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Reasonable Accommodations and the ADA Amendments' Overlooked Potential

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INTRODUCTION

There is "a dearth of precedent" outlining the scope of the Americans with Disabilities Act's reasonable accommodations provision.[1] The "little precedent"[2] available "remains severely underdeveloped,"[3] "in a state of chaos,"[4] and leaves "many issues unresolved."[5] Circuit splits abound. For example, courts widely differ in their perspectives about whether the ADA requires employers to permit employees with disabilities to work from home.[6] Similarly, in circumstances in which an employee with a disability can no longer do his or her current job, courts differ on the question of whether the ADA requires the employer to prefer the employee with a disability for vacant positions within the employer's organization.[7]

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1 Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 714 (2014).

2 *Id*. at 713.

3 Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122 (2010).

4 Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 543 (2013); *see also id.* at 546 ("[T]he case law demonstrates that trying to predict whether an accommodation will be deemed reasonable is difficult.").

5 Stein et al., *supra* note 1, at 714.

6 Porter, *supra* note 4, at 549 (observing that a "hopelessly muddled accommodation involves an employee who requests to work from home.") (footnote omitted); *see id*. at 549–51 (collecting cases).

7 *See* 42 U.S.C. § 12111(9)(B) (2012); Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* U.S. Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 1–2 (2002) [hereinafter Anderson, *"Neutral" Policies*] ("One of the most controversial provisions of the Americans with Disabilities Act (ADA) is the duty to reassign an employee with disabilities to a vacant position as a form of reasonable accommodation.") (footnote omitted); Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1056 (2000) ("Of all the accommodations listed in the ADA, the reassignment accommodation has generated the most litigation and fueled the greatest amount of controversy.") (footnote omitted). The Supreme Court granted certiorari to decide this

These and other questions about the scope of the ADA's reasonable accommodations provision remain unresolved because the first two decades of judicial opinions construing the ADA did not focus on defining the reasonable accommodations provision. Instead, courts concluded that the vast majority of ADA plaintiffs were not "disabled enough" to bring ADA claims.[8] Commentators labeled this phenomenon the "ADA backlash" and speculated that it was fueled by judicial discomfort with the obligations that the ADA's reasonable accommodations provision placed on employers.[9]

Today, the ADA Amendments Act of 2008's dramatic expansion of the ADA's protected class requires courts to directly confront the many unresolved questions about the breadth of the ADA's reasonable accommodations provision. In virtually all cases, courts can no longer avoid delineating the scope of an employer's accommodations obligation by concluding that the plaintiff is ineligible to bring a reasonable accommodations claim.[10]

To date, academic commentary has assumed that courts will respond to the ADA's expanded protected class by constricting reasonable accommodations law. Commentators reason that the same discomfort with the ADA's reasonable accommodations provision that motivated judicial constriction of the ADA's protected class will now prompt courts to constrict the law of reasonable accommodations itself.[11] One commentator, Nicole Porter, has

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issue but subsequently dismissed the case when the parties settled. *See* Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008) (dismissing writ of certiorari).

[8] *See, e.g.*, Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Majority Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 180 (1999).

[9] *See, e.g.*, RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 96–125 (2005); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 64–65 (Linda H. Krieger ed., 2006); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 54–55 (2005); Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1268, 1272 (2009) [hereinafter Anderson, *Ideological Dissonance*]; Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315, 317–20 (2009).

[10] *See* Porter, *supra* note 4, at 543 ("[B]ecause more cases will proceed past the initial inquiry into whether an individual has a disability, more courts will have to determine what constitutes a reasonable accommodation. . . . [T]his issue is in a state of chaos.") (footnote omitted).

[11] *See, e.g.*, Anderson, *Ideological Dissonance*, *supra* note 9, at 1284 ("One thing is clear—the ADAAA should finally move the judicial focus away from the definitional stage and onto the substantive rights granted under the statute. Courts should begin to address more questions of what is discrimination on the basis of disability, and what is a reasonable accommodation. As they do, we will see whether the restrictive interpretations have simply been shifted from one arena to another.").

marshaled persuasive evidence that this has already occurred.[12] She concludes that the amendments have triggered "a new ADA backlash" targeted at the ADA's reasonable accommodations provision.[13]

This article offers a dramatically different—and much more optimistic—perspective about the amendments' effect on reasonable accommodations law. It contends that the ADA Amendments Act ("ADAAA") holds the potential to not only stop the backlash Porter has identified, but to affirmatively expand reasonable accommodations law. When integrated with preexisting ADA provisions, the peculiar method by which the ADAAA enlarges the ADA's protected class provides an unexpected new argument in favor of broadening current judicial constructions of the reasonable accommodations provision.

This argument requires some explication because it is not obvious on the face of the ADAAA. The sole ADAAA provision that changes the law surrounding reasonable accommodations implements a political compromise supporters believed necessary to garner sufficient support to pass the ADAAA:[14] it provides that a subset of the ADA's newly admitted class members may not bring reasonable accommodations claims.[15] In this way, the ADAAA for the first time divides the ADA's protected class into two groups: "tier one" plaintiffs who may bring reasonable accommodations claims and "tier two" plaintiffs who may not.[16]

Standing alone, this stratification of the ADA's protected class has little apparent effect on the scope of the ADA's reasonable accommodations provision. However, when integrated with existing ADA provisions, the ADAAA's stratified protected class casts a spotlight on the ADA claims that "tier two" plaintiffs may access. The significant overlap between these non-accommodations claims and reasonable accommodations claims suggests that courts should interpret the reasonable accommodations provision broadly in order to fulfill congressional intent to provide "tier one" plaintiffs more statutory muscle to compel workplace change.[17]

This argument proceeds as follows. Part I examines the ADAAA's stratification of the ADA's protected class. Part II identifies the claims available

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12 Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 5 (2014) (identifying "a new backlash against the ADA").

13 *Id.* at 7.

14 Stephan F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 4 UTAH L. REV. 993, 994–95 & nn.20–21 (2010).

15 *See* 42 U.S.C. § 12201(h) (2012) (providing that covered entities "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.").

16 *See* discussion *infra* Part I.

17 *See* Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 588–90 (1997).

to "tier two" class members, whom the ADAAA denies reasonable accommodations. Although these claims have seen little use to date, close attention to their text and history reveals that the widespread assumption that these provisions have little utility is based on unjustified comparison to Title VII's disparate impact provisions,[18] which involve limitations inapplicable to the ADA. In reality, the ADA's effects-based discrimination provisions significantly overlap current reasonable accommodations doctrine.

Finally, Part III argues that the ability of "tier two" plaintiffs to obtain workplace changes similar to reasonable accommodations provides a path to resolve some of the most intractable questions about the scope of reasonable accommodations. In order to effectuate congressional intent to provide the two different tiers of ADA plaintiffs different statutory benefits, courts should conclude that the ADA's reasonable accommodations provision does not merely overlap the provisions available to "tier two" plaintiffs, but extends beyond them.

I. THE AMENDED ADA'S STRATIFIED PROTECTED CLASS

This article uses the terms "tier one" and "tier two" to describe the divide the ADAAA creates between plaintiffs eligible to bring reasonable accommodations claims and plaintiffs ineligible to do so. "Tier one" plaintiffs, who may bring reasonable accommodations claims, must have "a physical or mental impairment that substantially limits one or more major life activities of such individual."[19] "Tier two" plaintiffs, by contrast, must instead simply have a "physical or mental impairment."[20] They need not prove that their impairments limit any of their life activities.[21]

This stratification did not exist prior to the ADAAA, which became effective in 2009.[22] During the nearly two decades between the ADA's original enactment and the ADAAA, an ADA plaintiff had to meet the first definition ("a physical or mental impairment that substantially limits one or more major life activities"[23]) not only to bring a reasonable accommodations claim, but also to bring all other ADA claims.[24] In other words, all ADA plaintiffs were

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18 42 U.S.C. § 2000e-2(k) (2012).

19 42 U.S.C. § 12102(1)(A) (2012). Although outside the scope of this article, a plaintiff may also establish "tier one" status by demonstrating that he or she has "a record" of "a physical or mental impairment that substantially limits one or more major life activities." *Id.* § 12102(1)(A), (B).

20 *See id.* § 12102(3).

21 *Id.*

22 *Opportunity Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP'T COMM'N, https://www1.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm? (last visited Aug. 8, 2016).

23 42 U.S.C. § 12102(1)(A) (2012).

24 *See* 42 U.S.C. § 12102(2) (2006).

"tier one" plaintiffs because individuals whose impairments were not substantially limiting simply fell outside the ADA's scope.

The only significant exception was a circuit split involving individuals who obtained ADA coverage solely via the ADA's "regarded as" provision, which focuses not on the individual's actual physical or mental condition but on the defendant's perception that the plaintiff has a physical or mental impairment.[25] Under this provision, a plaintiff without a substantially limiting impairment could establish ADA class membership by demonstrating that the defendant regarded him or her as having a substantially limiting impairment.[26] Some courts relied on a literal textual reading of the ADA to conclude that these plaintiffs were eligible for reasonable accommodations even though they did not actually have an impairment that substantially limited one or more major life activities.[27] This conclusion garnered criticism, however, because permitting employer misperceptions to trigger accommodations eligibility appeared unfair to persons with identical physical or mental conditions who were ineligible for accommodations because they were not similarly misperceived.[28] Due to this critique, another set of courts concluded that "regarded as" plaintiffs could not bring claims for reasonable accommodations.[29] In this way, these courts anticipated the ultimate "tier one" and "tier two" approach that the ADAAA adopts.

The ADAAA resolved the circuit split by restricting accommodations eligibility to persons who have one or more actual (not merely perceived) substantially limiting impairments.[30] This change does not disadvantage most of the individuals who had benefitted from the plaintiff-friendly side of the pre-ADAAA circuit split, however, because the ADAAA's more central provisions dramatically expand the scope of "major life activities" and direct courts and the EEOC to broadly construe the phrase "substantially limits."[31]

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25 42 U.S.C. § 12102(2)(C) (2006) ("The term 'disability' means, with respect to an individual . . . being regarded as having such an impairment.").

26 *See id.* Another, far more minor exception, may be found by inference from 42 U.S.C. § 12112(b)(4) (2006), which permits individuals without any impairment to sue for discrimination they experience due to their association with an ADA-eligible individual.

27 *See, e.g.*, D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004).

28 *See* Travis, *supra* note 9, at 332; *see also* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 906–07 (2000).

29 *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232–33 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999).

30 42 U.S.C. § 12201(h) (2012).

31 *Id*. §12102(4)(A)–(B); *see also* Jeannette Cox, *Crossroads and Signposts: the ADA Amendments Act of 2008*, 85 IND. L.J. 187, 201–02 (2010).

Accordingly, the vast majority of individuals in need of reasonable accommodations now qualify for them because they fit within the ADA's broadened "tier one" protected class.[32]

This article focuses on a lesser-known effect of the ADAAA's revision of the "regarded as" provision. In a sharp break with the past, the ADAAA creates a "tier two" category of ADA class members who may establish ADA class membership on the basis of impairment alone.[33] In other words, individuals with one or more impairments but no substantial limitation on any major life activity may bring all ADA claims except reasonable accommodations. The sole restriction is that the impairment cannot be both "transitory and minor."[34] The statute defines a transitory impairment as "an impairment with an actual or expected duration of 6 months or less."[35] Persons covered by this new portion of the ADA may include individuals with impairments as commonplace as mild seasonal allergies.[36]

This change has been underappreciated because the ADAAA's textual structure obscures it. Rather than pointedly stating that an impairment suffices to enable plaintiffs to bring all ADA claims other than reasonable accommodations, the ADAAA somewhat confusingly grafts individuals with non-substantially limiting impairments into the "regarded as" portion of the disability definition. As amended, the statute provides:

> (1) The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment (as described in paragraph (3)).[37]

This definitional paragraph does not expressly indicate that persons with non-substantially limiting impairments may bring ADA claims, but instead points

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32 *See* 42 U.S.C. § 12102(1)(C), (3) (2012).

33 *See id.* § 12102(3).

34 *See id*. § 12102(3)(B).

35 *Id.*; *see also* Davis v. N.Y.C. Dep't of Educ., No. 10-cv-3812 (KAM)(LB), 2012 WL 139255, at *1–2, *6 (E.D.N.Y. Jan. 18, 2012) (concluding that shoulder and back injuries that required a three month leave were not "minor"); Gaus v. Norfolk S. Ry. Co., No. 09-1698, 2011 WL 4527359, at *17 (W.D. Pa. Sept. 28, 2011) (concluding that chronic pain in joint, hands, and hip lasting over a year was not "transitory"). *But see* Zurenda v. Cardiology Assocs., 3:10–CV–0882, 2012 WL 1801740, at *9 (N.D.N.Y. May 16, 2012) (concluding that a knee surgery with a 6 to 12 month recovery was "transitory and minor") Lewis v. Fla. Default Law Grp., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *5–7 (M.D. Fla. Sept. 16, 2011) (concluding that flu is "transitory and minor").

36 *See* OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, ADA AMENDMENTS ACT OF 2008 (2008), http:// www.whitehouse.gov/sites/default/files/omb/legislative/sap/110-2/saphr3195-r.pdf (suggesting that the ADA now covers "a mild seasonal allergy").

37 42 U.S.C. § 12102(1) (2012).

to paragraph 3, which is labeled "Regarded as having such an impairment."[38] Paragraph 3 provides, in relevant part:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of *an actual or perceived physical or mental impairment* whether or not the impairment limits or is perceived to limit a major life activity.[39]

This provision awkwardly clusters three groups of plaintiffs within the "regarded as" heading. The first group is familiar because it has enjoyed ADA coverage since the ADA's inception: it consists of persons whose employers believe them to have a substantially limiting impairment.[40] This is the group that was subject to the pre-ADAAA circuit split about whether "regarded as" plaintiffs may receive reasonable accommodations.[41] The other two groups are new. One consists of persons who are regarded by their employers as having a *non*-substantially limiting impairment.[42] The final group, which is most likely the largest, does not fit comfortably under the "regarded as" heading. Persons within this group obtain ADA coverage by demonstrating that they have "an *actual* . . . physical or mental impairment."[43] They do not need to demonstrate that their impairment substantially limits a major life activity.[44] They also do not need to demonstrate that their employer erroneously believed that their impairment substantially limited a major life activity.[45]

Unfortunately, Congress's choice to place persons with actual, non-substantially limiting impairments under the "regarded as" heading has caused some courts to overlook the fact that the ADAAA grants "tier two" class membership on the basis of impairment alone. In at least two cases purporting to apply the ADAAA, courts have erroneously held that a plaintiff with a non-substantially limiting impairment had to prove that his employer believed that his impairment substantially limited a major life activity in order

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38 *See id.* § 12102(3).
39 *Id*. § 12102(3)(A) (emphasis added).
40 *See supra* notes 22–29 and accompanying text.
41 *See* cases cited *supra* at notes 27, 29.
42 42 U.S.C. § 12102(3)(A) (2012).
43 *Id.* (emphasis added)
44 *See id.*
45 *See id.*

to obtain ADA coverage.[46] The error is stark: in both opinions, the courts' recitation of facts states that the plaintiff had an actual impairment.[47]

Despite this risk for error, the statutory clustering of these three disparate groups of ADA plaintiffs has some logic because the three groups share a common feature: the ADAAA denies reasonable accommodations claims to all three.[48] Accordingly, this article uses the term "tier two" to describe all three categories of individuals the ADAAA makes ineligible for reasonable accommodations. The primary focus, however, is on individuals who have an actual impairment that does not substantially limit a major life activity.

II. CLAIMS AVAILABLE TO "TIER TWO" PLAINTIFFS

Congress's choice to deny "tier two" class members access to the ADA's reasonable accommodations provision gives new significance to the ADA's other effects-based discrimination claims.[49] Much like the ADA's reasonable accommodations provision, the ADA's other effects-based discrimination provisions do not require a plaintiff to prove that the employer intended to discriminate; the plaintiff must simply establish that an employer policy imposes disadvantage on the basis of disability.[50] If the plaintiff does so, the employer may avoid liability only by proving that the challenged policy is job-related for the position in question and consistent with business necessity.[51]

This Part first outlines the often-overlooked effects-based discrimination provisions that accompany the ADA's reasonable accommodations provision. It then demonstrates that "tier two" ADA class members may rely on

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46 *See* McBride v. Amer Tech., Inc., No. SA–12–CV–00489–DAE, 2013 WL 2541595, *5, *8–9 (W.D. Tex. June 10, 2013) (although quoting the new statutory language and acknowledging that the plaintiff's direct supervisor "stated in his affidavit: 'I knew [Plaintiff] had Tourettes,'" the court granted summary judgment to the defendant because the plaintiff failed to prove he "was regarded as having an impairment that substantially limits a major life activity."); O'Donnell v. Colonial Intermediate Unit 20, No. 12-6529, 2013 WL 1234813, at *7 (E.D. Pa. Mar. 27, 2013) (erroneously concluding that "a plaintiff is still required to plead the existence of a substantial limitation on a major life activity, either because the employer mistakenly believed he had a non-existent impairment that caused one, or because the employer believed an actual impairment caused one, when it in fact did not.").

47 *See McBride*, 2013 WL 2541595, *1; *O'Donnell*, 2013 WL 1234813, at *1.

48 42 U.S.C. § 12201(h) (2012).

49 *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 37 n.172 (2005) ("Under the ADA, plaintiffs are not limited to the accommodation theory of discrimination, but may use the disparate impact theory as well.") (citations omitted); *see also* Pamela S. Karland & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6 n.20 (1996) (noting that the ADA "essentially codif[ies] the theory of disparate impact.") (citations omitted).

50 Travis, *supra* note 49, at 37–38.

51 42 U.S.C. § 12113 (2012) (stating that if the plaintiff is eligible for reasonable accommodations, the employer must also demonstrate that reasonable accommodation is not possible).

these effects-based discrimination provisions to obtain workplace changes that resemble reasonable accommodations.

A. *The ADA's Effects-Based Discrimination Provisions*

Four effects-based discrimination provisions appear alongside the reasonable accommodations provision in 42 U.S.C. § 12112(b).[52] Section 12112(b)(1) prohibits employers from "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[53] This language mirrors the provision that governs race and sex disparate impact claims in Title VII of the Civil Rights Act of 1964.[54] Similarly, § 12112(b)(3) prohibits employers from "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability."[55] Additionally, § 12112(b)(6) requires employers to demonstrate that selection criteria that screen out individuals with disabilities (or a single individual with a disability) be job-related for the position in question and consistent with business necessity.[56] Similarly, § 12112(b)(7) requires employers to ensure that "tests concerning employment" do not unnecessarily adversely affect job applicants or employees with disabilities that "impair[] sensory, manual, or speaking skills."[57]

These provisions, which surround the reasonable accommodations provision (located in § 12112(b)(5)), function similarly to Title VII disparate impact claims.[58] They permit an individual to not only challenge selection criteria that directly target his or her disability, such as vision or hearing tests, but also selection criteria that have the effect of imposing disadvantage on the basis of disability.[59] For example, they allow an individual with a vision

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52 *Id.* § 12112(b).

53 *Id.* § 12112(b)(1).

54 *See id.* § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

55 *Id.* § 12112(b)(3).

56 *Id.* § 12112(b)(6).

57 42 U.S.C. § 12112(b)(7) (2012).

58 *See id.* § 2000e-2.

59 *See* H.R. Rep. No. 101-485(II), at 105 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 388 ("[T]his subsection prohibits the imposition of criteria that 'tend to' screen out an individual with a disability. This concept, drawn from current regulations under Section 504 (See, e.g.[,] 45 C.F.R. 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation.").

impairment to challenge a facially neutral requirement that job applicants present a driver's license.[60]

Both courts and litigants have frequently overlooked these effects-based discrimination provisions.[61] Despite the Supreme Court's acknowledgement in *Raytheon Co. v. Hernandez*[62] that "disparate-impact claims are cognizable under the ADA,"[63] most academic commentary has given little attention to the ADA's effects-based discrimination provisions.[64] Judicial opinions describing the claims available to ADA employment discrimination plaintiffs frequently list only intentional discrimination and reasonable accommodations claims.[65] The few commentators who have discussed the ADA's effects-based discrimination provisions have observed that "almost no ADA disability disparate impact cases exist" in the employment discrimination context.[66]

Prior to the ADAAA, this tendency to overlook the ADA's effects-based discrimination provisions was natural because, at that time, all ADA class members were eligible for reasonable accommodations.[67] Given the option between effects-based discrimination claims and reasonable accommodations claims, plaintiffs naturally chose reasonable accommodations claims

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60 *See id.* ("Such diminution of opportunity to participate can take a number of different forms. If, for example, a drugstore refuses to accept checks to pay for prescription drugs unless an individual presents a driver's license, and no other form of identification is acceptable, the store is not imposing a criterion that identifies or mentions disability. But for many individuals with visual impairments, and various other disabilities, this policy will operate to deny them access to the service available to other customers; people with disabilities will be disproportionately screened out.").

61 *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 203 (2005) ("Perhaps because disparate impact is similar to the duty of reasonable accommodation, courts frequently overlook it as a viable theory of discrimination under the ADA.") (footnotes omitted).

62 540 U.S. 44 (2003).

63 *Id.* at 53.

64 *But see* James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 28–29 (2005) (briefly discussing the ADA's disparate impact provisions); Timmons, *supra* note 61, at 251 (observing that "it is easier for a plaintiff to prove disparate impact under the ADA than it is under Title VII because the ADA allows individually focused disparate impact claims. Rather than needing to produce statistical evidence showing that the challenged policy disqualified or excluded a disproportionate number of persons in a protected group, an ADA plaintiff need prove only that the policy had an adverse effect on the plaintiff because of his or her disabilities.") (footnote omitted).

65 *See, e.g.*, Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999) ("Under the ADA, two distinct categories of disability discrimination claims exist: failure to accommodate and disparate treatment."); EEOC v. Eckerd Corp., No. 1:10–cv–2816–JEC, 2012 WL 2726766, at *4 (N.D. Ga. July 9, 2012) ("[T]here are two distinct categories of disability discrimination claims under the ADA: (1) failure to accommodate and (2) disparate treatment.").

66 Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1240 n.101 (2003).

67 As previously discussed, the sole exception was that some circuits held that plaintiffs who established ADA class membership solely though the "regarded as" provision could not sue for reasonable accommodations. *See supra* notes 25–29 and accompanying text.

because effects-based discrimination claims held no potential to generate compensatory and punitive damages.[68]

After the ADAAA, ADA effects-based discrimination claims remain rare because most individuals who need reasonable accommodations are eligible for "tier one" status under the ADAAA's expanded disability definition.[69] However, Congress's choice to create a category of ADA class members ineligible for reasonable accommodations gives new significance to the ADA's effects-based discrimination provisions.[70] Although the number of "tier two" plaintiffs to bring effects-based discrimination claims is likely to be small, the mere potential for these claims sheds new light on the ADA's more frequently employed reasonable accommodations provision.

B. *Remedies for Effects-Based Discrimination Resemble Reasonable Accommodations*

To date, widespread misconceptions about the ADA's effects-based discrimination claims have obscured their overlap with the reasonable accommodations provision. Many courts and commentators assume that the ADA's effects-based discrimination provisions cannot require employers to incur expenses that parallel the expenses required by reasonable accommodations.[71] Additionally, many courts and commentators assume that the small number of individuals with a specific disability employed by a particular employer gives the ADA's effects-based discrimination provisions little practical utility because these small numbers prevent statically valid comparisons between a policy's effect on persons with and without disabilities.[72]

However, as the follow sections demonstrate, the historical underpinnings of effects-based discrimination law and the ADA's text undermine these and other limiting assumptions about the ADA's effects-based discrimination provisions. In significant ways, the ADA's effects-based discrimination claims mirror reasonable accommodations claims.[73] Accordingly, in order to fulfill Congress's intent that "tier one" plaintiffs enjoy more statutory protection than "tier two" plaintiffs, courts should interpret the reasonable

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68 42 U.S.C. §§ 12117(a), 1981a(a)(2) (2012). Damages are available in reasonable accommodations, however, only when the employer has not acted in good faith. *See id.* § 1981a(a)(3) ("damages may not be awarded under this section where the [employer] demonstrates good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.").

69 *See supra* notes 30–32 and accompanying text.

70 *See* 29 C.F.R §§ 1630.4–1630.11 (2016).

71 *See infra* notes 75–90 and accompanying text.

72 *See infra* note 94 and accompanying text.

73 *See* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 536 (1991).

accommodations provision to provide more robust protection than the ADA's effects-based discrimination provisions.[74]

1. Employers May Incur Costs

As Christine Jolls has observed in the Title VII context, close examination of effects-based discrimination law undermines the assumption that it cannot require employers to incur the types of monetary expenses more typically associated with reasonable accommodations.[75]

For example, even a quintessential Title VII disparate impact case, such as a sex-based challenge to a requirement that workers' height exceed six feet, may require the employer to incur expenses. In addition to abandoning the discriminatory selection criterion, the employer may ultimately expend resources to adapt the employers' uniforms, machinery, and equipment to fit shorter workers.[76] In this way, classic Title VII disparate impact cases bear more similarity to reasonable accommodations than many commentators assume.

Less typical Title VII disparate impact cases even more directly require employers to incur expenses and construct new facilities in a manner that resembles reasonable accommodations.[77] For example, the EEOC and two Circuit Courts of Appeals have indicated that employers who do not currently provide their employees sanitary restroom facilities (a practice that disparately impacts women) must do so in order to avoid Title VII disparate impact liability.[78] As Mary Crossley has suggested, this remedy "parallel[s] closely

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74 ADA Amendments Act (ADAAA), Pub. L. No. 110-325 §2(b)(5), 122 Stat. 3553, 3554 (2008) (codified as amended at 42 U.S.C. § 12101 (2012)).

75 Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 643, 644–45 (2001).

76 *Id.* at 645, 656.

77 *Id*. at 651 ("[I]mportant aspects of disparate impact liability under Title VII are in fact accommodation requirements.").

78 DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000) ("[I]nsofar as absence of restroom facilities deters women . . . but not men from seeking or holding a particular type of job, and insofar as those facilities can be made available to the employees without undue burden to the employer, the absence may violate Title VII.") (citations omitted); Lynch v. Freeman, 817 F.2d 380, 389 (6th Cir. 1987) (holding that a plaintiff who proved that unsanitary portable restroom facilities disparately impacted women was entitled to summary judgment); Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(5) (2009) ("Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms . . . ."). *Cf.* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1270, 1271 (W.D. Wash. 2001) ("Title VII . . . require[s] employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same." (citing Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1084

the actions one might expect of an employer accommodating a disabled worker in order to avoid liability."[79] Tellingly, the courts in these disparate impact cases implicitly acknowledge that they are applying analysis comparable to the analysis used for reasonable accommodations claims. In *DeClue v. Central Illinois Light Co.*,[80] one of the restroom cases, the Seventh Circuit used the ADA term "undue burden" to describe the limits of the employer's duty to remedy the disparate impact created by its lack of sanitary restroom facilities.[81]

Some commentators have characterized the restroom cases as outside the mainstream of disparate impact law because they "compel the employer to provide a benefit it is not providing or to do something it is not doing, as opposed to challenging a requirement the employer has put in place."[82] However, the primary case that supports the proposition that a plaintiff cannot use Title VII disparate impact law to challenge employer inaction is a 1991 decision by the Seventh Circuit,[83] which employs reasoning that other circuits have criticized and rejected.[84] The Seventh Circuit itself also implicitly abrogated its own reasoning when it opined in *DeClue*, a case in which the plaintiff had not even raised a disparate impact claim, that a female employee could use the disparate impact theory to challenge an employer's lack of restroom facilities.[85] Accordingly, it appears that the explanation for the relative scarcity of Title VII disparate impact remedies that require employers to build new facilities or purchase new equipment is not that these remedies fall outside the normal scope of effects-based discrimination law. Instead, the explanation is the relatively small number of circumstances in which the biological needs of the groups protected by Title VII significantly differ from the biological needs of other workers.

Furthermore, as Mary Crossley has observed, the disparate impact theory's overlap with reasonable accommodations law has been present from

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n.14 (1983)) (holding that an employer's exclusion of birth control pills from its health insurance plan, which provided generally comprehensive prescription coverage, violated Title VII).

79 Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 915 (2004).

80 223 F.3d 434 (7th Cir. 2000).

81 *Id.* at 436 ("[I]nsofar as those facilities can be made available to the employees without *undue burden* to the employer, the absence may violate Title VII.") (emphasis added) (citations omitted).

82 Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1562 (2004); *see also* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 920 n.257 (2006) (agreeing with Sullivan that "this could be a particularly broad use of impact theory").

83 EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991).

84 *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998) (declining to certify a class); Thomas v. Wash. County Sch. Bd., 915 F.2d 922, 924–26 (4th Cir. 1990) (holding that nepotism and word-of-mouth hiring practices could result in disparate impact liability under Title VII).

85 *DeClue*, 223 F.3d at 436.

disparate impact law's beginning.[86] In *Griggs v. Duke Power Co.*,[87] the Supreme Court decision that first adopted the disparate impact theory, Justice Burger used language that signaled that remedies for disparate impact law may closely resemble reasonable accommodations.[88] Referring to an Aesop's fable in which a fox finds that he cannot drink milk served in a narrow-mouthed jar designed for a stork, the *Griggs* Court suggested that disparate impact law requires employers to ensure "that the vessel in which the milk is proffered be one all seekers can use."[89] In this way, the Court indicated that disparate impact law can require employers to incur costs in order to adapt existing workplaces to the varying physical needs of historically excluded workers.[90]

2. Individuated Evidence and Individuated Remedies

Differences between the ADA's effects-based claims and Title VII's disparate impact claims make the ADA's effects-based claims resemble reasonable accommodations even more closely. Unlike Title VII disparate impact claims, which typically require group evidence and group remedies, the ADA's effects-based discrimination claims are more functionally similar to reasonable accommodations because they are individualized.

First, unlike Title VII disparate impact cases, in which courts typically require plaintiffs to use statistics or other forms of group-based evidence to demonstrate that the challenged policy adversely affects their protected class as a group,[91] the ADA does not require an effects-based discrimination plaintiff to present proof that a challenged employer policy disadvantaged anyone other than himself.[92] Section 6 is most clear on this point. It prohibits not only selection criteria that "screen out or tend to screen out . . . a class of individuals with disabilities," but also selection criteria "that screen out or tend to screen out *an individual* with a disability."[93] In this way, section 6 permits a

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86 Crossley, *supra* note 79, at 914.

87 401 U.S. 424 (1971).

88 *Id.* at 431.

89 *Id.*

90 *Id.* Lower courts even more formally recognized that *Griggs* overlaps reasonable accommodations law. One court, for example, suggested that the *Griggs* decision made Title VII's religious accommodation provision largely "redundant and unnecessary." Isaac v. Butler's Shoe Corp., 511 F. Supp. 108, 112 (N.D. Ga. 1980).

91 *See, e.g.*, Caron v. Scott Paper Co., 834 F. Supp. 33, 38 (D. Me. 1993) (holding that a prima facie disparate impact case exists if evidence is presented and shows statistical disparities which are sufficiently substantive to raise an inference of causation).

92 *See, e.g.*, Gonzales v. City of New Braunfels, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case [of disparate impact] by demonstrating an adverse impact on himself rather than on an entire group.").

93 42 U.S.C. § 12112(b)(6) (2012) (emphasis added).

plaintiff to challenge selection criteria that adversely affect him or her without producing evidence that anyone else was similarly disadvantaged.[94] ADA section 7, which focuses on tests, uses singular language; it refers to "a job applicant or employee," "such applicant or employee," and "such employee or applicant."[95]

Unlike sections 6 and 7, the ADA's other effects-based discrimination provisions do not explicitly authorize an individual plaintiff to bring an effects-based discrimination claim without evidence that other persons are adversely affected.[96] Based on this difference, most commentators assume that these provisions require group evidence.[97] However, textual differences between the ADA and Title VII cast doubt on this assumption. Title VII's disparate impact provision uses the language of groups: it focuses on situations

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94 *See Gonzales*, 176 F.3d at 839 n.26 ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case [of disparate impact] by demonstrating an adverse impact on himself rather than on an entire group."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § IV-4.3(2) (2002), http://www.jan.wvu.edu/links/ADAtam1.html. ("It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard. . . . As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability."). In many cases, however, courts have overlooked the textual difference between the ADA and Title VII. *See, e.g.*, Crawford v. U.S. Dept. of Homeland Sec., 245 Fed. App'x. 369, 381 (5th Cir. 2007) (rejecting the plaintiff's ADA Title I disparate impact claim because she "offers no valid statistical evidence"); Smith v. Miami-Dade Cty., 21 F. Supp. 3d 1292, 1295 (S.D. Fla. 2014) ("[E]vidence that one disabled person was adversely affected by a particular employment practice is not sufficient to create a prima facie case of a disparate impact under the ADA."); Corbin v. Town of Palm Beach, No. 13–80106–CIV, 2014 WL 866415, at *2 (S.D. Fla. Mar. 5, 2014) ("Besides pointing to a specific employment practice that allegedly has a disparate impact, a plaintiff must also demonstrate causation by offering statistical evidence to show that the challenged practice has resulted in prohibited discrimination.") (citation omitted); Gray v. U.S. Steel Corp., No. 2:09–cv–327-APR, 2013 WL 6682951, at *10 (N.D. Ind. Dec. 17, 2013) ("[A] disparate impact claim under the ADA . . . . requires statistical correlation evidence . . . .") (citation omitted); Anderson v. Duncan, 20 F. Supp. 3d 42, 54 (D.D.C. 2013) ("A prima facie case of disparate impact requires . . . a demonstration of causation through statistical evidence . . . .") (citation omitted); Kintz v. United Parcel Serv., 766 F. Supp. 2d 1245, 1254 (M.D. Ala. 2011) ("[T]he plaintiff must produce some evidence about the population that a policy applies to, some numbers or proportional statistics, . . ."); Slocum v. Potter, No. 3:08–3714–CMC–JRM, 2010 WL 2756953, at *7 (D.S.C. June 8, 2010) ("Insofar as Slocum now asserts a claim based on a theory of disparate impact, it fails . . . . [T]he record contains no statistical evidence . . . ."); Jeffrey v. Ashcroft, 285 F. Supp. 2d 583, 588 n.3 (M.D. Pa. 2003) (indicating that an ADA disparate impact analysis would "involv[e] statistical evidence").

95 42 U.S.C. § 12112(b)(7) (2012). While the remaining disparate impact provision, section 3, does not expressly use singular language, it also does not employ plural language. *See id.* § 12112(b)(3) (prohibiting employers from "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability").

96 42 U.S.C. § 12112(b)(1), (3), (7) (2012).

97 *See, e.g.*, Leonard, *supra* note 64, at 27–28 (indicating that 42 U.S.C. § 12112(b)(3) falls within the disparate impact category that normally requires "group-to-group comparison and is normally done on the strength of the statistical evidence"); Stein & Waterstone, *supra* note 82, at 911.

in which employer actions may limit, segregate, or classify "employees or applicants."[98] By contrast, the ADA's parallel provision focuses on situations that involve limiting, segregating, or classifying a single "job applicant or employee."[99]

Additionally, the affirmative defense the ADA provides employers facing effects-based discrimination claims is couched in terms of individual, rather than group, impact. It provides:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit *to an individual with a disability* has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, . . .[100]

This defense bears the statutory label of "[i]n general," and functions as the affirmative defense for all four of the ADA's effects-based discrimination provisions.[101] By emphasizing that employers must justify practices "that screen out or tend to screen out or otherwise deny a job or benefit to *an individual* with a disability," this provision suggests that none of the ADA's effects-based discrimination claims require evidence of group impact.[102]

The ADA's effects-based claims' resemblance to reasonable accommodations is also striking from a remedies perspective. To remedy an ADA effects-based discrimination claim, an employer may make an individualized exception to a policy while continuing to apply the policy to other workers.[103] Such individualized remedies rarely occur in the Title VII context because ceasing to apply a policy to one Title VII group typically leaves the employer vulnerable to "reverse discrimination" claims from members of another Title VII group.[104] For example, the remedy for a minimum height requirement that

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98 42 U.S.C. § 2000e-2(a)(2) (2012).

99 *Id.* § 12112(b)(1).

100 *Id*. § 12113(a) (emphasis added).

101 *Id.*

102 *Id*. (emphasis added).

103 *See* Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL'Y REV. 1, 5–6 (2013) ("[I]n contrast to Title VII, the ADA typically requires employers to make *retail* accommodations rather than *wholesale* ones—to fashion individualized exceptions to generally applicable workplace policies and practices on a case-by-case basis rather than to revise the policies and practices for all employees. (Though, to be sure, this is only a generalization: Title VII mandates some retail accommodations, while the ADA mandates some wholesale ones.)").

104 *Cf.* Schwab & Willborn, *supra* note 66, at 1238 ("The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group. . . . By contrast, a successful ADA reasonable accommodation case requires the employer to take special steps to a particular group, but not for everybody."); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1399 (2009) ("[T]here is no intrinsic connection between disparate impact liability and

disparately impacts women must be to eliminate the requirement for everyone. Eliminating it only for women would create a "reverse discrimination" disparate treatment claim for short men.[105] The ADA, by contrast, expressly bars "reverse discrimination" claims brought by persons outside the ADA's protected class.[106] Accordingly, employers may, if they choose, respond to ADA effects-based discrimination claims by making case-by-case exceptions to a policy instead of eliminating the policy altogether.[107]

In this way, ADA effects-based discrimination claims parallel the small category of Title VII disparate impact cases that commentators have characterized as functionally indistinguishable from ADA reasonable accommodations cases because they permit employers to address the adverse impacts of their policies by making case-by-case exceptions.[108] For example, in cases involving "no beard" policies that disparately impact individuals with the skin condition pseudofolliculitis barbae ("PFB") (a condition that predominantly affects African Americans), courts have ordered a narrow, rather than universal, remedy. They have permitted employers to retain "no beard" pol-

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universal remedies, just as there is no intrinsic connection between nonaccommodation and individualized remedies.") (citation omitted).

105 *See* Schwab & Willborn, *supra* note 66, at 1238 ("The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group. . . . [For instance,] if a high school diploma requirement has a disparate impact on blacks that cannot be justified by business necessity, a Title VII court would order the employer to drop the requirement for whites as well as blacks.").

106 42 U.S.C. § 12201(g) (2012) ("Nothing in [the ADA] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."); *see also* H.R. REP. NO. 110-730, pt. 1, at 17 (2008) ("The bill prohibits reverse discrimination claims by disallowing claims based on the lack of disability . . . ."). Even before the ADAAA codified the ADA's prohibition of reverse discrimination suits, the ADA's limited protected class made this conclusion easy to reach as a textual matter because unlike Title VII, which prohibits discrimination on the basis of "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), the ADA prohibited disability discrimination only against "individual[s] with a disability," 42 U.S.C. § 12112(a) (2006). *But see* Woods v. Phoenix Soc'y of Cuyahoga Cty., No. 76286, 2000 WL 640566, at *2–3 (Ohio Ct. App. May 18, 2000) (permitting a reverse-discrimination suit to proceed on separate common law grounds).

107 *See* Schwab & Willborn, *supra* note 66, at 1238 ("[A] successful ADA reasonable accommodation case requires the employer to take special steps to a particular group, but not for everybody.").

108 *Id.* ("The Title VII no-beard cases look like accommodation cases."); Jolls, *supra* note 75, at 655 ("Remedies in the no-beard cases . . . that have been decided in favor of employees nicely highlight the fundamental equivalence between disparate impact liability and requirements of accommodation. Courts typically have required employers to exempt black men who are unable to shave from rules prohibiting beards. Thus, quite directly in these cases, disparate impact liability requires employers to incur special costs in response to the distinctive needs (measured against existing market structures) of a particular group of employees.") (footnote omitted). *Cf.* Zatz, *supra* note 104, at 1399 (observing that "there is no intrinsic connection between disparate impact liability and universal remedies, just as there is no intrinsic connection between nonaccommodation and individualized remedies.") (footnote omitted).

icies for everyone who does not submit medical documentation demonstrating PFB.[109] In one of these cases, the Eighth Circuit acknowledged—likely unconsciously—the functional similarity between this disparate impact remedy and the remedies the ADA's reasonable accommodations provision requires by using the ADA term "reasonable accommodation,"[110] which is not part of Title VII race discrimination doctrine. The court stated that "Domino's is free to establish any grooming and dress standards it wishes; we hold only that *reasonable accommodation* must be made for members of the protected class who suffer from PFB."[111]

This section has demonstrated that the ADA's effects-based discrimination provisions are far more similar to the reasonable accommodations provision than most courts and commentators currently assume. The ADA's effects-based discrimination provisions can require employers to incur expenses to remedy inaction that imposes disability-based disadvantage. The ADA's effects-based discrimination provisions do not require evidence that a challenged employer practice harmed a statistically significant numbers of individuals; instead, harm to a single individual may suffice.[112] Similarly, the ADA's effects-based discrimination provisions authorize remedies in the form of individualized exceptions to broadly applicable policies; they do not require employers to abandon policies altogether.[113] Accordingly, in many respects, the ADA's effects-based discrimination provisions authorize "tier two" ADA class members to obtain workplace changes that strongly resemble reasonable accommodations.

III. OVERLAP WITH CURRENT REASONABLE ACCOMMODATIONS LAW

Because the ADA's effects-based discrimination provisions remain understudied and underdeveloped, the precise extent of their overlap with the reasonable accommodations provision is difficult to determine. With this limitation in mind, this Part examines the ADA's text and parallel Title VII case law to roughly outline the overlap. This examination reveals that the claims available to "tier two" ADA plaintiffs duplicate significant portions of current reasonable accommodations law.

The EEOC's Enforcement Guidance provides that "[i]n general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal

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109 *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (allowing employer to retain "no beards" rule for employees who fail to submit medical documentation of their inability to shave); Richardson v. Quik Trip Corp., 591 F. Supp. 1151, 1155 (S.D. Iowa 1984); EEOC v. Trailways, Inc., 530 F. Supp. 54, 59 (D. Colo. 1981).

110 *Bradley,* 7 F.3d at 799.

111 *Id*. (emphasis added).

112 42 U.S.C. § 12112(b)(1), (3), (6), (7) (2012).

113 *See* Shapiro, *supra* note 103, at 5–6.

employment opportunities."[114] The EEOC identifies three types of accommodations that fall within the ambit of the ADA's reasonable accommodations provision:

> (1) accommodations that are required to ensure equal opportunity in the application process;
> (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and
> (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.[115]

The following sections demonstrate that the effects-based discrimination claims available to "tier two" plaintiffs overlap each of these reasonable accommodations categories.

A. *Accommodations to Ensure Equal Opportunity in the Application Process*

The ADA's effects-based discrimination provisions most obviously overlap the EEOC's first reasonable accommodations category, which requires employers to ensure equal opportunity in the application process.[116] Section 7, the ADA's most narrowly targeted effects-based discrimination provision, defines discrimination to include

> failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).[117]

While section 7 does not use the word "accommodation," it addresses the same concern for equal opportunity in the application process as the

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114 29 C.F.R. app. § 1630.2(o) (2015). The text of the ADA does not define the term "reasonable accommodation." It does, however, provide examples. It declares that:

> The term "reasonable accommodation" may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (2012).

115 29 C.F.R. app. § 1630.2(o) (2015).

116 *Id.*

117 42 U.S.C. § 12112(b)(7) (2012).

EEOC's first category of reasonable accommodations.[118] It requires modifications to employment tests, such as converting a written test into Braille, that the average lay observer would likely call a reasonable accommodation.[119] In fact, section 7's directive that employers "select and administer tests . . . *in the most effective manner* to ensure that . . . such test results accurately reflect [the factor that the] test purports to measure"[120] might possibly require more than the reasonable accommodations provision, which courts generally regard to permit employers to select any accommodation that is effective, even if it is not "the *most* effective" option available.[121]

The ADA's other effects-based discrimination provisions, which have a broader scope than section 7, also appear to empower "tier two" plaintiffs to obtain changes to the application process.[122] For example, section 6 prohibits employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity."[123] Similarly, section 1 prohibits employers from "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[124] Even more broadly, section 3 prohibits employers from "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability . . . ."[125] In sum, each of the ADA's overlapping effects-based discrimination provisions enables "tier two" plaintiffs to obtain changes to the application process.

B. *Accommodations to Facilitate On-the-Job Performance*

The claims available to "tier two" plaintiffs also overlap the EEOC's second reasonable accommodations category: "accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired."[126] Even though section 6 appears limited to

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118 *See* 29 C.F.R. app. § 1630.2(o) (2015).

119 *Id*.

120 42 U.S.C. § 12112(b)(7) (2012) (emphasis added).

121 *Id.*; *see, e.g.*, Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 95 (2d Cir. 2015) ("[E]mployers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee."); 29 C.F.R. app. § 1630.2(r) ("[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, . . .").

122 *See* 42 U.S.C. § 12112(b)(1), (3), (6) (2012).

123 *Id*. § 12112(b)(6).

124 *Id.* § 12112(b)(1).

125 *Id.* § 12112(b)(3)(A).

126 29 C.F.R. app. § 1630(r) (2015).

"selection criteria,"[127] the EEOC has concluded that its scope extends to "uniformly applied standards, criteria and policies *not relating to selection*," such as "safety requirements, vision or hearing requirements, walking requirements, [and] lifting requirements" that apply to current employees.[128] Both logic and the text of the ADA support this conclusion. Logically, even though employers typically scrutinize employees' qualifications most exactingly at the time of hiring or promotion, employers typically require their employees to meet "qualification standards" (such as safety requirements, vision or hearing requirements, walking requirements, and lifting requirements) throughout their employment.[129] Additionally, the ADA expressly provides that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[130] Commentary surrounding this provision supports the commonsense conclusion that whether a worker poses a direct threat is relevant not only to hiring and promotion but also to retention.[131] Accordingly, it appears likely that the EEOC is correct that section 6 permits challenges not solely to hiring and promotion criteria but also to ongoing workplace policies that screen a current worker out of an employment opportunity due to his or her disability.

Even if the EEOC is incorrect about section 6's scope, the ADA's other effects-based provisions give "tier two" plaintiffs opportunities to obtain workplace changes to facilitate their day-to-day job performance. Section 3 prohibits employers from "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability."[132] Similarly, section 1 defines "discriminate" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the

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127 42 U.S.C. § 12112(b)(6) (2012).

128 29 C.F.R. app. § 1630.15(c) (2015) ("Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation."); *Id.* app. § 1630.10(a) ("This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests.").

129 *Cf.* Timmons, *supra* note 61, at 246 ("Courts should construe the disparate impact provisions of the ADA as encompassing challenges to policies prohibiting workplace misconduct. The statute's reference to 'qualification standards . . . [and] selection criteria' can be interpreted as including an employer's standards for existing employees to remain qualified as opposed to being selected for discharge. . . . Policies prohibiting workplace misconduct certainly constitute standards and criteria.") (footnote omitted).

130 42 U.S.C. § 12113(b) (2012).

131 *See, e.g.*, Timmons, *supra* note 61, at 247 n.348 ("[The direct threat] provision must apply to existing employees as well as applicants for hire or promotion; it would not make sense to prohibit an employer from terminating an existing employee who—perhaps due to acquiring a contagious disease—became a direct threat to the health of others in the workplace.").

132 42 U.S.C. § 12112(b)(3)(A) (2012).

opportunities or status of such applicant or employee because of the disability of such applicant or employee."[133]

This language parallels Title VII's disparate impact provision, which courts have read to require employers to make significant changes to facilitate previously excluded workers' day-to-day job performance. For example, courts have held that Title VII disparate impact law requires employers to construct women's restrooms, discontinue rules that require workers to communicate exclusively in the English language, and make medical exceptions to "no beard" policies for persons with the skin condition PFB.[134] In light of these cases, it appears reasonable to assume that the ADA's effects-based discrimination provisions similarly encompass not only the application process but also day-to-day business operations.

Additionally, another ADA provision that operates independently of the effects-based discrimination provisions makes very explicit that a specific remedy classically labeled a "reasonable accommodation"—reallocating or redistributing marginal job functions—is available to "tier two" plaintiffs.[135] The ADA defines the term "qualified individual" to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[136] This unique definition of "qualified" requires employers to excuse an individual's inability to do a job's marginal functions, even if the individual is ineligible for reasonable accommodations.[137]

Had Congress intended to make the reallocation of marginal job functions a statutory benefit available solely to "tier one" plaintiffs, Congress could have defined "qualified" to mean that the individual can perform *all* the job functions the employer has assigned to the position. Under that approach, the employer would be required to reallocate marginal job functions only for individuals eligible for reasonable accommodations. By instead defining "qualified" to mean that the individual simply "can perform *the essential functions*," the ADA enables a "tier two" plaintiff to challenge an employer's decision not to hire him on the basis of his inability to perform an

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133 *Id.* § 12112(b)(1).

134 *See id.* § 2000e-2(a) ("[I]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."); Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (permitting a disparate impact challenge to a "no beards" rule); Garcia v. Spun Steak Co., 998 F.2d 1480, 1487–88 (9th Cir. 1993) (permitting a disparate impact challenge an "English-only" rule).

135 42 U.S.C. § 12111(8) (2012); Deane v. Pocono Med. Ctr., 142 F.3d 138, 146–47 (3d Cir. 1998) (en banc).

136 *Id.* § 12111(8).

137 *See Deane*, 142 F.3d at 146–47.

inessential job function.[138] His lack of eligibility for reasonable accommodations is not a barrier to this claim.

An en banc Third Circuit decision from 1998 demonstrates that Congress had at least constructive notice that "tier two" plaintiffs would be eligible for the reallocation of marginal job functions.[139] In the brief pre-ADAAA period in which the Third Circuit disallowed "regarded as" plaintiffs from bringing reasonable accommodations claims, the Third Circuit concluded that the ADA's text compelled it to reject a three-judge panel's assumption that it was "common sense" that "that *any* employee, 'disabled or otherwise,' must be able to perform all the requisite functions of a given job," unless the law provides a reasonable accommodation.[140] Despite the intuitive appeal of the panel's reasoning, the en banc court observed that the ADA's "plain and unambiguous" text defines "qualified" as the ability to "perform *the essential functions*" rather than all job functions.[141] Accordingly, the en banc court concluded that "if an individual can perform the essential functions of the job without accommodation *as to those functions*, regardless of whether the individual can perform the other functions of the job (with or without accommodation), that individual is qualified under the ADA."[142] Although there is no evidence that any members of Congress read this decision, it highlighted, long before the ADAAA's enactment, that disallowing certain ADA class members to access the ADA's reasonable accommodations provision would not prevent them from obtaining remedies that overlap current reasonable accommodations law.

C. *Accommodations to Enable Equal Opportunity to Enjoy Benefits and Privileges of Employment*

The ADA's effects-based discrimination provisions also overlap the EEOC's third, and most contested, reasonable accommodations category: "accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities."[143] These accommodations include making accessible "non-work areas used by the employer's employees," such as break

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138 42 U.S.C. § 1211(8) (2012) (emphasis added).

139 *See Deane*, 142 F.3d at 146–47 (3d Cir. 1998). When the Third Circuit later concluded that the ADA requires employers to provide "reasonable accommodations" to "regarded as" plaintiffs, its determination that the essential functions limitation applies to persons ineligible for reasonable accommodations became moot. *See* Williams v. Phila. Hous. Auth. Police Dept., 380 F.3d 751, 775 (3rd Cir. 2004).

140 Deane v. Pocono Med. Ctr., No. 96-7174, at *19 (3d Cir. Aug. 25, 1997), *rev'd*, 142 F.3d 138, 146 (3d Cir. 1998) (en banc).

141 *Deane*, 142 F.3d at 146 (emphasis added).

142 *Id*. at 147.

143 29 C.F.R. app. § 1630.2(o) (2015); *id.* § 1630.2(o)(1)(iii).

rooms and lunch rooms.[144] They also include accommodations necessary to provide employees with disabilities "an opportunity to attain the same level of performance . . . as are available to the average similarly situated employee without a disability."[145]

Not all courts accept the EEOC's conclusion that the ADA's reasonable accommodations provision extends beyond enabling individuals with disabilities to minimally perform their job's essential functions.[146] Instead, some courts insist that proof that the plaintiff cannot perform all the job's essential functions without accommodation is "an essential element of the [plaintiff's] prima facie case of discrimination based on failure to accommodate."[147]

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144 *Id.* app. § 1630.2(o).

145 *Id.* app. § 1630.9.

146 *See* Gaines v. Runyon, 107 F.3d 1171, 1178 (6th Cir. 1997) ("The plaintiff must first demonstrate that without the requested accommodation, he is unable to perform the essential functions of his job. . . . The employer need only provide reasonable accommodations that make it possible for the disabled employee to perform the essential functions of his job.") (citations omitted); Davis v. Chao, No. 06 C 1066, 2008 WL 905184, at *12 (N.D. Ill. Mar. 31, 2008) (expressing skepticism about whether "a person such as [the plaintiff] who can admittedly perform all the essential functions of her job could be entitled to a reasonable accommodation"); Dage v. Leavitt, No. 04–0221 (JGP), 2007 WL 81961, at *7 (D.D.C. Jan. 9, 2007) ("It is well-settled that in asserting discrimination based on failure to accommodate, the moving party must establish that 'an accommodation was needed' in order to carry out *the essential functions of the position*." (quoting Bissell v. Reno, 74 F. Supp. 2d 521, 528 (D. Md. 1999))); Goodman v. Potter, 412 F. Supp. 2d 11, 17 (D.D.C. 2005) ("The government is not obligated under the statute to provide plaintiff with every [requested] accommodation, but only with reasonable accommodation as is necessary to enable [her] to perform [her] essential functions." (quoting Carter v. Bennett, 651 F.Supp. 1299, 1301 (D.D.C. 1987))); Bissell v. Reno, 74 F. Supp. 2d 521, 528 (D. Md. 1999) ("[A]ll of the evidence in the record indicates that [the plaintiff] was 'fully successful' on all six categories of her performance evaluation . . . and that she was entirely capable of carrying out its functions, essential and otherwise, without the requested accommodation . . . . As a result, [she] has failed to establish an essential element of the prima facie case of discrimination based on failure to accommodate: that 'an accommodation was needed' in order to carry out the essential functions of the position." (quoting Gaines v. Runyon, 107 F.3d 1171, 1175 (6th Cir. 1997))); Harmer v. Va. Elec. & Power Co., 831 F. Supp. 1300, 1307 (E.D. Va. 1993) ("[B]ecause the evidence established that [the plaintiff] could at all times adequately perform his employment duties, [he] is not entitled to further accommodation under the ADA.").

This is the minority view. Most courts accept the EEOC's position. *See* Feist v. La., Dep't of Justice, 730 F.3d 450, 453 (5th Cir. 2013) ("[A] modification that enables an individual to perform the essential functions of a position is only one of three categories of reasonable accommodation.") (footnote omitted); Buckingham v. U.S., 998 F.2d 735, 740 (9th Cir. 1993) ("[C]ontrary to what the government urges, employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to [] enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees . . . ."); McWright v. Alexander, 982 F.2d 222, 227 (7th Cir. 1992) ("We . . . reject the district court's suggestion that [the plaintiff's] claim was defective because the accommodation she requested 'was not related to any specific condition of her work.' . . . The Rehabilitation Act calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific employment tasks.") (citation omitted).

147 *Bissell*, 74 F. Supp. 2d at 528.

Based on this conclusion, one court held that an employer had no obligation to provide an employee with a pulmonary disability the smoke-free work environment his doctor recommended because the plaintiff's receipt of satisfactory performance evaluations indicated that the smoke present in his work environment did not prevent him from performing his job's essential functions.[148] Similarly, another court denied accommodations to an employee with Multiple Chemical Sensitivity Syndrome ("MCSS") because "throughout the entire time of her struggle with MCSS, she has been able to perform her job well, as evidenced by consistently favorable job evaluations."[149] The court reached this conclusion even after accepting the plaintiff's assertion that the fumes in her work environment not only occasionally prevented her from performing the essential functions of her job but also caused nausea, headaches, hair loss, and memory loss.[150]

These courts' conclusions not only conflict with the ADA's basic discrimination provisions, which explicitly encompass discrimination in "terms, conditions, and privileges of employment," but also the ADA's effects-based discrimination provisions.[151] The ADA's affirmative defense to effects-based discrimination claims requires employers to justify not only practices "that screen out or tend to screen out" an individual with a disability but also practices that "otherwise deny a job *or benefit* to an individual with a disability."[152] In this way, the ADA indicates that the ADA's effects-based discrimination provisions encompass ongoing employer practices that undermine an individual with a disability's opportunity to enjoy the benefits and privileges of employment that his or her coworkers enjoy.

Title VII disparate impact case law supports the conclusion that the ADA's effects-based discrimination provisions encompass situations in which an employer subjects an individual with a disability "to harsher working conditions than the general employee population."[153] For example, the

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148 *Harmer*, 831 F. Supp. at 1306–07.

149 Gordon v. Safeway, Inc., No. 39671–4–I, 1997 WL 679660, at *3 (Wash. Ct. App. Nov. 3, 1997) (analyzing both the ADA and state law).

150 *Id.* at *1.

151 *See* 42 U.S.C. § 12112(a) (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

152 *Id.* § 12113(a) (emphasis added).

153 Garcia v. Spun Steak Co., 998 F.2d 1480, 1485 (9th Cir. 1993); *see also* Lynch v. Freeman, 817 F.2d 380, 387 (6th Cir. 1987) ("We reject TVA's argument that working conditions may never be the basis of disparate impact claims. . . . The language of section 703(a)(2) is . . . broad enough to include working conditions that have an adverse impact on a protected group of employees. It is an unlawful employment practice under § 703(a)(2) 'to limit . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.' The condition of the toilets did 'limit' female . . . employees in a way that adversely affected their status as employees based solely on their sex."); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 977

Ninth Circuit has permitted workers who speak English as a second language to challenge rules requiring them to communicate exclusively in English while at work.[154] The court permitted this challenge despite the fact that the plaintiffs continued to work for the defendant employer.[155] In this way, the court concluded that Title VII disparate impact law encompasses not only situations in which protected individuals lose their jobs, but also situations in which protected individuals face unequally burdensome working conditions.[156]

Furthermore, the Title VII restroom cases indicate that disparate impact law authorizes not only challenges to policies that an employer consciously adopts, such as "no beard" or "English-only" rules, but also to employer inaction.[157] In *Lynch v. Freeman*[158] and *DeClue v. Central Illinois Light Co*., the Sixth and Seventh Circuits concluded that Title VII disparate impact law could address the impact that the absence of sanitary toilet facilities had on female employees' working conditions.[159] They concluded that Title VII disparate impact law may require employers to purchase equipment or construct new facilities in order to equalize biologically different individuals' working conditions due to their membership in a protected class.[160]

In sum, the ADA's effects-based discrimination claims overlap all three of the EEOC's categories of reasonable accommodations. The overlap is most obvious for "category 1" reasonable accommodations, which encompass employment tests and qualification standards. However, the ADA's text and comparable Title VII case law indicate that the overlap also extends to "category 2" accommodations that enable employees to perform their job's essential functions. Additionally, the overlap appears to extend even to the EEOC's occasionally contested "category 3" accommodations, which enable employees to enjoy equal benefits and privileges of employment.

The significant overlap between reasonable accommodations doctrine and the claims available to "tier two" plaintiffs suggests that there is room for advocates to urge courts to expand the scope of reasonable accommodations. Congress's choice to deny "tier two" plaintiffs reasonable accommodations claims indicates that Congress expects that the workplace changes available via the reasonable accommodations provision will exceed those available via the other ADA effect-based discrimination claims.

(2005) ("Although most disparate impact cases have focused on selection devices or discrete policies, the statutory language is far broader . . . .") (footnote omitted).

154 *See Spun Steak Co.*, 998 F.2d at 1487–88.

155 *See id.* at 1483.

156 *See id.* at 1485–86.

157 DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000); *Lynch*, 817 F.2d at 388.

158 817 F.2d 380 (6th Cir. 1987).

159 *DeClue*, 223 F.3d at 436–37; *Lynch* 817 F.2d at 387.

160 *See DeClue*, 223 F.3d at 437; *Lynch* 817 F.2d at 388.

IV. HOW REASONABLE ACCOMMODATIONS LAW SHOULD EXPAND TO FULFILL CONGRESSIONAL INTENT TO PRIORITIZE "TIER ONE" PLAINTIFFS

The assumption that reasonable accommodations should extend beyond other ADA claims predates the ADAAA. The original ADA's text indicates that the statute's drafters and supporters expected the ADA's reasonable accommodations provision to provide persons with disabilities greater leverage to achieve workplace change than Title VII's disparate impact provisions.[161] Although the ADA's individualized approach to effects-based discrimination partly accomplished this goal, Congress also anticipated that reasonable accommodations claims would extend beyond the ADA's effects-based discrimination claims.[162]

This expectation is perhaps most clear in the ADA's affirmative defense to effects-based discrimination claims. This defense provides that even when an employer demonstrates that a challenged employment practice is "job-related and consistent with business necessity," employers have an additional, separate obligation (for plaintiffs eligible for reasonable accommodations) to demonstrate that "performance cannot be accomplished by reasonable accommodation."[163] This pairing of the classic disparate impact defense, "job-related and consistent with business necessity," with "reasonable accommodation" strongly suggests that Congress expected the reasonable accommodations provision to extend beyond the ADA's effects-based discrimination provisions.[164]

Courts may employ this insight to resolve three of the most intractable questions about the scope of the reasonable accommodations obligation. First, the renewed significance that the ADAAA's stratification of the ADA's protected class places on the ADA's effects-based discrimination provisions invites reexamination of the "practical burden of proof dilemma" in reasonable accommodations cases.[165] Second, the ADAAA's stratification of the ADA's protected class provides courts an opportunity to reconsider whether to defer to employers' views about which elements of a job are "essential

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161 *See* 29 C.F.R. app. § 1630.15 (2015).

162 *Id.*

163 42 U.S.C. § 12113(a) (2012). *See also* 29 C.F.R. app. § 1630.15(a) (2015). ("[E]ven if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.").

164 42 U.S.C. § 12113(a) (2012).

165 US Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002).

functions."[166] Third, Congress's intent to provide "tier one" ADA plaintiffs more statutory muscle to compel workplace change than "tier two" plaintiffs may also facilitate resolution of the longstanding controversy about the ADA's reassignment provision.[167]

A. *The Burden of Proof Should Rest on Employers*

Because reasonable accommodations questions are highly fact-intensive, and many issues surrounding reasonable accommodations remain unresolved, it is significant which party bears ultimate responsibility for convincing the fact-finder.[168] Commentators who have attempted to create a descriptive account of reasonable accommodations law conclude "that trying to predict whether an accommodation will be deemed reasonable is difficult"[169] because the case law is "in a state of chaos."[170] Courts and commentators disagree about the extent to which myriad factors, such as positive and negative effects on coworkers, should impact the reasonableness inquiry.[171] Similarly, courts vary widely in their attitudes toward a variety of frequently requested accommodations, such as reassignment, accommodations related to parking and transportation, and working at home.[172]

Accordingly, in a significant number of cases, the inquiry into whether the ADA requires a proposed accommodation may be so difficult for the fact-

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166 29 C.F.R. § 1630.2(n)(3)(i) (2015).

167 *See id.* § 1630.2(o)(2)(ii).

168 *See* Porter, *supra* note 4, at 543–44 ("'Reasonable,' under the ADA, has no specific definition in the statute or its accompanying regulations. It is an ambiguous word with different meanings in different areas of law but no discernible meaning in disability law.") (footnotes omitted); Porter, *supra* note 12 at 68 ("[T]he word 'reasonable' is so vague; it is not defined in the statute, and the regulations do not explicitly define it.") (footnote omitted); Stein et. al., *supra* note 1, at 714 ("[T]here is little precedent to assure a challenging party that a particular accommodation will be found reasonable and not to constitute an undue hardship. . . . The judiciary's reluctance to adumbrate the issue of reasonable accommodation has left a dearth of precedent and many issues unresolved.") (footnotes omitted).

169 Porter, *supra* note 4, at 546.

170 *Id.* at 543.

171 *See, e.g.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 840 (2008) (arguing that "Courts and agencies interpreting the Americans with Disabilities Act (ADA) generally assume that workplace accommodations benefit individual employees with disabilities and impose costs on employers and, at times, coworkers. This belief reflects a failure to recognize a key feature of ADA accommodations: their benefits to third parties. Numerous accommodations—from ramps to ergonomic furniture to telecommuting initiatives—can create benefits for coworkers, both disabled and nondisabled, . . .").

172 Porter, *supra* note 4, at 547–52.

finder that the question of which party bears the burden of proof may be outcome-determinative.[173] Perhaps of even more practical importance, the determination of who bears the risk associated with carrying this burden may affect the parties' perceptions of the potential risks and rewards of litigation, which will influence whether an employer chooses to deny an employee's accommodation request in the first place.

In *US Airways, Inc. v. Barnett*,[174] the only Supreme Court decision to address Title I's reasonable accommodations obligation,[175] the Supreme Court concluded that the plaintiff bears the burden of proof on the question of whether an accommodation is "reasonable on its face, *i.e*., ordinarily or in the run of cases."[176] Although this burden is relatively light, Barnett had argued that his burden should be lighter: he argued it should be limited to demonstrating that the accommodation would be effective.[177] In support of this argument, Barnett emphasized that the ADA requires the employer to bear the burden of proof on whether an accommodation imposes an "undue hardship."[178] As Mark Weber has subsequently emphasized, the fact that the ADA provides a detailed definition for the term "undue hardship" but no definition of "reasonable" suggests that courts should understand "reasonable" and "undue hardship" not as two separate hurdles but instead as alternate descriptions of the same statutory limit on defendants' duty to accommodate.[179] This view of the statute suggests that, contrary to the Supreme Court's holding in *Barnett*, defendants should bear the entire burden of proof on the scope of their accommodation obligations.[180]

The ADAAA's stratification of the ADA's protected class provides an additional argument for placing the burden of proof solely on the employer. The effects-based discrimination claims available to disfavored "tier two" plaintiffs place the entire burden of persuading the fact-finder about the appropriateness of changing standard operating procedure on the employer.[181] To avoid liability, the employer must prove, as an affirmative defense, that a policy that screens the plaintiff out is "job-related and consistent with business necessity."[182] Unlike the reasonable accommodations proof structure the Supreme Court created in *Barnett*, the ADA's effects-based discrimination provisions do not require plaintiffs to demonstrate that a waiver or modifica-

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173 *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (2002); Atkins v. Salazar, 677 F.3d 667, 681–82 (5th Cir. 2011); Riechmann v. Cutler Hammer, Inc., 183 F. Supp. 2d 1292, 1296 (D. Kan. 2001).

174 535 U.S. 391 (2002).

175 Weber, *supra* note 3, at 1124.

176 *US Airways*, 535 U.S. at 401.

177 *Id.* at 399.

178 *Id*.

179 Weber, *supra* note 3, at 1165–66.

180 *See id*.

181 *Id.* at 1149–50.

182 42 U.S.C. § 12113(a) (2012).

tion of the challenged policy is "reasonable on its face" or reasonable "ordinarily or in the run of cases."[183] Instead, they must simply (1) identify the policy, (2) demonstrate that the policy screened them out due to their impairment, and (3) demonstrate that they are "otherwise qualified" for the desired position.[184] The burden of proof on the question of whether the employer must waive or modify the policy rests solely on the employer.[185]

To ensure that the reasonable accommodations remedies available solely to "tier one" class members are not more difficult for plaintiffs to obtain than the parallel remedies available to "tier two" plaintiffs, the Supreme Court should consider making the plaintiff's burden for reasonable accommodations claims more similar to the plaintiff's burden for effects-based discrimination claims. In other words, the Supreme Court should consider limiting the plaintiff's burden in a reasonable accommodations case to (1) demonstrating that the accommodation will be effective, (2) demonstrating that the plaintiff's disability creates the need for accommodation, and (3) demonstrating that the plaintiff is "otherwise qualified" for the desired position.[186] The remaining question of whether the ADA requires the accommodation should rest solely on the employer's arguments that the proposed accommodation constitutes an undue hardship.[187]

B. *The Essential Functions Provision Should Not Circumvent the Undue Burden Analysis*

Relatedly, the ADAAA's stratification of the ADA's protected class provides courts an opportunity to reexamine their deference to employers'

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183 US Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002).

184 Atkins v. Salazar, 677 F.3d 667, 681 (5th Cir. 2011) ("Once an employee shows that a qualification standard tends to screen out an individual with a disability, the employer shoulders the burden of proving that the challenged standard is job-related and consistent with business necessity." (quoting Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 862 (9th Cir. 2009))).

185 *See* 42 U.S.C. § 12113(a) (2012); *cf.* Riechmann v. Cutler Hammer, Inc., 183 F. Supp. 2d 1292, 1296 (D. Kan. 2001) ("[T]he Title VII disparate impact and business necessity principles set forth in *Griggs v. Duke Power*, 401 U.S. 424 (1971), should apply to analogous cases under the Rehabilitation Act in which employers used tests or other selection criteria that tended to screen out handicapped persons.").

186 Additionally, the fact that "tier one" plaintiffs may bring "disparate impact on one" claims as well as reasonable accommodation claims makes it seem unlikely that Congress intended that plaintiffs bear any burden on whether an employer must provide a particular accommodation, other than proving that they are eligible for accommodations and that the proposed accommodation will be effective. It seems unlikely that Congress would have wanted "tier one" plaintiffs to choose between sharing the burden of proof and damages. Some plaintiffs may plead in the alternative: leading with a reasonable accommodation claim in order to obtain damages and then, if that fails, arguing "disparate impact on one," which places the burden of proof solely on the defendant. It seems unlikely Congress intended to introduce this unnecessarily complex proof structure.

187 42 U.S.C. § 12112(b)(A) (2012).

views about which elements of a job are "essential functions" that cannot be altered via the reasonable accommodations provision.[188] As originally conceived, the essential functions limitation's role was to prevent employers from excluding individuals with disabilities for their inability to perform minor tasks that were not essential to the position they sought.[189] However, as Michelle Travis has observed, employers have skillfully turned the essential functions provision to their advantage by capitalizing on two lines of precedent related to the essential functions limitation.[190] The first provides that eliminating an essential function is never a reasonable accommodation.[191] The second provides that courts should consider employers' views about which job functions are essential.[192] With these precedents in mind, employers and their advisors cleverly craft job descriptions that effectively label the absence of a need for accommodation as an "essential job function."[193]

For example, even though the text of the ADA indicates that "[t]he term 'reasonable accommodation' may include . . . job restructuring, part-time or modified work schedules,"[194] employers have successfully argued that the ability to rotate every two weeks between day, evening, and overnight shifts is an essential job function.[195] Similarly, even though the EEOC concludes that unpaid leave may be a reasonable accommodation,[196] some courts have

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188 *Id.* § 12111(8) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, ...").

189 *Id.* ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."); 29 C.F.R. § 1630.2(n)(1) (2015) ("The term *essential functions* means the fundamental job duties of the employment position . . . [and] does not include the marginal functions of the position.").

190 *See* Michelle A. Travis, *Disqualifying Universality under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1697 (2015) (observing that "the 'essential functions' component of the qualifications test has become the critical source for undermining the ADAAA.").

191 29 C.F.R. app. § 1630.2(o) (2015) ("An employer or other covered entity is not required to reallocate essential functions.").

192 42 U.S.C. § 12111(8) (2012) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.").

193 *See* Travis, *supra* note 190, at 1699–1702 (collecting evidence demonstrating that employer-side advocates have advised employers to draft broad job descriptions in order to prepare to defend against failure to accommodate claims).

194 42 U.S.C. § 12111(9)(B) (2012).

195 *See, e.g.*, Rehrs v. Iams Co., 486 F.3d 353, 359 (8th Cir. 2007) (concluding that shift rotation was an essential function of the plaintiff's job); *see also* Tucker v. Mo. Dept. of Soc. Servs., No. 2:11–CV–04134–NKL, 2012 WL 6115604, at *4–6 (W.D. Mo. Dec. 10, 2012) (accepting employer's assertion that the ability to work the day, evening, and overnight shifts was an essential job function).

196 *See* 29 C.F.R. app. § 1630.2(o) (2015) (identifying unpaid leave as an accommodation).

accepted employers' assertions that "regularly attending work on-site is essential to most jobs."[197]

When courts permit employers to reframe the ability to work without a reasonable accommodation as an essential job function, employers circumvent the critical inquiry that the ADA requires: whether a requested accommodation (such as avoiding the overnight shift or taking an unpaid leave) would impose an undue burden on the employer's business. In lieu of this inquiry, some courts appear to apply an analysis akin to the defense applicable to effects-based discrimination claims, which permits employers to avoid liability by proving that the challenged policy is job-related and consistent with business necessity.[198]

In perhaps the most explicit example of this approach, the Sixth Circuit in *E.E.O.C. v. Ford Motor Co.*[199] applied the "job-related and consistent with business necessity"[200] test to uphold an employer's refusal to permit telecommuting as a reasonable accommodation.[201] It held that employers are entitled to summary judgment when the employer's judgment that a particular job function (such as physical presence at the employer's worksite) is essential is "job-related, uniformly-enforced, and consistent with business necessity."[202]

The ADAAA's stratified protected class highlights the problem with applying this deferential "job-related, uniformly-enforced, and consistent with business necessity" defense to reasonable accommodations claims.[203] As discussed above, this defense applies to "tier two" plaintiffs' effects-based discrimination claims. Accordingly, if a shift rotation or "no telecommuting" policy screens out a "tier two" plaintiff, the employer may avoid liability simply by demonstrating that the policy is "job-related and consistent with business necessity."[204] In order to fulfill Congress's intent for "tier one" plaintiffs to have more statutory muscle to compel workplace change than "tier two" plaintiffs, courts should not apply the "job related and consistent with business necessity" standard to accommodation claims.[205] They should instead apply the more demanding undue burden analysis, which uniquely applies to the reasonable accommodations claims available only to "tier one" class members.

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197 EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015) (en banc). *See also* Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013); Brown v. Honda of Am., No. 2:10-cv-459, 2012 WL 4061795, at *6 (S.D. Ohio Sept. 14, 2012).

198 *Ford Motor Co.*, 782 F.3d at 765–66.

199 782 F.3d 753 (6th Cir. 2015) (en banc).

200 42 U.S.C. § 12113(a) (2012).

201 *Ford Motor Co.*, 782 F.3d at 766.

202 *Id.* (quoting Tate v. Farmland Indus., Inc. 268 F.3d 989, 993 (10th Cir. 2001)).

203 *Id.*

204 42 U.S.C. § 12113(a) (2012).

205 *Id.*

C. *Reassignment Preferences Should Be Available to "Tier One" Plaintiffs*

Congress's intent to provide "tier one" ADA plaintiffs more statutory muscle to compel workplace change than "tier two" plaintiffs may also facilitate resolution of the longstanding controversy about the ADA provision naming "[r]eassignment to a vacant position" as a "reasonable accommodation."[206]

Some courts, hewing closely to the ADA's text, conclude that when no reasonable accommodation would enable an employee with a disability to remain in his or her current job, the employer must reassign the employee to a vacant position for which the employee is qualified, even if another employee with superior qualifications also expresses interest in the vacant position and the employer would normally hire the most qualified applicant.[207] These courts emphasize that the statute expressly identifies "[r]eassignment to a vacant position" as a "reasonable accommodation."[208] They reason that because other ADA provisions already require employers to permit employees with disabilities to compete on an equal basis with other employees, the reassignment provision must require employers to do more for employees whose disabilities prevent them from continuing in their current positions.[209] Accordingly, they conclude that the reassignment provision requires employers to transfer such persons to vacant positions for which they are qualified, even if a more highly qualified employee requests to be transferred as well.[210]

Other courts, by contrast, are unwilling to conclude that the ADA's reassignment accommodation requires employers to prefer persons with disabilities over more qualified applicants when the employer would normally rely on merit-based selection.[211] They reason that doing so would amount to "affirmative action with a vengeance" and "giving a job to someone solely on the basis of his status as a member of a statutorily protected group."[212] As

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206 *Id.* § 12111(9)(B); Anderson, *supra* note 7, at 1–2 ("One of the most controversial provisions of the Americans with Disabilities Act (ADA) is the duty to reassign an employee with disabilities to a vacant position as a form of reasonable accommodation.") (footnote omitted); Befort & Donesky, *supra* note 7, at 1056 ("Of all the accommodations listed in the ADA, the reassignment accommodation has generated the most litigation and fueled the greatest amount of controversy.") (footnote omitted). The Supreme Court granted certiorari to decide this issue but subsequently dismissed the case when the parties settled. *See* Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008) (dismissing writ of certiorari).

207 *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc).

208 42 U.S.C. § 12111(9)(B) (2012). *See Smith*, 180 F.3d at 1164; *Aka*, 156 F.3d at 1302.

209 *Smith,* 180 F.3d at 1164; *Aka*, 156 F.3d at 1302.

210 *Smith,* 180 F.3d at 1164; *Aka*, 156 F.3d at 1302.

211 *See, e.g.*, Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2007); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).

212 *Huber*, 486 F.3d at 484 (quoting EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000)).

these statements suggest, these courts find it difficult to characterize an absolute right to reassignment as the removal of an arbitrary barrier to equal employment opportunity.[213] They note that it appears more analogous to a disability-based preference than "requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing."[214]

The ADAAA's stratified protected class provides a new tool to navigate this longstanding dispute. By creating a secondary category of ADA plaintiffs ineligible for "reasonable accommodation" claims but eligible for effects-based discrimination claims, the ADAAA directs courts to read the ADA's "reasonable accommodation" provision more broadly than the ADA's effects-based discrimination provisions. In this way, the ADAAA suggests that the fact that an absolute right to reassignment "fits uncomfortably at best"[215] with disparate impact law may not be sufficient reason to conclude that an absolute right to reassignment is not a reasonable accommodation. Courts may adopt a robust reading of the ADA's reassignment provision in order to implement congressional intent that the ADA should provide greater benefits to "tier one" ADA plaintiffs than to "tier two" plaintiffs.

CONCLUSION

This article has argued that the ADAAA's stratified class provides a new argument for expanding reasonable accommodations law. By creating a secondary tier of protected class members ineligible for reasonable accom-

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213 *See* Crossley, *supra* note 79, at 942 n.348 ("Certainly, if it is conclusively established that the ADA requires [an employer to reassign a disabled employee to a vacant position even when a better qualified employee or applicant seeks that position], then the reassignment accommodation will function much like affirmative action in preferring a group member over a non-group member. . . . It is difficult to imagine how giving an already-employed disabled person a right of reassignment to a position for which he is qualified, but not the best qualified, is meant to compensate that individual for the lingering effects of discrimination against people with disabilities.").

214 *Humiston-Keeling, Inc*., 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

215 Mary Crossley, *supra* note 79, at 943 n.348. *See also* Anderson, *supra* note 9, at 1315 ("By granting individuals with disabilities the right to an open position, even if there are other, more qualified individuals the employer ordinarily would choose, the ADA in effect creates a straight-forward preference for individuals with disabilities.") (footnote omitted); *id*. at 1315–16 (noting that "[c]ommentators who have argued that reasonable accommodation is not different, that it fits within the realm of already-existing anti-discrimination doctrine, conspicuously avoid mentioning reassignment in their arguments."); Befort & Donesky, *supra* note 7 at 1059 ("[T]he reassignment accommodation has the effect of providing a preference to the rights of the disabled over those of the non-disabled.") (footnote omitted); *id.* at 1082 ("The similarities between reasonable accommodation and affirmative action are most acute when the accommodation in question is reassignment. For reassignment, as with affirmative action, protected class status serves as a preferential basis for selecting someone to fill a job position."); Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J. L & FEMINISM 213, 222 (1997) ("The controversy surrounding whether or not the ADA is an 'affirmative action' statute is largely centered on [the reassignment provision].").

modations, the ADAAA casts a spotlight on other ADA provisions that require workplace change. Close examination of the ADA's long-dormant effects-based discrimination provisions reveals that the workplace changes they require substantially overlap the workplace changes required by current reasonable accommodations doctrine. Therefore, in order to fulfill Congress's intent to provide "tier one" class members more statutory muscle to compel workplace change than "tier two" class members, courts should revisit pre-ADAAA assumptions about the scope and proof structure surrounding reasonable accommodations claims.