that the employer absorb only *de minimis* cost.⁹⁶ Courts may have been reluctant to recognize a significant obligation of reasonable accommodation under section 504 because the language of the section does not mention reasonable accommodation, and the legislative history of section 504 gives little indication of Congress's intent as to the meaning and scope of nondiscrimination under section 504.⁹⁷ The ADA, in contrast, expressly contemplates reasonable accommodation for qualified individuals with disabilities, and Congress has made clear that the ADA is meant to impose a burden above and beyond *de minimis* cost.⁹⁸ Congress has also

⁹² In *Arline*, the Supreme Court stated that although employers "are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *School Board of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987).

⁹³ See *Davis v. United States Postal Serv.*, 675 F. Supp. 225, 233 (M.D. Pa. 1987); cf. *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (applying § 504 and the regulations implemented under § 501 to the claim of a postal employee).

⁹⁴ A few courts have explicitly stated that a federal employer's duty of reasonable accommodation is identical under §§ 501 and 504 (which applies to federal agencies as well as recipients of federal funds). See *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 307 & n.21 (5th Cir. Unit A Nov. 1981); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 763 (D. Kan. 1988); see also Comment, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employers Who'd Rather Fight May Have to Switch*, 59 WASH. L. REV. 305, 315-16 (1984) (stating that the burden of reasonable accommodation is identical under §§ 501 and 504).

⁹⁵ See *Dexler*, 660 F. Supp. at 1425-26.

⁹⁶ See *American Fed'n of Gov't Employees, Local 51 v. Baker*, 677 F. Supp. 636, 638 (N.D. Cal. 1987).

⁹⁷ See Note, *supra* note 29, at 888-89.

⁹⁸ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 68, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 350.

stated that undue hardship, a central factor in determining whether an accommodation is reasonable, is to be interpreted consistently with the regulations under both section 504 and section 501.⁹⁹ Thus, if the courts are to consider existing law in interpreting the ADA, it is crucial that they look to both section 501 and 504 to determine what constitutes reasonable accommodation, rather than adopt a constricted view of section 504.

II. THE SUBSTANCE OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA

A. *Reasonable Accommodation*

1. Essential Functions and Job Restructuring

Reasonable accommodation is the key concept of the employment provisions of the ADA, and it distinguishes the ADA from other areas of discrimination law. Given the concept's importance, it is perhaps strange that the statute does not define reasonable accommodation. Instead, it merely suggests possible accommodations, including physical modifications to make facilities accessible, job restructuring, part-time or modified work schedules, reassignment, modification of existing equipment or acquisition of new equipment, adjustments in examinations, training materials, and policies, and the provision of readers or interpreters.¹⁰⁰ Without an additional limiting factor, the duty to accommodate would be virtually boundless, limited only by the disabled individual's imagination.

The ADA, however, provides two limiting factors. An employer need not accommodate an employee with a disability if doing so would cause the employer undue hardship.¹⁰¹ But before the issue of undue hardship arises, a more fundamental limitation created by the ADA applies: an employer need not accommodate an employee with a disability unless the accommodation will enable

⁹⁹ See *id.* at 67. To the extent that the courts have been willing to impose a greater burden on federal employers under § 501 than on private or state employers under § 504, their decisions should be interpreted as resting on the fact that the federal government, with its tremendous resources, is able to absorb far greater costs without undue hardship than a private employer is likely to be. See *infra* notes 179-88 and accompanying text.

¹⁰⁰ See 42 U.S.C.A § 12111(9)(B) (West Supp. 1991).

¹⁰¹ See *id.* § 12112 (b)(5)(A).

the employee to perform the essential functions of the position. Although this requirement is nowhere expressly stated in the Act,¹⁰² it has been a constant in cases brought under the Rehabilitation Act¹⁰³ and is the central component of the Act's requirement of nondiscrimination.¹⁰⁴

While stating that a reasonable accommodation must enable the employee to perform the essential functions of the job, the Act leaves open the question of what those functions are. In this respect, the Act confronts a fundamental tension. Congress did not intend to require employers to restructure their workforces substantially in order to accommodate employees with disabilities.¹⁰⁵ The employer must be left with a substantial amount of discretion to decide how best to allocate tasks among its workers.¹⁰⁶ On the other hand, Congress was unwilling to accept the employer's definition of the essential functions of a job as binding.¹⁰⁷ The ADA's duty of reasonable accommodation requires the employer to make affirmative efforts that may entail some expense. An unfortunate consequence of this duty is that the employer has an incentive to define the essential functions of a position in a manner that precludes an individual with a handicap from being able to perform them. Congress, however, also wanted to ensure that individuals with handicaps were not barred from the workplace by their inability to perform truly peripheral tasks.¹⁰⁸ Congress compromised in the ADA by stating that the employer's definition of essential job functions must be given consideration. This consideration, however, is not conclusive and does not rise to

¹⁰² The Act does state that a qualified individual with a disability is one who, "with or without reasonable accommodation, can perform the essential functions" of the job. See *id.* § 12111(8).

¹⁰³ See *School Board v. Arline*, 480 U.S. 273, 287 n.17 (1987); *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1078 (6th Cir. 1988); *Mantoletto v. Bolger*, 767 F.2d 1416, 1421 (9th Cir. 1985); *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983); *Treadwell v. Alexander*, 707 F.2d 473, 477-78 (11th Cir. 1983); *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 307 (5th Cir. Unit A Nov. 1981); *Simon v. St. Louis County*, 656 F.2d 316, 320 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

¹⁰⁴ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 55, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 337.

¹⁰⁵ See *id.* at 64, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 346.

¹⁰⁶ See Note, *A Principled Limitation for Section 504 of the Rehabilitation Act: The Integrity-of-the-Program Test*, 53 FORDHAM L. REV. 1409, 1433-35 (1985).

¹⁰⁷ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 33, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 455-56.

¹⁰⁸ See *id.* pt. 2, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 353-54.

the level of a presumption.¹⁰⁹ Ultimately, therefore, the courts will have to determine what are the essential functions of a job.

In making this determination consistently with legislative intent, a court should examine the following three factors. First, the court should determine whether all relevant employees actually perform the essential functions of the job as defined by the employer.¹¹⁰ If all employees are not required to perform a given task, then an employer who refuses to hire an applicant with a disability based on that individual's inability to perform the task is discriminating on the basis of handicap. Second, the court should look to the amount of time required by the task as a proportion of the employee's total work schedule.¹¹¹ If an employee spends a large percentage of her time on a given task, it is reasonable to assume that the task is an essential function of her job. The converse, however, is not necessarily true. The fact that an employee spends only a small amount of time on a task does not mean that the task is necessarily peripheral.¹¹² Third, to determine whether a task that occupies only a small proportion of an employee's time is essential, the court must examine the job not in isolation, but in the context of the overall work environment.¹¹³ This takes into account the employer's interest in ensuring an optimal level of overall activity. Because the employer is presumed to know better than the court how best to reach this level of activity, the employer will not be required to reshape its entire organization in order to create a job whose essential functions an individual with a disability is capable of performing.¹¹⁴ If, however, a task that occupies only a small percentage of the typical employee's time can be reassigned without disrupting the overall efficiency of the employer's operation, that task should be reassigned. The legislative history of the ADA indicates that such reassigning, rather than redefinition of the essential functions of the job, is what Congress intended when it suggested job restructuring as an example of reasonable accommodation.¹¹⁵

¹⁰⁹ See *id.* pt. 3, at 33, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 456; 42 U.S.C.A. § 12111(8) (West Supp. 1991).

¹¹⁰ See *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1079; *Simon v. St. Louis County*, 656 F.2d 316, 321; Note, *supra* note 35, at 721.

¹¹¹ See *Tucker*, *supra* note 14, at 904.

¹¹² See *Treadwell v. Alexander*, 707 F.2d 473, 477 (11th Cir. 1983).

¹¹³ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 33, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 455-56.

¹¹⁴ See Note, *supra* note 106, at 1433-35.

¹¹⁵ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 62, reprinted in 1990 U.S. CODE

Three cases under section 501 provide examples of what may or may not be required as job restructuring. In *Dexler v. Tisch*,¹¹⁶ the plaintiff suffered from achondroplastic dwarfism, which abnormally shortened his limbs and left him unable to perform some of the tasks required of clerks at the New Britain Post Office.¹¹⁷ The court refused to require the defendant post office to change his job structure entirely and adopt an assembly line operation that would allow the plaintiff to perform only those tasks within his capabilities.¹¹⁸ In *Treadwell v. Alexander*,¹¹⁹ the plaintiff, whose heart condition severely restricted his capacity for physical activity, applied to be a seasonal park technician with the Army Corps of Engineers. The plaintiff argued that he could perform the single task of fee collection, which, he said, occupied the majority of a seasonal park technician's time. The defendant, however, introduced convincing evidence that the plaintiff would be unable to perform the more physically arduous tasks of the job.¹²⁰ Because the few other employees at the site would not be able to accomplish both their own work and the work that the plaintiff was unable to do, the court concluded that allowing the plaintiff to do only those tasks within his abilities would not be a reasonable accommodation.¹²¹

In contrast, the court in *Davis v. Frank*¹²² reached a different result. In that case, a deaf postal worker sought promotion to the position of time and attendance clerk. Although the plaintiff was able to perform most of the duties of a time and attendance clerk, the defendant required the time and attendance clerk, together with three other employees, to answer incoming phone calls. The position also required, according to the defendant, the ability to hear conversational voice, with or without a hearing aid.¹²³ The court found that the job could be restructured to enable the plaintiff to perform its essential functions. The court reasoned that the job required not the ability to hear the conversational voice but the ability to exchange information, which, with the aid of minimal

CONG. & ADMIN. NEWS at 344-45.

¹¹⁶ 660 F. Supp. 1418 (D. Conn. 1987).

¹¹⁷ See *id.* at 1419-23.

¹¹⁸ See *id.* at 1428.

¹¹⁹ 707 F.2d 473 (11th Cir. 1983).

¹²⁰ See *id.* at 475-77.

¹²¹ See *id.* at 478.

¹²² 711 F. Supp. 447 (N.D. Ill. 1989).

¹²³ See *id.* at 449.

physical accommodations, the plaintiff possessed.¹²⁴ It further found that answering the phone was not central to the duties of a time and attendance clerk, and the court rejected the defendant's argument that requiring the other three employees to handle the phones would undermine their morale.¹²⁵

2. Safety

Employers are legitimately concerned with the ability of their employees to function not only efficiently but also safely. To ensure that their employees do not create an unnecessary risk of harm to each other or to the public, many employers use safety-related screening devices designed to identify those applicants or employees who pose particular risks.¹²⁶ Although these screens may conceivably be implicated in any form of employment discrimination, they are particularly relevant to discrimination on the basis of disability. While virtually no screen that eliminated applicants on the basis of their race could be justified on the basis of safety, and only a very few such screens that selected applicants on the basis of sex or age could be so justified,¹²⁷ an individual's disability may be directly related to her ability to perform a job safely.¹²⁸ No one would argue that a transit authority should be required to hire blind bus drivers merely because the requirement that bus drivers be able to see has a disproportionate impact on the visually impaired. Yet precisely because disability may have a direct bearing on safety, it is vitally important to scrutinize safety-related screens carefully, to ensure that the screens distinguish among applicants on the basis of the genuine risk that they would create, and not on the basis of stereotypes and misconceptions about the disabilities that the individuals may possess.¹²⁹

¹²⁴ See *id.* at 454.

¹²⁵ See *id.* The court also noted that "[i]n any event, the possibility of lowered morale does not rise to the level of 'undue hardship.'" *Id.*

¹²⁶ See McGarity & Schroeder, *Risk-Oriented Employment Screening* 59 TEX. L. REV. 999, 1001-02 (1981).

¹²⁷ See, e.g., *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985) (holding invalid under the Age Discrimination in Employment Act a mandatory retirement policy for flight engineers, which the employer had defended on grounds of safety); *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (upholding a state policy that prohibited women from serving as prison guards for safety and prison security reasons).

¹²⁸ See McGarity & Schroeder, *supra* note 126, at 1067.

¹²⁹ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 45, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 468.

The courts interpreting the Rehabilitation Act have struggled to balance the competing interests of employers, who are concerned with selecting a safe workforce at the lowest possible expense, and employees and applicants with disabilities, who desire to be judged on their own merits, rather than on the basis of assumptions about their disabilities. One court has upheld an employer's decision to discharge an employee on safety-related grounds by applying a rational basis test. In *Doe v. Region 13 Mental Health-Mental Retardation Commission*,¹³⁰ the Fifth Circuit said that as long as there was no evidence of discriminatory animus, it would give "reasonable deference" to the employer's conclusion that the employee posed a safety risk.¹³¹ Although the *Doe* court did have a fair amount of evidence about the extent of the plaintiff's mental illness before it, the court's standard would appear to allow employers to base a decision not to hire or to discharge an individual with a disability on the statistical risks associated with that disability. The court's reasoning also suggested that only a low threshold of risk was necessary to support an adverse employment decision.

Other courts have held employers to a higher standard. First, they have required proof of a higher level of likelihood and substantiality of possible harm. In *Strathie v. Department of Transportation*,¹³² the Third Circuit held that an employer may not set its safety standards so as to eliminate all risks of harm; rather, the employer may only seek to eliminate "appreciable risks."¹³³ Allowing the employer to set its standards so as to eliminate all risks, even remote ones, would enable the employer to refuse to hire any individual who relied on a mechanical aid that might fail or be dislodged.¹³⁴ The Ninth Circuit set a still higher standard in *Mantolete v. Bolger*.¹³⁵ There, the court required "a showing of a

¹³⁰ 704 F.2d 1402 (5th Cir. 1983).

¹³¹ See *id.* at 1410; see also *Doe v. New York Univ.*, 666 F.2d 761, 776 (2d Cir. 1981) (stating that the court will give "considerable" deference to a university's decision that the risk created by an applicant's disability renders the applicant less qualified than other applicants).

¹³² 716 F.2d 227 (3rd Cir. 1983).

¹³³ See *id.* at 232.

¹³⁴ See *id.* at 232-33. The *Strathie* court noted that, although the department justified its decision to ban wearers of hearing aids from the position of school bus driver by arguing that the device might become dislodged in an emergency, the department did not have a similar ban on wearers of eyeglasses, which could also be dislodged. See *id.* at 232.

¹³⁵ 767 F.2d 1416 (9th Cir. 1985).

reasonable probability of substantial harm."¹³⁶ The Supreme Court also set a higher standard than the *Doe* court in *School Board v. Arline*,¹³⁷ stating that an employer need not hire an individual who posed a "significant risk" if that risk could not be eliminated by reasonable accommodation.¹³⁸ Second, the courts have required direct evidence, rather than inferential or speculative evidence, of a substantial risk. The Ninth Circuit in *Mantolete* required that the showing of likelihood of substantial harm be based not on the employer's speculations, or on statistical evidence related to the individual's disability, but rather on the individual's own work history and medical history.¹³⁹

The ADA rejects the position espoused by the Fifth Circuit in *Doe*. It allows an employer to invoke safety concerns only when it can show that the individual with a disability poses "a direct threat to the health or safety of other individuals in the workplace."¹⁴⁰ By requiring a direct threat, Congress intended to adopt the standard of *Arline* that the individual must pose a significant threat, not merely a remote or speculative threat.¹⁴¹ A lesser standard, Congress reasoned, would allow employers to make decisions based on "generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies."¹⁴² Moreover, by requiring that employment decisions be based on an individualized inquiry into the particular characteristics of the applicant, the ADA rejects the notion that an individual with a disability presents a significant risk simply because, on the whole, that disability is statistically associated with a significant risk.¹⁴³ The requirement of individualized inquiry is implicit in the notion that the individual must pose a "direct threat" of harm. The ADA further requires

¹³⁶ *Id.* at 1422.

¹³⁷ 480 U.S. 273 (1987).

¹³⁸ *See id.* at 287 n.16.

¹³⁹ *See Mantolete*, 767 F.2d at 1422-23. The court also held that an employer must "independently assess both the probability and severity of potential injury," which entails an analysis of the particular job the individual is seeking. *Id.* at 1423.

¹⁴⁰ 42 U.S.C.A. § 12113(b) (West Supp. 1991).

¹⁴¹ *See* H.R. REP. NO. 485, *supra* note 1, pt. 2, at 76, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 359; *id.* pt. 3, at 45, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 468.

¹⁴² *Id.* pt. 2, at 56, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 338.

¹⁴³ *See id.* pt. 2, at 57, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 339 (citing *Mantolete*); *see also* Miller, *supra* note 61, at 41 (arguing that an employer's decision that a potential employee poses a risk of future harm should be based on an individual analysis of the applicant's medical condition).

that, if the employer determines that the individual will pose a significant risk, the employer consider whether any reasonable accommodation would lower the risk to an acceptable level.¹⁴⁴ Finally, the ADA permits the employer to base an adverse decision on safety concerns only if the individual with a disability creates a direct threat to "other individuals."¹⁴⁵ The ADA does not allow a paternalistic employer to refuse to hire an applicant with a disability for what it perceives to be that applicant's own good; rather, the Act operates on the premise that an individual with a disability, when fully apprised of a potential risk and when the risk is only of future harm to herself, is capable of deciding for herself whether or not to submit to the risk.¹⁴⁶

B. *Undue Hardship*

Once the employer has determined that it can accommodate an employee or applicant with a disability—that is, that an accommodation will enable the individual to perform the essential functions of the job without endangering others—the employer must determine if implementing the proposed accommodation would cause undue hardship. The undue hardship standard was one of the most controversial elements of the ADA during its consideration in Congress. As originally introduced, the Act called for a very high standard: an accommodation would not be unreasonable unless it threatened the continued existence of the employer's business.¹⁴⁷ Faced with a rash of protests from the business community, Congress scaled back the burden in the final version of the Act.¹⁴⁸

A 1982 United States Department of Labor study suggested that employers' concerns about the excessive cost of accommodating individuals with disabilities were somewhat misplaced: it found that only 22% of disabled workers received any form of accommodation at all, and that for those requiring accommodation, 51% of the

¹⁴⁴ See 42 U.S.C.A. § 12113(a) (West Supp. 1991); H.R. REP. NO. 485, *supra* note 1, pt. 2, at 76, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 358.

¹⁴⁵ 42 U.S.C.A. § 12113(b) (West Supp. 1991) (emphasis added).

¹⁴⁶ See *id.* § 12101(a)(5) (citing "overprotective rules and policies" as an obstacle to be overcome); cf. Tucker, *supra* note 14, at 898-99 (arguing that under § 504 an employer should not be able to refuse to hire an individual with a disability on the basis of risk of future harm to that individual "unless it is *virtually certain*" that she would suffer permanent impairment as a result).

¹⁴⁷ See Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927.

¹⁴⁸ See 42 U.S.C.A. § 12111(10)(A) (West Supp. 1991).

accommodations imposed no cost, and 30% cost less than \$500 per worker.¹⁴⁹ To reduce this remaining burden on employers, Congress left in place a substantial duty to accommodate: an accommodation does not cause undue hardship unless it requires "significant difficulty or expense."¹⁵⁰

To assist in the determination of what constitutes an undue hardship, the ADA lists a number of factors that are to be considered. These factors relate to the cost of the proposed accommodation, the size, nature, and resources of the facility at which the accommodation is to be implemented, and the size, nature, and resources of the employing business entity as a whole.¹⁵¹ The factors indicate that what matters most in determining whether an accommodation causes undue hardship is not the cost of the accommodation in the abstract, but rather the employer's ability to bear the cost.¹⁵² Undue hardship must therefore be determined on a case-by-case basis; an accommodation that would impose an

¹⁴⁹ See Tucker, *supra* note 147, at 930.

¹⁵⁰ 42 U.S.C.A. § 12111(10)(A) (West Supp. 1991). This standard is significantly higher than the standard of undue hardship formulated by the Supreme Court for accommodation of religious practice under Title VII, which requires that the employer bear only a de minimis cost. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). Congress has expressly rejected application of the TWA standard to the ADA. See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 68, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 350; *id.* pt. 3, at 40, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 463.

¹⁵¹ The statute provides:

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C.A. § 12111(10)(B) (West Supp. 1991).

¹⁵² See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 35, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 457; *cf.* *Bey v. Bolger*, 540 F. Supp. 910, 926-27 (E.D. Pa. 1982) (discussing the defendant's ability to bear the cost of the accommodation under the Rehabilitation Act of 1973); *Wegner, supra* note 29, at 480-81 (discussing cost as a defense under § 504 of the Rehabilitation Act of 1973).

undue hardship on a small business, or in a particular industry, may be reasonable for a large employer, or in a different industry.¹⁵³

Undue hardship has been criticized as a standard so vague as to amount to no standard at all. One commentator asserted that, in practice, undue hardship under the Rehabilitation Act of 1973 has not served as a principled limitation, but rather has been "a label for accommodations that courts have refused to require in particular cases."¹⁵⁴ There is some merit to this criticism. Congress has clearly marked the outer bounds of undue hardship: an undue hardship may be something less than a cost that would drive the employer to the verge of going out of business, but must impose more than a *de minimis* cost. Within these outer bounds, however, the courts have considerable room to maneuver.

Congress has provided some guidance in determining what constitutes undue hardship, and several additional factors can be adduced from the factors described in legislative history. First, in determining whether a particular accommodation would impose an undue hardship on an employer, the court must look not to the gross cost of the accommodation, but rather to its net cost. To the extent that an employer receives tax credits or other benefits for the installation of an accommodation, these must be offset from the accommodation's cost.¹⁵⁵ The cost of the accommodation to the employer must be its real cost. The employer must not be allowed to inflate the cost of hiring an employee with a disability by speculating about the possibility of increased workers' compensation liability¹⁵⁶ or tort liability.¹⁵⁷ Allowing the employer to project

¹⁵³ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 69-70, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 352. Congress recognized that, in limited circumstances, a particular accommodation which would be reasonable in most industries would be unsuited, and therefore cause undue hardship, for particular industries. Congress gave as an example the creation of wheelchair-accessible ramps on construction sites, stating that because of the constantly changing nature of a construction site it would not be practicable to provide ramps. This argument, Congress recognized, would not be applicable if the individual with a disability were seeking an office job instead of a construction job. See *id.*

¹⁵⁴ Note, *supra* note 23, at 1011.

¹⁵⁵ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 69, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 351-52; see also Tucker, *supra* note 14, at 890-91 (stating that the measure of undue hardship under § 504 should take into account tax credits, and all federal financial assistance received by an employer); Comment, *supra* note 35, at 556-57 (stating that a cost defense under § 504 should depend on tax incentives and other government offsets received by the employer).

¹⁵⁶ See Comment, *supra* note 35, at 558. To a limited extent, second-injury funds may alleviate employer fears about increased workers' compensation liability. See *id.*

such costs without evidence that the individual in question is likely to require the cost would allow the employer to refuse to hire an applicant with a disability solely on the unfounded stereotype that workers with disabilities have more accidents than nondisabled workers.¹⁵⁸ Such an action would clearly constitute discrimination under the ADA.

Second, the court must take into account the number of employees, presently and in the future, who will benefit from the proposed accommodation.¹⁵⁹ An accommodation that might be unreasonable for one employee may not impose an undue hardship if five employees will benefit. By extension, the court should take into account the number of employees, regardless of whether or not they have disabilities, who will derive a significant benefit from a proposed accommodation. The court should not place much weight on this factor, however, since the ADA does not require that an employer provide accommodations for employees who do not have disabilities. Nevertheless, the fact that a large number of employees would derive a significant benefit from a particular accommodation may contribute to the likelihood that the employer will eventually provide the accommodation, regardless of whether it is required by a disabled employee. If an employer would eventually provide the proposed accommodation, but refuses to provide it when it is needed to accommodate an applicant or employee with a disability, the employer should be liable for discrimination, unless changing the timing would itself cause an undue hardship.¹⁶⁰

Third, the court must recognize that when examining the impact of a proposed accommodation on a facility, the concerns are slightly different than they are when examining the impact on the employing entity as a whole. By responding to criticism and scaling down the level of the burden of undue hardship, Congress made clear that it did not intend to push employers to the verge of insolvency.¹⁶¹

at 558-59.

¹⁵⁷ See *Smith v. Administrator of Veterans Affairs*, 32 Fair Empl. Prac. Cas. (BNA) 986, 990 (C.D. Cal. 1983).

¹⁵⁸ See *id.*

¹⁵⁹ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 69, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 351. The House Report emphasizes, however, that if two or more employees are to share an accommodation, the employer must be sure that "each employee is not denied a meaningful equal employment opportunity caused by limited access to the needed accommodation." *Id.*

¹⁶⁰ For an example of such a situation, see *infra* notes 164-75 and accompanying text.

¹⁶¹ See *Tucker, supra* note 147, at 927.

Thus, an accommodation may impose an undue hardship without threatening the continued vitality of the enterprise. With regard to a particular facility, however, Congress intended a higher standard. The version of the ADA passed by the Senate did not provide for consideration of the impact on an individual facility in determining undue hardship; it looked only to the impact on the employer's business as a whole.¹⁶² The House amended this provision because of its concern that an otherwise thriving enterprise would shut down a marginal facility rather than absorb the cost of the proposed accommodation at that facility. The House Report offered the example of a department store chain operating a store in a rural area at a loss. Because the House did not want to deprive the community of the benefit of having the store, it determined that if the cost of the proposed accommodation would cause the chain to close the store or reduce overall employment at the store, the accommodation would impose an undue hardship.¹⁶³ The fact that Congress's concern was with the continued existence of employment at marginal facilities suggests that, as long as a facility is not threatened with closure or job loss, an accommodation may be relatively costly with regard to the budget for the particular facility if it would not impose an undue hardship on the employing enterprise as a whole.

An analysis of a leading case under section 501 demonstrates the manner in which a court might consider the factors suggested by Congress to arrive at the proper level of accommodation and hardship required by the ADA. In *Gardner v. Morris*,¹⁶⁴ the plaintiff, a manic-depressive civil employee with the Army Corps of Engineers, sought transfer to a construction project in Saudi Arabia.¹⁶⁵ The plaintiff controlled his illness with lithium carbonate, but there remained a risk that he would suffer a manic episode; in addition, the plaintiff's use of lithium required him to undergo blood tests every three months to detect lithium toxicity.¹⁶⁶ The medical facilities existing at the site in Saudi Arabia were primitive and would not allow blood analysis to be done on-site; there also were no doctors at the site. The nearest clinic staffed by physicians

¹⁶² See S. 933, 101st Cong., 1st Sess. § 101(9) (1989).

¹⁶³ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 40-41, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 463.

¹⁶⁴ 752 F.2d 1271 (8th Cir. 1985).

¹⁶⁵ See *id.* at 1274.

¹⁶⁶ See *id.*

available to the plaintiff would have been a one-hour flight or thirteen-hour drive away, and travel between the site and the clinic was occasionally disrupted by sandstorms.¹⁶⁷ Under these circumstances, the court held, the defendant was not required to transfer the plaintiff because no reasonable accommodation would ensure his safety and the safety of his co-workers.¹⁶⁸ The court rejected a proposed protocol that would have established procedures for treating the plaintiff in the event that he suffered a manic episode, stating that the lack of on-site facilities and the difficulty of travel to the clinic meant that the protocol would not guarantee the plaintiff's safety.¹⁶⁹ The court further reasoned that the Corps was not required to provide both a physician and on-site laboratory facilities, because the cost of such accommodations would be unreasonable.¹⁷⁰

The court's application of section 501 was questionable and has been sharply criticized.¹⁷¹ Had the case been brought under the ADA and adjudicated according to the principles established by Congress, the court's reasoning would also have been severely flawed. First, the court failed to provide any analysis of the burden that providing improved medical facilities would impose on the Corps as a whole, and on the particular site.¹⁷² The cost of providing such facilities surely would not have imposed an undue hardship on the Corps as a whole, and there was no evidence that the cost of providing the medical facilities would have prevented the project in Saudi Arabia from proceeding.¹⁷³ Second, the court failed to take into account the fact that, as the project expanded, the medical facilities at the Saudi site were progressively upgraded. By the spring of 1980, two years after plaintiff's transfer was denied, the need for medical facilities at the site was so great that the Corps had established a 100-bed hospital with laboratory facilities.¹⁷⁴ Thus, the plaintiff was not simply asking that the Corps provide him with his own personal doctor; rather, he was asking the Corps to

¹⁶⁷ See *id.* at 1275.

¹⁶⁸ See *id.* at 1284.

¹⁶⁹ See *id.* at 1283.

¹⁷⁰ See *id.* at 1283-84.

¹⁷¹ See Tate, *supra* note 77, at 810-11.

¹⁷² Tate has made a similar criticism of the court's analysis under § 501. See *id.*

¹⁷³ There was no evidence that the cost of providing the medical facilities would have prevented the project from proceeding. Rather, the court only found that "[t]he cost of such accommodations in the early stage of a construction project would be unreasonable." *Gardner*, 752 F.2d at 1284.

¹⁷⁴ See *id.* at 1275.

adjust the transition from the early stages of the project, when only a nurse was stationed at the site, to the later stages, when the ability to provide full medical care at the site was needed. Surely the plaintiff would not have been the only worker at the site to benefit from the presence of a doctor and a basic laboratory. To deny reasonable accommodation under the ADA, the court would have had to find both that the proposed accommodation would place an undue burden either on the Corps as a whole or on the Saudi site, and that the burden could not be justified by the fact that the plaintiff would not be alone in benefitting from the accommodation. While the court could have reached such a conclusion on the facts before it, it would have done so through a far more rigorous analysis than it actually applied.¹⁷⁵

The standard for undue hardship can be further refined by drawing on the concerns expressed by Congress when defining reasonable accommodation and undue hardship. First, in defining reasonable accommodation, Congress expressed a concern for the employer's overall performance. By specifying that a reasonable accommodation is one that allows an employee with a disability to perform the essential functions of the position, Congress indicated that the employer need not accept a lower standard of performance from its employees who have disabilities.¹⁷⁶ Second, in describing the reason for examining the impact of an accommodation on a facility as well as on the business entity as a whole, Congress stated that it did not intend the Act to require employers either to cease operations or to reduce their workforce.¹⁷⁷ In these two portions of the Act, Congress has clearly indicated those burdens that it does not intend to impose on employers. It follows that, under the Act, an accommodation imposes an undue hardship if its cost would either (a) substantially impair the ability of the employer to produce goods or provide services, or (b) impose such a high cost that the

¹⁷⁵ The *Gardner* court *did* hold that the plaintiff's proposed accommodation would create an undue hardship at the site. See *id.* at 1284. The court, however, provided no analysis to support its conclusion; the court appeared guilty of the formless undue-hardship analysis that commentators have criticized. See *supra* note 154 and accompanying text; see also Tate, *supra* note 77, at 811 (describing the *Gardner* court's analysis as "unsupported" and "arbitrary").

¹⁷⁶ For a discussion of reasonable accommodation, see *supra* notes 100-125 and accompanying text.

¹⁷⁷ For a discussion of hardship on the employer, see *supra* notes 162-63 and accompanying text.

employer would be forced to compensate by reducing the overall workforce.¹⁷⁸

This proposed test is consistent with the boundaries set on reasonable accommodation by Congress. It would impose a lower threshold of undue hardship than the so-called "bankruptcy" provision that Congress rejected early in its consideration of the Act, yet the test would require employers to absorb more than a *de minimis* cost.¹⁷⁹ Moreover, it is consistent with the notion that a large employer should be able to absorb a higher cost of accommodation than a small employer. One case brought under section 504, *Nelson v. Thornburgh*,¹⁸⁰ illustrates this relationship. In *Nelson*, the court required the Pennsylvania Department of Public Welfare to hire readers for three blind income maintenance workers who, with the accommodation, were able to perform their jobs as well as their sighted co-workers.¹⁸¹ The court estimated the annual cost of providing a reader for four hours a day at roughly \$6638.¹⁸² The court then compared that cost with the department's \$300 million administrative budget, and concluded that the cost was not unreasonable.¹⁸³ The court further noted that the accommodation could be adopted "without any disruption of DPW's services."¹⁸⁴ The court thus concluded that the accommodation would not, under the circumstances, impose an undue hardship.¹⁸⁵ Had the employer been a neighborhood clinic with a four-digit budget, rather than a nine-digit budget, it is unlikely that the court would have reached the same result; the required accommodation would have threatened the clinic's ability to provide services.

A strict definition of undue hardship that would provide a clear-cut answer in every situation is not possible, because of the range

¹⁷⁸ Although arrived at by different means, this test is similar to the integrity of the program test set forth in Note, *supra* note 106, at 1415, 1434. Cf. Tucker, *supra* note 14, at 896 ("In sum, the 'fundamental alteration' or 'substantial modification' test should be defined as requiring that the accommodation at issue would 'sacrifice the integrity' of the job or program."); Note, *supra* note 29, at 900 ("To justify not accommodating handicapped persons who show they can benefit from the program, a recipient must demonstrate that implementing the affirmative steps would severely impair a program's services.").

¹⁷⁹ See *supra* text preceding and following note 154.

¹⁸⁰ 567 F. Supp. 369 (E.D. Pa. 1983).

¹⁸¹ See *id.* at 373, 382.

¹⁸² See *id.* at 376.

¹⁸³ See *id.* at 380.

¹⁸⁴ *Id.*

¹⁸⁵ See *id.*

of possible accommodations and the variances in employer resources. To ensure that employers meet the obligations imposed by the ADA, it is essential that courts carefully scrutinize claims that a particular accommodation would impose an undue hardship.¹⁸⁶ In particular, the court must recognize that a mere loss in efficiency is not the equivalent under the ADA of impaired ability to provide services or produce goods. Although the ADA requires that individuals with disabilities be as capable of performing the essential functions of their jobs as nondisabled employees, the ADA expressly contemplates, in its reasonable accommodation requirement, that an equivalent level of performance may come at a higher cost to the employer. For example, Congress, like the *Nelson* court, recognized that in some circumstances, providing a reader for a blind employee may be a reasonable accommodation.¹⁸⁷ The employer will not be required to provide the reader if doing so does not allow the blind employee to achieve a productivity comparable to that of sighted employees.¹⁸⁸ But the accommodation would not cause an undue hardship merely because, to obtain a comparable level of performance, the employer will have to pay wages to both the blind employee and the reader, rather than to a single sighted employee. To assert a defense of undue hardship, the employer must show more than increased costs of production; it must show that the increased costs threaten its ability to maintain its current level of output or its current workforce.

III. PROCEDURAL CONSIDERATIONS UNDER THE ADA

A. *The Employer's Duty of Individual Consideration*

The ADA's requirement of reasonable accommodation is the key to breaking down the walls of myth and ignorance that have limited opportunities for individuals with disabilities. By imposing the duty of reasonable accommodation, Congress hoped to force employers to overcome their preconceived notions about disabilities and focus

¹⁸⁶ See, e.g., Tate, *supra* note 77, at 806-12 (criticizing courts applying § 501 for failure to scrutinize employers' claims of undue hardship).

¹⁸⁷ See, e.g., H.R. REP. NO. 485, *supra* note 1, pt. 2, at 65, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 347 (stating, as an example, that a law firm may be required to hire a part-time reader for a visually impaired associate if doing so would not impose an undue hardship).

¹⁸⁸ For a discussion of performance of essential functions, see *supra* notes 100-125 and accompanying text.

on the capabilities of individual applicants. Congress has specified that reasonable accommodation is a fact-specific question to be determined on a case-by-case basis.¹⁸⁹ Because an employer cannot determine which accommodations are needed, or whether accommodation would be reasonable, without a careful examination of the applicant's abilities and the job's essential functions, the ADA should be read to impose a procedural duty as well as a substantive duty on employers.¹⁹⁰ A decision that is not based on the individual's capabilities will in essence be arbitrary, and if that arbitrariness is related to the individual's disability, then the purpose of the Act will have been circumvented.¹⁹¹ In the absence of a procedure that requires the employer to make a fact-specific inquiry during the hiring process, the employer will fail to meet the substantive duties imposed by the Act.

The bounds of the procedural duty imposed by the requirement of reasonable accommodation have been muddled by the courts' divergent interpretations of the Rehabilitation Act. Characterizing section 501's requirement of accommodation as an affirmative duty, courts have required that federal employers conduct detailed individual inquiries before taking action that is adverse to an employee or applicant with a known disability.¹⁹² Courts interpreting section 504, in contrast, have generally been unwilling to establish such procedural duties. Although courts have recognized that reasonable accommodation requires consideration of the applicant's or employee's individual abilities and limitations,¹⁹³ several courts have nevertheless refused to recognize under section 504 the procedural requirements that they read into section 501, justifying the distinction by arguing that section 501 requires more

¹⁸⁹ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 62, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 344.

¹⁹⁰ See, e.g., McGarity & Schroeder, *supra* note 126, at 1024 (arguing that a fair employment system includes a procedural component).

¹⁹¹ See *id.* at 1025.

¹⁹² See, e.g., *Mantolite v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985) (stating that proper evaluation of the safety hazards posed by a disabled employee "necessarily requires the gathering of substantial information by the employer"); *Reynolds v. Dole*, No. C-84-7012-VW (N.D. Cal. Aug. 1, 1990) (LEXIS, Genfed library, Dist file), at *92 (stating that "it is important to craft a requirement of reasonable inquiry and assessment into the federal employer's duty of reasonable accommodation"); *American Fed'n of Gov't Employees v. Baker*, 677 F. Supp. 636, 638 (N.D. Cal. 1987) (stating that under section 501, the consideration of accommodation before termination of employment is "an indispensable prerequisite").

¹⁹³ See *Simon v. St. Louis County*, 656 F.2d 316, 321 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

of a federal employer than section 504 requires of a recipient of federal funds.¹⁹⁴ This approach is unnecessarily grudging and fails to consider the true meaning of reasonable accommodation. In *School Board v. Arline*,¹⁹⁵ the Supreme Court asserted that reasonable accommodation, under section 504 as well as under section 501, is an "affirmative obligation"¹⁹⁶ designed to prevent exclusion of capable individuals from the workforce on the basis of misconceptions and myths about their disabilities.¹⁹⁷ Similarly, if the employer cannot make a nondiscriminatory decision under section 501 without considering the individual's own abilities, rather than its preconceived notions about the individual's disability, it should not be able to make such a decision under either section 504 or the ADA.

The means by which an employer may consider an applicant, however, are limited by the ADA in important ways. The Act prohibits the employer from inquiring about an applicant's disabilities or from requiring that the applicant submit to a pre-employment medical examination.¹⁹⁸ An employer may inquire only about the applicant's ability to perform the essential functions of the job in question.¹⁹⁹ Congress chose to forbid pre-employment inquiries on the grounds that such inquiries may lead the employer to make its hiring decisions based on irrelevant stereotypes; instead, Congress insisted, the employer's only legitimate inquiry is into the applicant's ability to perform the job effectively and safely.²⁰⁰ Because the Act only requires the employer to

¹⁹⁴ See *Reynolds*, LEXIS at *73 n.13, *75-77; *Am. Fed'n of Gov't Employees*, 677 F. Supp. at 638; see also Kelley, *Reasonable Accommodation in the Federal Sector: An Examination of the Application of the Rehabilitation Act to the Federal Employer*, 29 HOW. L.J. 337, 344 (1986) (stating that courts have distinguished § 501 from § 504 by requiring under § 501 "some evidence . . . of an effort to explore individualized avenues of accommodation before a conclusion of 'unqualified' or 'undue hardship' will be legally acceptable").

¹⁹⁵ 480 U.S. 273 (1987).

¹⁹⁶ *Id.* at 289 n.19.

¹⁹⁷ See *id.* at 284-85.

¹⁹⁸ See 42 U.S.C.A. § 12112(c)(2) (West Supp. 1991). The employer may, in limited circumstances, extend to an applicant a conditional offer pending the results of a post-offer medical examination. The Act allows the employer to require a medical examination in this way only if all new employees are required to submit to a similar examination, regardless of disability, and the results of the examination are kept confidential, with access restricted to three narrowly defined groups in limited circumstances. See *id.* § 12112(c)(3).

¹⁹⁹ See *id.* § 12112(c)(2)(B).

²⁰⁰ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 72-73, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 354-56.

make reasonable accommodations to the known limitations of the applicant or employee, the duty to accommodate should be triggered by a request for accommodation by the applicant or employee.²⁰¹

Once the employer has been informed of the need for accommodation, it must conduct a review of the job in question to determine its essential functions;²⁰² it must also determine that its selection criteria accurately measure the skills required to perform the job and are consistent with business necessity.²⁰³ When considering an individual with a disability, the employer must be certain that its selection criteria measure actual job skills, and not traits or abilities that the employer merely believes to be associated with these skills, or traits or abilities that merely facilitate measuring job skills.²⁰⁴ An individual with a disability who cannot perform a task in a traditional manner may nevertheless be able to perform that task as effectively as a nondisabled employee, either with or without accommodation.²⁰⁵ Thus, to return to the example of *Davis v. Frank*,²⁰⁶ when a hearing-impaired individual applies to be a time and attendance clerk, the employer should recognize that, although ability to communicate with the employees whose records she keeps is an essential skill for that position, the clerk need not be able to hear as long as other effective means of communication exist.²⁰⁷ To take another example, when a job does not require the ability to read, but the employer demands that all new employees take part in a training program that requires reading, the employer may not exclude a dyslexic job applicant, even if the training program is job-related and consistent with business necessity, provided that alternative means, such as the

²⁰¹ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 39, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 462; Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725, 747.

²⁰² See *supra* notes 100-07 and accompanying text.

²⁰³ See 42 U.S.C.A. § 12112(b)(6) (West Supp. 1991); H.R. REP. NO. 485, *supra* note 1, pt. 2, at 72, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 354.

²⁰⁴ Cf. 42 U.S.C.A. § 12112(b)(7) (West Supp. 1991) (defining as discrimination administration of tests requiring sensory, manual, or speaking skills to individuals whose sensory, manual, or speaking skills are impaired, unless the test is designed to measure those skills).

²⁰⁵ See Miller, *supra* note 61, at 53.

²⁰⁶ 711 F. Supp. 447 (N.D. Ill. 1989); see *supra* notes 122-25 and accompanying text.

²⁰⁷ See *Frank*, 711 F. Supp. at 453-54.

provision of a reader, would enable the dyslexic applicant to participate fully in the program.²⁰⁸

As this example indicates, even if the employer's criteria meet the business necessity standard, the employer must determine whether reasonable accommodation would enable the applicant with a disability to meet those criteria. In determining whether reasonable accommodation is possible, the employer should consult with the disabled individual, who, because of her familiarity with the limits imposed by her disability, may be able to suggest an accommodation that would fully meet her needs.²⁰⁹ The fact that the applicant cannot suggest an accommodation, however, does not relieve the employer of its obligations. Although the applicant may be more familiar with her disability, the employer is more familiar with the demands of the job and the workplace.²¹⁰ The employer may also have a better understanding of which changes are technologically feasible. Thus, although the employer should discuss possible accommodations with the applicant, the burden remains primarily on the employer to determine whether accommodation is possible.²¹¹ If the employer is unable to identify a reasonable accommodation, it should consult with other employers, a state vocational rehabilitation services agency, or the federal Job Accommodation Network, which has compiled and makes available to employers information on thousands of possible accommodations.²¹² Only if the employer can point to specific facts suggesting an inability to accommodate should the employer be able to reject an applicant as unqualified. Likewise, the employer should

²⁰⁸ See *Stutts v. Freeman*, 694 F.2d 666, 668-69 (11th Cir. 1983). *Stutts* is cited approvingly in H.R. REP. NO. 485, *supra* note 1, pt. 2, at 71-72, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 354.

²⁰⁹ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 65, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 348; Comment, *supra* note 201, at 747.

²¹⁰ See Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 896-97 (1984).

²¹¹ If the applicant is unable to suggest an appropriate accommodation, Congress has suggested a four-step procedure for the employer to follow. The employer should (1) determine what particular tasks or aspects of the work environment will prevent or hinder the applicant's performance, given her disability; (2) identify possible accommodations; (3) determine which of the possible accommodations are reasonable in terms of effectiveness and equal opportunity; and (4) implement the accommodation that is most appropriate and that does not require undue hardship. H.R. REP. NO. 485, *supra* note 1, pt. 2, at 66, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 348-49.

²¹² See *id.* at 63-64, 66, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 345-46, 348.

not be allowed to reject an applicant as posing a safety risk unless the employer has taken steps to evaluate the extent of the risk given the individual applicant's particular disability, and to consider whether accommodation would enable the employer to reduce the risk to an acceptable level.²¹³

By requiring the employer to conduct an individualized inquiry, the ADA greatly restricts the employer's ability to rely on screening devices, whether those devices are designed to measure productivity or safety. The Act will have a particularly dramatic impact on safety-related screens, which tend to eliminate individuals from consideration based not on their own particular traits but on the statistical risks associated with the group of which they are a member. Individuals with disabilities are particularly susceptible to safety-related screens, because certain disabilities will create genuinely elevated risks in certain occupations.²¹⁴ Allowing the employer to classify individuals by the risks associated with their disability, however, would ignore the fact that there may exist substantial variations among individuals within each classification. The fact that the group as a whole may create a substantial and statistically significant risk of harm does not mean that any given individual within the group presents the same risk.²¹⁵ The requirement of reasonable accommodation makes clear that employers may not rely on less costly, broad-based screens in order to avoid individual consideration. Rather, Congress has explicitly stated a strong preference for fact-specific inquiries into the individual's own abilities in order to evaluate possible risks.²¹⁶ In making this inquiry, the employer should examine, whenever possible, the applicant's work and medical history.²¹⁷ Only if an

²¹³ See Miller, *supra* note 61, at 41.

²¹⁴ See McGarity & Schroeder, *supra* note 126, at 1066-68.

²¹⁵ See Note, *supra* note 106, at 1429-30.

²¹⁶ See H.R. REP. NO. 485, *supra* note 1, pt. 3, at 45, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 468.

²¹⁷ Cf. *Mantolite v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) (requiring that a federal employer examine the individual applicant's work and medical history under § 501). This inquiry may appear contrary to the requirement that the employer not make a pre-employment inquiry into the applicant's disability. See *supra* notes 198-201 and accompanying text. Its rationale, however, is different. Before the applicant raises the issue of disability, the employer has no legitimate interest in knowing about the individual's disability *per se*; rather, it only has an interest in the individual's ability to perform the job. See *supra* notes 198-201 and accompanying text. Once the applicant has invoked its right to accommodation under the ADA, however, the employer needs relevant information about the applicant's disability to fulfill its duties under the act.

individualized inquiry is impossible should the employer be allowed to rely on statistical evidence relative to the group of people possessing the disability.²¹⁸

A cursory reading of the Act might give the impression that an employer could continue to use a safety-related screen provided that it could show that the screen was job-related and consistent with business necessity. The Act specifically allows the use of qualification standards. By definition, qualification standards may include safety standards²¹⁹ that screen out individuals with disabilities, provided that they are job-related and consistent with business necessity, and that reasonable accommodation is impossible.²²⁰ Careful examination of the statutory language, however, reveals that Congress intended a much higher standard with regard to safety screens. Although the employer may take safety into account, the requirement that the individual pose a *direct* threat to the health and safety of others mandates individualized inquiry. By adopting the standard stated in *School Board v. Arline*,²²¹ Congress has accepted the Supreme Court's determination that, in the context of discrimination on the basis of disability, an employer may not rely on safety concerns unless it can demonstrate that the individual would pose the threat sought to be avoided.²²² According to Congress, a blanket rule excluding individuals on the basis of their type of disability can be justified only "where in all cases physical condition by its very nature would prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodations."²²³ This standard more closely resembles the standard for bona fide occupational qualification under Title VII and the Age Discrimination in Employment Act²²⁴ than the standard for business necessity. In short, while the employer has a legitimate interest in protecting the integrity of its operations and

²¹⁸ See Miller, *supra* note 61, at 38, 43.

²¹⁹ See 42 U.S.C.A. § 12113(b) (West Supp. 1991).

²²⁰ See *id.* § 12113(a).

²²¹ 480 U.S. 273 (1987).

²²² See *id.* at 287-88; H.R. REP. NO. 485, *supra* note 1, pt. 2, at 76, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 359; *id.* pt. 3, at 45, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 468.

²²³ S. REP. NO. 116, *supra* note 16, at 27.

²²⁴ See, e.g., *Western Air Lines v. Criswell*, 472 U.S. 400, 422-23 (1985) (holding that a standard qualifies as a bona fide occupational qualification if it is reasonably necessary to the normal operation of the business and if it is "highly impractical" to determine on an individual basis who within the group is able to perform the job safely).

the safety of its employees, it may not rely on generalizations or stereotypes in order to protect that interest.

B. *Burdens of Proof*

Congress has specified that the burden of proof under the ADA is to be allocated in a manner consistent with the cases interpreting the section 504 regulations.²²⁵ This statement, unfortunately, provides little guidance. There is general agreement that a section 504 plaintiff may establish a *prima facie* case by showing that (1) she was an individual with a handicap within the meaning of the Rehabilitation Act, (2) she was otherwise qualified for the position sought, and (3) she was excluded solely because of her handicap.²²⁶ Once the plaintiff has established the *prima facie* case, the burden shifts to the defendant to show that the plaintiff was not otherwise qualified—in other words, that no reasonable accommodation was possible—or that any possible accommodation would cause the defendant undue hardship. There is, however, considerable room for disagreement about the amount and quality of evidence that the plaintiff must present to establish the *prima facie* case. There is also room for disagreement about the nature of the burden that shifts to the defendant, once the *prima facie* case has been established.

The disputes center chiefly on the requirement that the plaintiff demonstrate that she is otherwise qualified. There are three possible interpretations of the phrase “otherwise qualified.” The first model, articulated by the Supreme Court in *Southeastern Community College v. Davis*,²²⁷ requires the plaintiff to establish that she was able to meet all of the employer’s requirements in spite of her disability. The second model, unlike the first, explicitly

²²⁵ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 72, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 354.

²²⁶ See *Copeland v. Philadelphia Police Dep’t*, 840 F.2d 1139, 1148 (3rd Cir. 1988), *cert. denied*, 109 U.S. 1636 (1989); *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3rd Cir. 1983); *Dexler v. Tisch*, 660 F. Supp. 1418, 1425 (D. Conn. 1987); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1135 (S.D. Iowa 1984). These § 504 cases include a fourth component in the *prima facie* case: the plaintiff must establish that the employer is a recipient of federal funds. This element is plainly inapplicable to the ADA, although as a parallel the plaintiff may be required to show that the employer is a “covered entity” under the Act, that is, an employer of fifteen or more employees that does not fall within one of the Act’s exclusions. See 42 U.S.C.A. § 12111(2), (5) (West Supp. 1991).

²²⁷ 442 U.S. 397, 406 (1979).

recognizes the element of accommodation, but, like the first, places the burden of persuasion squarely on the plaintiff. Under this model, the plaintiff not only must demonstrate that she met all of the employer's requirements not related to her disability, but must also introduce evidence sufficient to prove that the employer could have reasonably accommodated her as to those requirements that her disability prevented her from meeting. The third model requires the plaintiff to carry the burden of persuasion on the issue of whether she can meet all of the employer's standards on which her disability has no impact. If there are standards that she cannot meet because of her disability, the plaintiff must meet the burden of production on the issue of whether the employer could have reasonably accommodated her. The defendant would then have the burden of persuasion to show that no reasonable accommodation was possible.

Of the three models, the first is clearly inappropriate for the ADA. Its requirement may be read in two ways. The first, accepting the words of the model at face value, would read the requirement of reasonable accommodation out of the Act. The second, while acknowledging the requirement of accommodation, collapses the separate inquiries of whether the plaintiff's inability to meet the employer's standards was related to the limitations imposed by her disability—if it was not, then the employer is under no obligation to offer accommodation²²⁸—and whether the barrier that her disability created could have been overcome by reasonable accommodation. The first model thus would only lead to conceptual confusion, and should be rejected by courts applying the ADA.

The second model, which has been adopted rather casually by several courts,²²⁹ has more to recommend it. The element of reasonable accommodation is presented in the statute not as a defense but as part of the definition of discrimination.²³⁰ Thus, this model has the conceptual virtue of requiring the plaintiff to carry the burden of persuasion on all the elements constituting

²²⁸ See, e.g., H.R. REP. NO. 485, *supra* note 1, pt. 2, at 65, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS at 347 (stating as an example that a law firm that requires incoming attorneys to have graduated from an accredited law school and to have passed a bar need not offer an accommodation to an individual with a visual impairment who does not meet these requirements).

²²⁹ See, e.g., *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (stating that the plaintiff bears the ultimate burden of proof on the issue of whether he was otherwise qualified).

²³⁰ See 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 1991).

discrimination. Placing the burden of persuasion on the plaintiff might also reduce the number of frivolous suits brought under the Act.

Despite its apparent appeal, the second model should be rejected. Instead, courts should adopt the third model. As set forth in *Prewitt v. United States Postal Service*,²³¹ the third model requires the plaintiff to prove that she is an individual with a disability within the meaning of the Act. She must also prove that she is otherwise qualified, in spite of her disability. That is, the plaintiff must show that she meets all of the employer's standards except for those that her disability renders impossible to meet without assistance. As to these standards, the plaintiff should be required to introduce plausible evidence that reasonable accommodation is possible.²³² Once this evidence has been introduced, the burden shifts to the defendant to prove that it could not accommodate the plaintiff or that any accommodation would cause undue hardship.²³³ By requiring the plaintiff to present sufficient evidence to meet the burden of production, this model will prevent the plaintiff from succeeding with a patently frivolous suit. But by placing the burden of persuasion on the issue of accommodation on the employer, the model serves three purposes. First, it serves the value of logical

²³¹ 662 F.2d 292 (5th Cir. 1981). Although the *Prewitt* court discussed both § 504 and § 501, its analysis of the prima facie case was restricted to § 501. See *id.* at 308-10. There are several reasons, however, why the analysis of the *Prewitt* court should be considered applicable to the ADA. First, the *Prewitt* model was applied to a § 504 case in *Bey v. Bolger*, 540 F. Supp. 910, 924-28 (E.D. Pa. 1982). Second, as was discussed *supra* at notes 71-94 and accompanying text, the duty of reasonable accommodation, properly understood, is substantially the same under both § 501 and § 504, and Congress has stated that reasonable accommodation and undue hardship are to be interpreted under the ADA as they are under both sections of the Rehabilitation Act. See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 62, 67, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 349. Although Congress mentioned only § 504 as a model for the allocation of the burden of proof, see *id.* at 72, there is little reason to believe that Congress would have drawn a sharp distinction between the burdens of proof under §§ 501 and 504 without specifying what it meant by the burdens under § 504. Third, the source on which the *Prewitt* court apparently relied in formulating its allocation of the burden of proof analyzed not § 501, but § 504. See *Prewitt*, 662 F.2d at 308 (citing Note, *supra* note 33). The concerns expressed in the cited Note which the court found persuasive in the context of § 501 are equally applicable to the ADA. Most notable among these is the fact that the employer is better situated to determine whether reasonable accommodation is possible. See *id.*; see also Wegner, *supra* note 29, at 462 (noting that where the defendant has greater access to relevant information the burden of persuasion is traditionally placed on the defendant).

²³² See *Prewitt*, 662 F.2d at 309-10.

²³³ See *id.* at 310.

consistency by placing the burden of proof on the party that is required to consider reasonable accommodation under the Act. Second, it ensures that employers will take their procedural duties under the Act seriously, by not permitting employers to rebut the plaintiff's *prima facie* case with the kind of generalities and stereotypes whose use the Act is intended to prevent.²³⁴ Finally, the model places the burden on the party that, because it has greater resources, is better situated to determine whether reasonable accommodation is possible.²³⁵ Because the Act places the duty to consider reasonable accommodation not on the plaintiff but on the defendant, the defendant should bear the burden of showing that accommodation was impossible.²³⁶ If the defendant can show that it conducted a reasonable inquiry into the possibility of accommodation and was unable to find a solution, it should have the benefit of a presumption that accommodation was impossible.²³⁷ Once the plaintiff has introduced sufficient evidence to create the presumption, however, the plaintiff may rebut the defendant's proof with evidence, from experts or otherwise, that accommodation was indeed possible.²³⁸ Although this evidence must go beyond the plausible evidence required to create an issue of fact under the *prima facie* case, the burden of persuasion on the issue of accommodation should not shift back to the plaintiff once the defendant has established the presumption; instead, the burden of persuasion should remain with the defendant.

CONCLUSION

The Americans with Disabilities Act is hardly a perfect solution to the difficulties faced by individuals with disabilities in the employment market. The Act represents a compromise between the competing interests of enabling individuals with disabilities to participate in the workforce to the fullest extent of their abilities and allowing employers to select productive employees without unnecessary complexity or expense. It redefines discrimination in

²³⁴ See Comment, *supra* note 210, at 896.

²³⁵ See *supra* notes 210-11 and accompanying text. This allocation of the burdens of proof is consistent with the traditional rule that where the defendant has greater access to information the burden of persuasion is placed on the defendant. See *Prewitt*, 662 F.2d at 308; Wegner, *supra* note 29, at 462.

²³⁶ Note, *supra* note 33, at 189 & n.125; Comment, *supra* note 210, at 896.

²³⁷ See Note, *supra* note 33, at 189.

²³⁸ See *Prewitt*, 662 F.2d at 310.

a manner that substantially enlarges the protection of individuals with disabilities but does not require their integration into the workforce at all costs; it imposes a significant burden on employers but stops short of requiring affirmative action and allows the employer to maintain what it perceives to be a fully qualified workforce.

There is risk that the ADA, by requiring affirmative efforts to accommodate employees with disabilities, will produce resentment and lessen good will toward individuals with disabilities among both employers and coworkers.²³⁹ The risk of such a backlash, however, is no reason to oppose full implementation of the ADA. The current attitudes that allegedly produce sympathy for individuals with disabilities are also pervaded by ignorance, misunderstanding, and, to a certain extent, fear of the unknown or the different.²⁴⁰ Moreover, whatever benefits individuals with disabilities derive from an alleged atmosphere of sympathy may be more than offset by an accompanying paternalism on the part of employers and the general public, which forces individuals with disabilities into stereotyped roles and refuses to recognize them as fully human.²⁴¹ Thus, the apparent sympathy for individuals with disabilities is itself an obstacle to equal employment opportunity that must be overcome. This is what differentiates discrimination on the basis of disability from other forms of discrimination. The ADA may not in and of itself overcome all of the misunderstandings and fears that employers and coworkers have about individuals with disabilities.²⁴² By requiring employers to make their decisions without reference to those misunderstandings, however, the ADA will force both employers and employees to confront their attitudes toward disability. For all its flaws, the Americans with Disabilities Act will require employers to see the disabled not as stereotypes but as individuals,

²³⁹ See, e.g., Peck, *supra* note 3, at 379 (citing a study that indicated that full enforcement of § 503 would reduce sympathy for the disabled and would lessen the willingness of employers to hire them).

²⁴⁰ See ACCOMMODATING THE SPECTRUM, *supra* note 2, at 23.

²⁴¹ See H.R. REP. NO. 485, *supra* note 1, pt. 2, at 30, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 311; ACCOMMODATING THE SPECTRUM, *supra* note 2, at 23-26.

²⁴² Cf. Tucker, *supra* note 14, at 846-47 (arguing that § 504 alone cannot overcome negative attitudes towards individuals with disabilities).

individuals possessing unique abilities and unique potentials for contribution. The ADA represents an important first step toward the congressional goal of rescuing individuals with disabilities from the fringes of society and integrating them as fully as possible into the social and economic structure of the country.²⁴³

²⁴³ See S. REP. NO. 116, *supra* note 16, at 2.