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How Courts Still Focus on the Plaintiffs' Establishing Coverage Under the ADA Amendments Act in the Area of Employment

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1. Introduction

Some cancer patients have no major limitations only after a few months of treatments while others need to live with restrictions for years after the first diagnosis. Either way, it is extremely important for many cancer patients and survivors to be able to concentrate on treatments while keeping their jobs to not worry about paying their bills and to maintain a good quality of life. However, it is not unusual that they are denied reasonable accommodations, discharged from their jobs or otherwise discriminated against on the basis of their disability. This article examines the mechanism by which the ADA Amendments Act[1] purports to protect persons with cancer and other disabilities from employment discrimination and how courts in particular do not quite meet the expectations of these persons in lawsuits.

Compared to the pre-ADA Amendments Act era, the ADA Amendments Act has significantly reduced the plaintiffs' need to fight the first level inquiry into coverage: being an individual with a disability. However, many plaintiffs now face the huge hurdle of the second level inquiry into coverage: being a qualified individual. Some plaintiffs are scrutinized over and over by courts on the issue of whether they could perform the essential functions of the position, which is a requirement to be a qualified individual. In the meantime, some of their employers walk out unquestioned about the related issue on the merits: whether they met their obligations not to discriminate against the employees, including fulfilling the duty to provide reasonable accommodation which might have allowed the employees to be qualified individuals.

This article suggests that the interpretation of "qualified individual" be adjusted in order to better conform to the congressional effort to broaden the scope of coverage for persons with cancer and other disabilities under the ADA amendments Act. It will first review the legislative history and the purposes of the Americans with Disabilities Act of 1990 ("ADA")[2] and the ADA Amendments Act.

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[1] The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[2] The Americans with Disabilities Act of 1990, 42 U.S.C. §§12101-12213 (2018).

2. Brief Legislative History and the Purposes of the ADA and the ADA Amendments Act

Disability is not among the suspect categories that enjoy heightened scrutiny in equal protection considerations under the United States Constitution.[3] The Supreme Court of the United States has taken the view that discrimination based on disability only requires the rational basis test.[4] Therefore, people with disabilities generally must look to the Rehabilitation Act of 1973 ("Rehabilitation Act")[5] and / or the ADA for claims of discrimination.[6] The covered entities of the Rehabilitation Act are federal departments and agencies (Section 501), entities with federal contracts of more than $10,000 (Section 503), and recipients of federal funds (Section 504). Although a landmark federal legislation for prohibiting discrimination against persons with disabilities and creating a foundation for the ADA, the Rehabilitation Act had been criticized for its limited coverage and lack of remedies.[7] Nevertheless, decisions based on the Rehabilitation Act still have much importance today since the ADA provides that the level of protection it affords does not fall below that of the Rehabilitation Act.[8]

Employees of private entities with 15 or more employees, state and local governments, and the United States Congress had to wait for protection from discrimination until the enactment of the ADA.[9] The ADA, often described as being comprehensive, became a model for much more futuristic Convention on the Rights of Persons with Disabilities ("CRPD") adopted by the United Nations in 2006.[10] The ADA states that the purpose of the statute includes: (1) "provid(ing) a clear and comprehensive national mandate" to do away with discrimination based on disability; (2) "provid(ing) clear, strong, consistent, enforceable standards" to end discrimination on persons with disabilities; and (3) making certain "that the Federal Government plays

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[3] Rutherglen, G. A., & Donohue, J. J. (2018). *Employment Discrimination: Law and Theory* 781 (4th ed.). St. Paul, MN: Foundation Press.

[4] *City of Cleburne, Texas v. Cleburne Living Center, Inc.*473 U.S. 432, 446 (1985).

[5] The Rehabilitation Act of 1973, 29 U.S.C. §§701 to 796 (2018).

[6] In addition to these federal laws, claims based on disability may be made under state or local law as Section 501(b) of the ADA does not preempt any state or local disability law that provides the same or greater protection. Rothstein, M. A., & Craver, C. B. (2019). *Employment Law* 438 (6th ed.). St. Paul, MN: West Academic Publishing.

[7] One has no private right of action under Section 503. *Id*. at 415.

[8] 42 U.S.C. §12201(a); Rutherglen and Donohue, *supra* note 3, at 784.

[9] Rothstein and Craver, *supra* note 6, at 417.

[10] Kanter, A. S. (2019). Let's Try Again: Why the United States Should Ratify the United Nations Conventions on the Rights of People with Disabilities. *35 Touro L. Rev.* 301, 301-302.

a central role in enforcing the standards" set forth in this statute.[11] Among the five titles of the ADA, Title I prohibits discrimination in employment. Soon, however, problems came to be seen.

The ADA Amendments Act was enacted in 2008, specifically to legislatively overrule the Supreme Court's narrow interpretations of who were covered persons with disabilities.[12] One of the main purposes of the ADA Amendments Act was "to reject" the conditions laid down in *Sutton v. United Air Lines, Inc.*[13] that the determination of whether a person has a disability (that substantially limits major life activities) should take into account "the ameliorative effects of the mitigating measures."[14] This clarification is good news for cancer patients and survivors who obviously try to seek treatments in the hopes that the cancer cells go into remission and experience disability in the meantime and afterwards. Another purpose of enacting the ADA Amendments Act was "to reject the standards" set forth in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[15] that the impairments that substantially limit the major life activity should be "strictly" construed "to create a demanding standard for qualifying as disabled."[16] In other words, the Supreme Court had construed the requirements for ADA coverage so narrowly that Congress was pressed to convey its intent that the requirements of disabilities should be construed very broadly. Details of the ADA and the effects of the ADA Amendments Act will be discussed in Section 3.

3. The ADA and the ADA Amendments Act Framework: Two Levels of Inquiry for Coverage

3.1. The Definition of Disability

The Rehabilitation Act and the ADA afford a three-pronged definition of covered disabilities. These prongs are (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual," (2) "a record of having such

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[11] 42 U.S.C. §12101(b)(1)-(3). However, the ADA only aims to have parties such as employers and facility owners remove some of the discriminations and barriers that are specifically complained of by persons with disabilities. This contrasts with CRPD, which places responsibilities on the state party to structurally remove discriminations and barriers created in society. Kanter, *supra* note 10, at 319.

[12] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(a), (b); *See* Rothstein and Craver, *supra* note 6, at 420.

[13] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

[14] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(b)(2).

[15] *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

[16] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(b)(4).

an impairment," or (3) "regarded as" having such an impairment.[17] The ADA Amendments Act provides that the term "disability" should be interpreted so that "broad coverage of individuals" can take advantage of the statute.[18] Before examining prong (1), prongs (2) and (3) will be discussed.

According to the EEOC regulations, one has (2) "a record of" a disability when the person has a history of, or has been mistakenly considered as having, a physical or mental impairment that substantially limits major life activities.[19] Therefore, an individual who has experienced cancer that substantially limited her major life activity of working has a claim if she is discriminated against by a covered employer. Even if a person's cancer no longer substantially limits the major life activity of working, but still requires periodical doctors' visits for treatments and monitoring, she has a record of an impairment that substantially limits her major life activity of working and may be entitled to reasonable accommodation of occasional leave from work.[20]

With respect to (3) "regarded as" having a disability, this prong was created by Congress in order to address myths, fears, prejudice or stereotypes about disabilities, which are just as disabling as actual disabilities.[21] A person is "regarded as having such an impairment" if she is subjected to a prohibited action by an employer based on actual or perceived physical or mental impairment, whether or not the impairment substantially limits a major life activity.[22] ADA Amendments Act lifted the requirement in the ADA that a plaintiff must prove the employer's subjective mind perceiving her to have an impairment that substantially limited a major life activity.[23] This "regarded as" prong does not apply to impairments that are transient and minor, i.e., having a duration of less than six months.[24] Further, a person who falls only under this "regarded as" prong cannot claim that the employer did not provide her with reasonable accommodation. If a person is discharged from work based on her cancer, the employer regarded her as having a disability.[25] Hence, a cancer patient may fall under any or all of the three prongs of the first level coverage inquiry of whether a person has a

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[17] 29 U.S.C §706(9)(B); 42 U.S.C. §12102 (1) (2018). The three prongs of the disability definition apply to all titles of the ADA. The Rehabilitation Act was amended by the ADA Amendments Act to add prongs (2) and (3). Rutherglen and Donohue, *supra* note 3, at 791.

[18] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §4(A).

[19] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §1630.2(k)(1) (2018).

[20] 29 C.F.R. §1630.2(k)(3)(A) (2018).

[21] Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. §1630.2(l) (2018).

[22] 42 U.S.C. §12102 (1) (2018).

[23] 29 C.F.R. pt. 1630, App. §1630.2(l) (2018).

[24] 42 U.S.C. §12102 (3)(B) (2018).

[25] 29 C.F.R. pt. 1630, App. §1630.2(l) (2018).

disability. In any case, a close examination of (1), the actual disability prong, is necessary as it serves as the definitional foundation for prongs (2) and (3).

Putting the requirements of the ADA together, there are two levels of inquiry into whether a person has coverage: (a) whether the person is an individual with a covered disability, i.e., (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a "record of," or (3) is "regarded as" having such an impairment; and (b) whether the person is a qualified individual.[26] The plaintiff has the burden of proving she is covered under the ADA (an individual with a disability and qualified).[27] It is, then, necessary to begin with examining the elements of the first level inquiry (a) having a covered disability (a "physical or mental impairment" that "substantially limits" one or more "major life activities.") Establishing covered disability was a great impediment for plaintiffs before the ADA Amendments Act.

(a) (i) Physical or Mental Impairment

The EEOC Regulations define physical or mental impairment as 1) "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems," or 2) "any mental or psychological disorder."[28] This definition should cover an extensive range of medical disorders and conditions including cancer. A physical or mental impairment is a disability if it "substantially limits" one or more "major life activities."

(ii) Substantially Limits and Major Life Activities

The *Sutton* case considered important the pre-ADA Amendments Act regulations that defined the term "substantially limits" as "*significantly restricted* as to the condition, manner or duration under which an individual can perform a major life activity" in comparison with an average person (emphasis added).[29] Moreover, the case was known for its decision that a person's disability should have been determined with regard to mitigating measures.[30] In that case, the plaintiffs alleged that the defendant discriminated against them in not hiring them as pilots based on their disability of near

[26] Rutherglen and Donohue, *supra* note 3, at 812.
[27] *Id*. at 792.
[28] 29 C.F.R. §1630.2(h)(1),(2) (2018). This definition of "physical or mental impairment" was borrowed from the regulations that defined section 504 of the Rehabilitation Act. Rothstein and Craver, *supra* note 6, at 420.
[29] *Sutton*, 527 U.S. at 480.
[30] *Id*. at 481-489.

sightedness. The Court said that the plaintiffs did not have a disability because their impairment could be corrected by wearing ordinary eyeglasses, thereby not making substantially limited, or significantly restricted, in performing major life activities. The Court considered and rejected the Interpretive Guidance issued by the EEOC and a guideline by the Department of Justice that instructed that a decision of whether an impairment substantially limited a major life activity should be made without regard to mitigating measures.[31]

This Supreme Court case severely slimmed the chance that a cancer patient could go passed this covered disability part of the ADA analysis. That is, when a cancer patient filed a charge against their employer or prospective employer, the court would conduct an extensive inquiry into whether the plaintiff had a covered disability and often rule that she did not because her cancer was in remission thanks to treatments. The plaintiff would lose on this first level inquiry before getting to the second level of coverage (qualified individual) and the merits of the case (whether the employer engaged in illegal discrimination). Cancer patients seek surgery, chemotherapy, radioactive therapy and other medical treatments in order to contain the spread of cancer cells and in the hope that the abnormal cells completely disappear. In the meantime, they experience pain, nausea, headaches, fatigue, hair loss, swollen body parts, mental stress and many other symptoms, just in the process of trying to get rid of the abnormal cell growth. Therefore, cancer patients and other plaintiffs were caught in a dilemma. When their conditions were mitigated by remedial measures, they did not have a disability and were outside the ADA protection. If their conditions were not mitigated and therefore could be considered to have a disability, their disability would prevent them from being qualified, because they had a hard time performing the essential functions of the positions.[32] It was as if cancer patients and others were punished for taking good care of their body and mind by seeking medical treatments or other mitigating measures.[33]

Further, with respect to when an impairment substantially limits "the major life activities" of working, *Sutton* relied on the then-effective EEOC regulations to the effect that it was when an individual was "significantly restricted" in performing "either a class of jobs or a broad range of jobs."[34] It is true that the regulations went on to say that "(t)he inability to perform a single, particular job does not constitute a substantial

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[31] *Id*. at 480-482, citing 29 C.F.R. Pt. 1630, App. §1630.2(j) (1998), and 28 C.F.R. pt.35, App. A., §35.104.
[32] Rothstein and Craver, *supra* note 6, at 420.
[33] Rutherglen and Donohue, *supra* note 3, at 809.
[34] 29 C.F.R. §1630.2(i)(3)(i) (1998).

limitation in the major life activity of working."[35] Therefore cancer patients and survivors who had been precluded from one position with an employer could not be considered to have a disability, even if they could somehow circumvent the issue of cancer in remission. Relevant to cancer patients whose jobs were to perform manual tasks, *Toyota Motor*, in line with *Sutton*, went on to address the major life activity of performing manual tasks. The court said that the focus needed to be on "whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[36] The claimant in that case could not perform her job because of her carpal tunnel syndrome but could perform household chores, which lead to the conclusion that she was not substantially limited in the major life activity of conducting manual tasks.[37]

Not happy with the *Sutton* and *Toyota Motor* decisions that overly restricted the protection for individuals with disabilities, Congress passed the ADA Amendments Act. The ADA Amendments Act specifically rejected *Sutton* and made clear the congressional intent that impairments are to be determined without regard to ameliorative effects of remedial measures.[38] Furthermore, the ADA Amendments Act clarifies that the term "disability" is to be construed to include impairments that are "episodic or in remission" when it substantially limits a major life activity of an individual "when active."[39]

ADA Amendments Act also rejected *Toyota Motor* and stated that "it is the intent of Congress" that attention should be on whether an employer discriminated against a person with a disability, and the issue of whether an impairment substantially limits a major life activity "should not demand extensive analysis."[40] Congress specifically stated that the term "disability" is to be interpreted "in favor of broad coverage" of persons "to the maximum extent permitted by the terms of this Act."[41] In line with this intent of Congress, the post-ADA Amendments Act regulations insist that "(a)n

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[35] *Id.*
[36] 534 U.S. at 200-201.
[37] 534 U.S. at 202.
[38] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(b)(2); 42 U.S.C. §12102(4)(E)(i) (2018). The amendments do not change the result of *Sutton*, since Congress explicitly allowed considering the mitigating effects of ordinary eyeglasses.
[39] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §4(a); 42 U.S.C. §12102(4)(D) (2018).
[40] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(b)(5). In addition, §2(b)(6) has directed the EEOC to revise its regulations that defined "substantially limits" as "significantly restricted."
[41] 42 U.S.C. §12102(4)(A) (2018). This is some improvement, although it probably does not go far enough in the minds of the advocates of CRPD. *See* Kanter, *supra* note 10 at 312-316.

impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[42]

On the subject of cancer, the ADA Amendments Act now provides that "major life activities" include major bodily functions such as normal cell growth.[43] The regulations further set forth that cancer does "substantially limit normal cell growth."[44] Thus, many cancer patients currently are relieved of endless and unsuccessful fights to prove that they are individuals with disabilities to put their foot in the door of making their claims. However, this was only the first level of inquiry into establishing coverage under the ADA Amendments Act. The congressional intent sounds extremely generous until cancer patients and other individuals with disabilities move on to the next level of coverage.

3.2 The Definition of a Qualified Individual

The ADA (and the ADA Amendments Act) prohibit discrimination only against qualified individuals with disabilities. Section 102 (a) prescribes that "(n)o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[45] The second level inquiry into coverage, therefore, is to determine whether the plaintiff is a "qualified individual."[46] Because of the circular definition, this inquiry is intertwined with the issue on the merits of whether the employer has engaged in a discriminatory action,[47] including not making reasonable accommodation. This second level coverage inquiry may be the biggest impediment for post-ADA Amendments Act plaintiffs.

Before discussing the definition of "qualified individual," prohibited actions that amount to discrimination against a qualified individual should be reviewed briefly. According to section 102(b), to "discriminate against a qualified individual on the basis of disability" encompasses following conducts: (1) "limiting, segregating, or classifying" an employee or prospective employee in a way that adversely affects the equal opportunities of that person because of a disability; (2) contracting or making other arrangements that result in discrimination of a person with a disability; (3) "utilizing standards, criteria, or methods of administration" that discriminate because of

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42 29 C.F.R. §1630.2(j)(1)(ii) (2018).
43 Pub. L. No. 110-325, 122 Stat. 3553 (2008), §4(a); 42 U.S.C. §12102(2)(B) (2018).
44 29 C.F.R. §1630.2(j)(3)(iii) (2018).
45 42 U.S.C. §12112 (a) (2018).
46 Rutherglen and Donohue, *supra* note 3, at 812.

a person's disability; (4) "excluding or denying equal jobs or benefits" to a person on the basis of known disability; (5) "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the employer can demonstrate that the accommodation would amount to an undue hardship on the business of the employer; (6) "using qualification standards, employment tests or other selection criteria," unless these criteria are job related; and (7) failing to administer tests in the most effective way to accurately reflect results in light of impaired sensory, manual and speaking skills, unless these skills are being measured.[48] (6) describes how the disparate impact theory is adopted by the ADA.[49]

Returning to the meaning of "qualified individual," it is defined in the ADA as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position."[50] The EEOC's Interpretive Guidance explains that the first step to determine a qualified individual is to ask whether a plaintiff satisfies the prerequisites for the position, such as educational background, work experience, skills and licenses.[51] The second step is determining whether the person can perform the "essential functions" of the position with or without reasonable accommodation.[52] "Essential functions" are functions that the person holding the position must be able to perform with or without reasonable accommodation.[53] EEOC cites to the House Labor Report that the purpose for the second step is to make sure that an individual is not denied a position because she cannot perform functions that are marginal to the position.[54] This may sound pro-employee, but the strict adherence by employers and courts to the employers' chosen essential functions has been a source of agony for a number of employees with disabilities.

The EEOC lays out some non-exclusive factors for which a job function is considered an essential function. These factors include whether the reason the position exists is to perform the function, a limited availability of employees to perform the function, whether the function is highly specialized, and whether removing the function from the position would fundamentally alter the position.[55] Other factors to be

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[47] *Id*.
[48] 42 U.S.C. §12112 (b) (2018).
[49] 42 U.S.C. §12112 (b)(6) (2018); Rutherglen and Donohue, *supra* note 3, at 784.
[50] 42 U.S.C. §12111 (8) (2018).
[51] 29 C.F.R. pt. 1630, App. §1630.2(m) (2018).
[52] *Id.*
[53] 29 C.F.R. pt. 1630, App. §1630.2(n) (2018).
[54] 29 C.F.R. pt. 1630, App. §1630.2(m) (2018).
[55] 29 C.F.R. §1630.2(n) (2018); 29 C.F.R. pt. 1630, App. §1630.2(n) (2018).

considered as evidence of what may be essential functions include a written job description prepared by the employer, terms of collective bargaining agreements, time spent on the job, and the work experience of past and present workers holding similar positions.[56]

With respect to the related issue on the merits of reasonable accommodation,[57] not providing reasonable accommodations to the known limitations of an otherwise qualified individual with a disability is a discrimination unless the employer can demonstrate that the accommodation would cause an undue hardship on the operation of business.[58] The duty of reasonable accommodation is making "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities,"[59] but the statute does not provide a very clear guidance.[60] The three groups of reasonable accommodations are accommodations that (1) provide equal opportunity in the job application process, (2) enable employees to perform essential functions of the position held or sought, and (3) enable employees to enjoy equal benefits and privileges of employment enjoyed by other employees.[61] Some of the examples of reasonable accommodations are making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant apposition, acquisition or modification of equipment, adjusting examinations, training materials or policies, and providing readers or interpreters.[62]

There also seems to be no clear definition of another related concept of undue hardship, other than that it is significant difficulty or expense and should be determined in light of some factors.[63] These factors include: (1) the nature and cost of the accommodation; (2) financial resources, the effect on expenses and resources, the number of employees, or the impact on the facilities; (3) the overall size of the

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[56] 42 U.S.C. §12111 (8) (2018); 29 C.F.R. pt. 1630, App. §1630.2(n) (2018).

[57] Reasonable accommodation is not a duty directly imposed by the Rehabilitation Act Section 504. The duty is read into it through the Rehabilitation Act regulations. The ADA changed this structure to directly impose the duty by defining reasonable accommodation in the law itself. On the other hand, entities covered under Sections 501 and 503 of the Rehabilitation Act have a duty to engage in affirmative action. Rutherglen and Donohue, *supra* note 3, at 829-830.

[58] 42 U.S.C. §12112 (b) (2018).

[59] 29 C.F.R. pt. 1630, App. §1630.2(o) (2018). Under the ADA Amendments Act, individuals with disabilities who are covered solely under the "regarded as" prong are not entitled to reasonable accommodation.

[60] Rutherglen and Donohue, *supra* note 3, at 844.

[61] 29 C.F.R. pt. 1630, App. §1630.2(o) (2018).

[62] 42 U.S.C. §12111 (9) (2018).

[63] 42 U.S.C. §12111 (10) (2018).

employer; and (4) the type of operation of the employer.[64] The ADA scheme is that the plaintiff proves that there is a reasonable accommodation and the employer may assert an undue hardship as an affirmative defense.[65] Courts have considered this scheme in terms of burden shifting. The plaintiff, first, must satisfy the burden of producing evidence that an accommodation is reasonable "ordinarily or in the run of cases" in respect of the effectiveness and impact on other employees and the employer.[66] Next, the burden of persuasion goes to the defendant to demonstrate that there is an undue hardship in the particular circumstances.[67]

This burden shifting may sound practical. However, what really counts is the employer's judgment in both the determination of whether the person with a disability is a qualified individual and in whether the employer did or did not provide the necessary reasonable accommodation, which includes the issue of undue hardship.

4. Keeping Up with the Employer's Judgment

Employers' decisions are what matters. The ADA prescribes that "(C)onsideration shall be given to the employer's judgment as to what functions of a job are essential."[68] The Interpretive Guidance insists that "(i)t is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards."[69] Because courts are not supposed to review the employer's business judgment, courts may think that they should necessarily focus on whether the plaintiff can perform the essential functions that the employer decides them to be and with the reasonable accommodation that the employer decides it to be.

The ADA Amendments Act states that one of the purposes of amending the ADA was "to convey that it is the intent of congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations."[70] Therefore, the attention should be on whether employers did any wrong. However, the employers set the standards for essential functions. Since these standards may not be questioned, courts may feel the need to only

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[64] *Id*. The existence of undue hardship is not limited to financial difficulty. 29 C.F.R. pt. 1630, App. §1630.2(p) (2018).

[65] *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002); Rutherglen and Donohue, *supra* note 3, at 844.

[66] *US Airways,* 535 U.S. at 401-401.

[67] *Id.*

[68] 42 U.S.C. §12111 (8) (2018).

[69] 29 C.F.R. pt. 1630, App. §1630.2(n) (2018).

[70] Pub. L. No. 110-325, 122 Stat. 3553 (2008), §2(b)(5).

consider whether the employees can keep up with the employers' standards, i.e., whether the employees are qualified with or without reasonable accommodations accepted by the employers. This ADA scheme is in sharp contrast to the scheme of the social model of disability, where the government and courts intervene with employment and other areas to truly remove barriers for persons with disabilities in order to achieve genuine social equality and inclusion.[71]

EEOC v. Womble Carlyle Sandridge & Rice, LLP[72] is illustrative of the way a court focuses on the employee's satisfying the qualified individual / essential functions requirement without analyzing the related employer's obligations. In that case, the employee was a support services assistant who was diagnosed with cancer. She took intermittent leave to undergo her surgery and chemotherapy. Two years after the surgery, she developed lymphedema after lifting and moving a number of boxes weighing 32 pounds to 50 pounds at work. She submitted notes from her doctor stating that she could not lift more than 10 pounds and later 20 pounds. The employer provided her with a reasonable accommodation of not lifting more than 10 pounds for six months and later put her on a medical leave. When the leave ran out, she was discharged.

The court of appeals affirmed the summary judgment in favor of the employer. The court spent almost all of the section on the issues of the appeal on discussing whether lifting more than 20 pounds was an essential function of the employee's position and how she could not perform this function. It is true that the court points out in the finding of the facts that the employer considered transferring the employee to a receptionist or messenger center operator position, which had no vacancy. However, the

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[71] *See* Kanter, *supra* note 10, at 315.
[72] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 Fed. App'x. 588 (4th Cir. 2015).

court does not consider whether the employer engaged in an interactive process[73] with the employee, or whether the employer considered effective reasonable accommodations other than transferring her, such as, for instance, letting her open the boxes and temporarily taking out the contents to avoid heavy lifting and later placing the contents back into the boxes.

In fact, the court brushes off the issue of the employer's obligation by simply stating in a footnote that there was no evidence that the employee had requested a reasonable accommodation, thereby not triggering the employer's obligation to engage in an interactive process. The court either did not defer to or missed the explanation in the Enforcement Guidance that submitting a letter from the employee's doctor about the employee's limitations constitutes a request for reasonable accommodation,[74] which she did twice. The court continued in the footnote that even if the employer's obligation to engage in an interactive process had been triggered, the plaintiff (EEOC) could not identify a reasonable accommodation, relieving the employer of liability.[75] Given the significant amount of words the court uses to opine that the employee could not perform the essential functions, one might have expected that the court spent a sentence or two discussing whether the employer considered effective accommodations in good faith.

Even though the plaintiff had the burden of proving the existence of a reasonable accommodation in court, the employer's cooperation in an interactive process may have helped identify some reasonable and effective accommodations before going to court, which is a requirement under the ADA. One should also be reminded that it is not required of an employee to request a precise reasonable accommodation in the

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[73] Under the ADA (and the ADA Amendments Act), employers are only supposed to provide reasonable accommodation to "the known" disability. It follows that a person with a disability must inform the employer of her physical or mental limitations and request a reasonable accommodation that would enable her to perform the essential functions or enjoy employee benefits and privileges. (Those advocating the social model of disability and substantive equality question this requirement of requesting reasonable accommodation because it does not protect people who cannot ask for it. Kanter, *supra* note 10 at 321.) After the employee requests a reasonable accommodation, the employer and the employee should engage in an informal interactive process. This is considered necessary in many cases in order to determine that the employee does have a covered disability, what her precise limitations are, and what may be a reasonable accommodation. 29 C.F.R. pt. 1630, App. §1630.2(o) (2018). An employer which has engaged in a good faith interactive process with the employee who requested accommodation is not liable for damages. 42 U.S.C. §1981a(a)(3). There are worries that employers may be relieved of liability to provide reasonable accommodation upon showing of an interactive process which had been conducted just as a formality rather than truly in good faith. *See* Hasegawa, T. (2018). *Shougaisha Koyou to Gouriteki Hairyo: Nichibei no Hikakuhou Kenkyuu* 178-181. Tokyo: Nihon Hyouronsha.

[74] U.S. Equal Emp. Opportunity Comm'n, EEOC-915.002, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002).

[75] *Womble Carlyle*, 616 Fed. App'x. at 594.

workplace.[76] She only has to request that she needs some type of accommodation because of her limitations related to her impairment.[77] The employer is the party that should try to identify reasonable accommodations in the process of engaging in talks with the employee.[78] Moreover, although the employer has an ultimate decision as to what is a reasonable accommodation, the employer has to "choose between effective accommodations," if there are a few, that would allow the employee to perform the essential functions, unless these accommodations cause undue hardship.[79]

In this Fourth Circuit case, there is no discussion of whether the employer tried to identify an effective reasonable accommodation which does not cause undue hardship, other than transferring to a receptionist position. This is so even though the issue of whether the employee was a qualified individual was closely connected to whether the defendant did not provide a reasonable accommodation, which was the plaintiff's claim. The court's only focus was on whether Jennings could not or did not do this and that, even though both the employer and the court admitted that she was talented in her job and extremely creative in trying to avoid further injury.

In *Golden v. Indianapolis Housing Agency*,[80] a police officer was diagnosed with cancer. She took twelve weeks of leave under the Family and Medical Leave Act of 1993[81] ("FMLA") to undergo surgery and other treatments. Upon the expiration of the FMLA leave, the employer gave the employee additional four weeks of unpaid medical leave. On the last day of leave, the employee requested yet additional unpaid leave in accordance with the city policy, which required a specified duration of six months maximum. The employer did not grant her the extra leave and she was terminated. The employee sued the employer under the Rehabilitation Act and the ADA,[82] which have the same disability, qualified individual and discrimination standards.

The Court of Appeals for the Seventh Circuit affirmed the lower court's grant of summary judgment to the employer. Again, the court's argument, following the decisions of previous Seventh Circuit cases, was that the employee was not a qualified individual because "an employee who needs long-term medical leave cannot work and

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[76] EEOC-915.002.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Golden v. Indianapolis Housing Agency*, 698 Fed. App'x. 835 (7th Cir. 2017).

[81] Family and Medical Leave Act of 1993, 29 U.S.C. §2601-2654.

[82] The ADA Amendment Act's definitions of qualified individual and discrimination against a qualified individual are the same as those under the ADA. Rutherglen and Donohue, *supra* note 3, at 809.

thus is not a 'qualified individual' under the ADA."[83] It continued that "a multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA," and that requesting a six months of leave in addition to the FMLA leave removed her from the protected class of disabled persons who were qualified individuals.[84]

However, this should not be a correct understanding of the Rehabilitation Act and the ADA. An employer must provide a reasonable accommodation, including additional leave after a FMLA leave, if that would enable an individual with a disability to perform essential functions, unless the employer can prove undue hardship.[85] The EEOC states that an employee must be granted leave if there is no other effective accommodation and the leave does not impose an undue hardship.[86] Presuming that uninterrupted attendance is an essential function of a position would effectively relieve the employer of the burden to prove that the requested accommodation causes an undue hardship.[87] It also defeats the need to conduct a case-by-case consideration required under the Rehabilitation Act and the ADA to determine whether a person with a disability was qualified and whether there was discrimination.[88] The court in *Golden*, presuming a multimonth leave is not allowed under ADA, omits requiring the defendant to bear the burden of persuading that an undue hardship existed in that particular case.

Many cancer patients and survivors are no longer closely probed into the issue of having covered disability, i.e., an impairment that substantially limits the major life activity of working. However, the attention of post-ADA Amendments Act cases is on the second level inquiry of coverage, i.e., a qualified individual.

5. Reallocating Essential Functions

The focus of courts in the post-ADA Amendments Act era tends to be on whether the plaintiff is a qualified individual. What is significant is that the issue of a qualified individual seems to be decided by courts in a great number of cases by way of only scrutinizing the employees' performance of essential functions, employees' requests for reasonable accommodations, and other factors required of employees. It is not unusual that this scrutiny is done without analyzing whether there are any factors that might

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[83] *Golden*, 698 Fed. App'x. at 837, citing *Stevenson v. Hartland Woodcraft, Inc*., 872 F.3d 476 (7th Cir. 2017); and *Byrne v. Avon Prods., Inc*., 328 F.3d. 379 (7th Cir. 2003).

[84] *Golden*, 698 Fed. App'x. at 837.

[85] EEOC-915.002.

[86] *Id*.

[87] Hodges, A. C. (2015). Working with Cancer: How the Law Can Help Survivors Maintain Employment, *90 Wash. L. Rev.* 1039, 1082-1083, citing *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d. 775, 782 (6th Cir. 1998).

[88] *See* Hodges, *supra* note 87, at 1083.

have amounted to the employers' violations (of not providing reasonable accommodations that would have enabled the employees to perform essential functions). Obviously, this question of whether or not the employers provided reasonable accommodation is closely related to whether the individual is qualified and should be examined hand in hand. Even though an employer's business judgment should be respected in the United States, under the ADA (and the ADA Amendments Act) courts still must make sure that the employer had engaged in an interactive process in good faith and that the employer establishes undue burden when it cannot provide the requested accommodation or other reasonable accommodations. In a way, the present system rewards employers for not carefully identifying reasonable accommodations, because an employer does not have to provide accommodation which is not identified as reasonable.

Looking at overall case outcomes where plaintiffs survived summary judgment motions, pre-ADA Amendments Act plaintiffs won 32.3% of the cases and post-ADA Amendments Act plaintiffs won 40% of the cases.[89] This is a little improvement for some plaintiffs but not enough for more than half of the plaintiffs. Commentators have pointed out that "(C)ourts could once again undermine congressional efforts to establish a national mandate against disability discrimination."[90]

A natural solution to come closer to the congressional intent to broaden coverage may be to somehow gear courts toward paying more deference to EEOC regulations and guidance on an interactive process, the burden of persuading undue hardship, and other employer-side obligations. However, the EEOC's efforts are partly offset when it provides that "(a)n employer never has to reallocate essential functions as a reasonable accommodation."[91] This not-having-to-reallocate-essential-functions escapeaway is at the heart of the problem for the path toward expanding coverage and eradicating discrimination. Courts reiterate this never-reallocate-essential-functions point over and over in disability discrimination cases.

This article proposes that the interpretation of the ADA Amendments Act be adjusted so that an employer should consider reallocating or redistributing not just marginal functions but also essential functions as a reasonable accommodation. This is so if there are no other reasonable accommodations and if it enables the person with a

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[89] Befort, S. F. (2013). An Empirical Examination of Case Outcomes Under the ADA Amendments Act. *70 Wash & Lee L. Rev.* 2027, 2069.
[90] *Id*. at 2068.
[91] EEOC-915.002; 29 C.F.R. pt. 1630, App. §1630.2(o) (2018).

disability to perform the new essential functions. Reallocation of essential functions should not take place if the employer can demonstrate that it imposes an undue hardship. Because an employer does not have to reallocate essential functions as a reasonable accommodation if there are other effective reasonable accommodations or if reallocating essential functions imposes undue hardship, this rule will not be giving a blank check to persons with disabilities.

Consideration of reallocating essential functions allows for a wider range of reasonable accommodations for persons with disabilities. It will have an effect of giving more incentives to employers to diligently identify effective reasonable accommodations. Courts, on the other hand, will likely examine "not making reasonable accommodation" more carefully, knowing the ADA Amendments Act aims to expand more coverage.

The rule to reallocate essential functions is only an alteration in the interpretation of "essential functions." The new "essential functions" that enable an individual to perform these functions and become a qualified individual are still "essential functions." Consequently, the definition of "qualified individual" (an individual who, with or without reasonable accommodation, can perform essential functions) remains unchanged.

Thus, changing the interpretation of essential functions will contribute, without putting too much burden on employers, to removing some more barriers in the workplace. The practice of reallocating essential functions will have advantages to the employers and to the society. Employers will be able to secure talented cancer patients and others with disabilities. The society will see that ultimately it will reduce the overall costs by retaining more and more persons in the workforce.

6. Conclusion

The ADA Amendments Act should be applauded for its message that Congress intended a broader definition of covered disabilities and for legislatively overriding Supreme Court cases that had narrowed the covered disabilities. However, some courts, again, have been narrowing coverage by fervently scrutinizing the second level coverage requirement of qualified individual. In particular, some courts have been overly zealous to conclude that the plaintiff could not perform the essential functions, which is a requirement to be a qualified individual.

Under the ADA (and the ADA Amendments Act), performing essential functions should be measured with or without reasonable accommodation. In lawsuits, an employee is only required to meet a prima facie showing of the existence of a

reasonable accommodation, while the employer is supposed to bear, if it cannot provide the accommodation, the burden of persuading that the accommodation imposes an undue hardship. However, a number of courts seem to presume that some accommodations requested by plaintiffs are not reasonable without requiring employers to prove undue hardship or without analyzing the existence and substance of the interactive process necessary to identify reasonable accommodation. Some courts seem to think that there exist some accommodations, such as multimonth leave, that are patently not reasonable and without the need to analyze undue hardship. Not requiring or only facially requiring an interactive process and a proof of undue hardship allow courts to decide what may be reasonable accommodation as not reasonable.

Because employers are told that they can decide on the essential functions and they do not need to reallocate these functions, it is possible that these courts tend to bypass the requirement that employers must prove an undue hardship when they are not providing reasonable accommodations that are effective and enable persons with disabilities to perform essential functions. However, one should not confuse the idea of respecting business judgment with not examining the existence of reasonable accommodations that enable disabled persons to become a qualified individual. In a sense, the present ADA Amendments Act practice rewards employers for not being scrupulous about identifying reasonable accommodations, because employers may not have to provide accommodations that are not identified as reasonable. To call for more scrutiny of the existence and real substance of an interactive process and an undue hardship as required by the EEOC regulations and guidance is always important. However, this effort is likely to be offset by the present interpretative framework set forth by the EEOC and courts that an employer does not have to reallocate essential functions as a reasonable accommodation.

A more effective way to achieve the congressional intent to expand coverage may be to guide courts and employers toward the interpretation and practice of considering reallocation of not just marginal functions but also essential functions as a reasonable accommodation. An employer only has to consider reallocating essential functions if there are no other effective accommodations, reallocating enables the person with a disability to perform the new essential functions, and the employer does not demonstrate that there is an undue hardship on its business. This practice of reallocating essential functions will not be unrestrained as the employer need not reallocate if that causes an undue hardship.

Reallocating essential functions can be considered as only a change in the interpretation of “essential functions” and does not alter the definition of “qualified

individual," which is still someone who can perform the essential functions of a position with or without reasonable accommodation.

Consideration of reallocating essential functions allows for a wider range of reasonable accommodations. It will have an effect of giving more incentives to employers to ascertain effective reasonable accommodations. On the other hand, more courts are likely to examine "not making reasonable accommodation" more ardently with the understanding that the ADA Amendments Act directs them to expand more protection for persons with disabilities. This should be considered good news for all parties. Employers will have the advantage of retaining talented workers including cancer patients and survivors. The society will have the benefit of reducing costs by more workers staying in the workforce. Finally, employees and prospective employees with cancer and other disabilities will be able to pay the bills and maintain a better quality of life.

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