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The Emerging Trend of Extending ADA Reasonable Accommodation  
beyond the Workplace to Include Commuting Issues: A comment on  
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# THE EMERGING TREND OF EXTENDING ADA REASONABLE ACCOMMODATION BEYOND THE WORKPLACE TO INCLUDE COMMUTING ISSUES: A COMMENT ON *COLWELL V. RITE AID*

By Frederick J. Melkey<sup>1</sup>

## I. Introduction

### A. *Colwell v. Rite Aid Breaks New Ground*

The Americans with Disability Act<sup>2</sup> (“ADA”) requires an employer to provide *reasonable accommodation* to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.<sup>3</sup> The Equal Employment Opportunity Commission (“EEOC”) describes a reasonable accommodation as “any change *in the work environment* (or in the way things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.”<sup>4</sup> Historically, employers have understood that the scope of a “reasonable accommodation” is limited to the workplace.<sup>5</sup> As one court stated, “[w]hile an employer is required to provide reasonable accommodations that eliminate barriers *in* the work environment, an employer is not required to eliminate those barriers which exist *outside* the work environment.”<sup>6</sup>

Last year, the Third Circuit broke with historical precedent in the case of *Colwell v. Rite Aid Corp.*<sup>7</sup> It stated that the ADA “does not strictly limit the breadth of reasonable accommodations to address only those problems that an employee has in performing her work that arise once she arrives at the workplace.”<sup>8</sup> *Colwell* was in direct conflict with a Third Circuit unpublished decision by a different three judge panel.<sup>9</sup> This result led to concern within the employer community about judicial expansion of the reasonable accommodation requirement under the ADA.<sup>10</sup> Fueling employer concerns is a new unpublished decision in the Ninth Circuit, *Livingston v. Fred Meyer Stores, Inc.*<sup>11</sup> which favorably cites *Colwell*, and also finds that the employer needs to consider

a reasonable accommodation for the non-workplace commute.

*Colwell* has drawn limited commentary from the academic community. Professor Sullivan mentions in a blog posting that *Colwell* may implicate the existing EEOC guidance that the ADA does not require an employer to make accommodations primarily for the employee’s personal benefit.<sup>12</sup> As he points out, “getting to work is not exactly for personal benefit, but both cases [*Colwell* and a 1995 case which it cites] illustrate the occasional difficulty of drawing the work/personal line. Certainly, many employers view their workers’ commutation as their own responsibility.”<sup>13</sup>

This paper recommends that although much of the case law<sup>14</sup> has not interpreted the reasonable accommodation provision of the ADA as broadly as *Colwell*, the holding and reasoning should be adopted by other circuits. Both legislative history and public policy reasons militate in favor of this approach. Much like the courts chipped away at the ADA’s definition of a “person with a disability,” narrowing it to the point it required Congress to enact amendments in 2008 to overturn Supreme Court precedent,<sup>15</sup> the courts have been similarly limiting the interpretation of “reasonable accommodation.” I promote a return to requiring employers and employees to engage in the interactive process envisioned by the ADA in circumstances similar to those in *Colwell*. A broader reading of the ADA’s reasonable accommodation requirements would not be judicial expansion, but a return to both the original meaning of the Act and the intent of Congress when it enacted the ADA twenty years ago. To that end, *Colwell* is not really breaking new ground; it is *replacing the divot*<sup>16</sup> made by courts as they have taken repeated swings at the statute.

B. *A Summary of the Original and Continuing need for the ADA*

People with disabilities have endured an inferior economic position in American society.<sup>17</sup> Before passage of the ADA in 1990

[T]wo out of every three disabled Americans of working-age were not employed, and two of three who were not working wanted to be, the income of disabled workers was about thirty six percent less than that of their nondisabled counterparts, and in 1984 fifty percent of adults with disabilities had household incomes of \$15,000 or less, compared to only twenty-five percent of non-disabled adults.<sup>18</sup>

Many of these trends continue to this day. In November of 2010, more than two out of three working-age people with disabilities were still not employed; those without disabilities were employed at roughly twice that rate.<sup>19</sup> As the Department of Labor recently articulated in a news release seeking public input on ways to strengthen disability regulations

...the rate of disabled people who are unemployed or not in the labor force remain[s] significantly higher than those without disabilities. According to recent data from the U.S. Department of Labor's Bureau of Labor Statistics, 21.7 percent of people with disabilities were in the labor force in June 2010, compared with 70.5 percent of people with no disability. In addition, the unemployment rate for those with disabilities was 14.4 percent, compared with 9.4 percent unemployment for those without a disability.

"Work is central to every person's financial independence, sense of self and integrity," said OFCCP Director Patricia A. Shiu.<sup>20</sup>

This poor experience of the disabled in the workplace can not be explained solely by the types of prejudice encountered by racial and ethnic minorities,

women, and the elderly.<sup>21</sup> Many disabilities prevent effective performance in a broad variety of jobs.<sup>22</sup> Moreover, employers may find it efficient to refuse to hire anyone with particular disabilities regardless of their ability to do the job because employers have structured their work processes and physical facilities for the average non-disabled worker.<sup>23</sup> "The lowering of this type of barrier to the equal participation of individuals in the workforce requires regulation beyond the mere condemnation of unequal treatment on the basis of disability as a suspect, protected class."<sup>24</sup> Instead, it requires the employers make accommodations for the disabled in the workplace. How far the employer must go to make *reasonable accommodations* is a policy choice with many facets.<sup>25</sup>

## II. The History of Workplace Disability Legislation

### A. *The Precursor to the ADA: The Rehabilitation Act of 1973*

In its first significant treatment of how far employers must go to provide accommodation for disabled employees, Congress stopped short of imposing obligations on private employers that could not pass the costs along to the federal government.<sup>26</sup> The Rehabilitation Act of 1973<sup>27</sup> made the policy choice that those accommodation costs be assessed upon federal sector employers, federal contractors, and other employers receiving federal financial assistance.<sup>28</sup>

"The 1973 Act, in addition to increasing funding for vocational rehabilitation, sought to eradicate discriminatory *and other barriers* to the hiring of disabled workers."<sup>29</sup> Part of the purpose stated in the statute is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living."<sup>30</sup>

"Section 501 imposes affirmative action obligations on federal agencies. Section 502 seeks to remove physical barriers in federal buildings. Section 503 levies affirmative action duties on all federal contractors with contracts in excess of \$10,000. These duties extend to all of the contractors' operations."<sup>31</sup>

Section 504 prohibits federal programs and any program or activity receiving federal funding assistance from discriminating against “otherwise qualified individual[s] with a disability . . . solely by reason of her or his disability.”<sup>32</sup> Thus, the Rehabilitation Act of 1973 goes beyond the neutral treatment of people with disabilities to require something more to ensure opportunities in employment.

#### B. ADA: *The American’s with Disabilities Act of 1990*

“Congress rarely writes on a clean slate, and the ADA is no exception to this rule. Congress drew heavily on section 504 and its regulations when enacting the ADA.”<sup>33</sup> Seventeen years after enacting the Rehabilitation Act, Congress took the next step of imposing similar obligations on all but the smallest private employers by enacting the Americans with Disabilities Act.<sup>34</sup> Supreme Court Justice Stevens noted

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA’s enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. Central among these conclusions was Congress’ finding that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from

stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” 42 U.S.C. § 12101(a)(7).

Invoking “the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,” the ADA is designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” §§ 12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.<sup>35</sup>

Also key within the employment context is that the ADA defines a “qualified individual with a disability” to mean “an individual with a disability who, with or without a *reasonable accommodation* can perform the essential functions of the employment position that such individual holds or desires.”<sup>36</sup> It also expressly includes as a category of discrimination “not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity.”<sup>37</sup> As such, the ADA “clearly seems to require employers something more than formally neutral treatment.”<sup>38</sup>

#### C. ADAAA: *The ADA Amendments Act of 2008*

The ADA Amendments Act of 2008<sup>39</sup> (ADAAA) is the most recent legislative response to the issues people with disabilities face. The ADAAA “represents a fairly dramatic change in disability law.”<sup>40</sup> As Professor Long observes, many of the objectives of the ADA were never realized

When the first President Bush signed the original Americans with Disabilities Act (ADA) into law in 1990, he said it was time “to rejoice in and celebrate another ‘Independence Day,’ one that is long overdue.” For the 43 million Americans with disabilities, the ADA was supposed to represent the opening of doors that had long been closed. Employers, state and local governments, and private businesses—from bowling alleys to restaurants—would now be required to make reasonable modifications to their facilities, policies, and procedures in order to allow full participation by individuals with disabilities. In short, expectations for the ADA were high.

This probably explains why the ADA is viewed so widely by disability rights advocates and its original authors as such a huge disappointment, especially in the employment context. Studies consistently reveal that, despite the ADA, employees who claim to be the victims of disability discrimination in the workplace face long odds. . . .

The ADA Amendments Act of 2008 sets out to address some of the more controversial and problematic aspects of the definition of disability.<sup>41</sup>

The ADAAA is a legislative response to years of judicial narrowing of that definition as it specifically abrogates several Supreme Court rulings.<sup>42</sup> The statute indicates that the purpose is to “carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA”<sup>43</sup> This expanded definition of disability means that more people will be able to pass the initial coverage threshold, and be able to enter the interactive process in which an employer must consider reasonable accommodations.<sup>44</sup>

One issue that has recently divided the circuit courts is whether an employer must provide

a reasonable accommodation to an individual that it merely “regards as” having a disability.<sup>45</sup> “The Act provides that employers and other covered entities ‘need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets’ the ‘regarded as’ definition. Thus, the new amendments effectively end the ongoing dispute among the courts on this issue.”<sup>46</sup> Congress did not address other aspects of reasonable accommodations.

### III. Defining a “Reasonable” Accommodation

#### A. Statutory Overview

Since *Colwell* is in the employment context, this paper focuses on the meaning of a Reasonable Accommodation within Title I of the ADA.<sup>47</sup> “One of the most elusive concepts in the ADA is that of ‘reasonable accommodation’ in the context of employment.”<sup>48</sup> There are several sections and definitions of terms that must be read together to establish the standard for providing a reasonable accommodation.

To avoid discriminating against a *qualified person with a disability*, the text of the statute requires that the employer “mak[e] *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity.”<sup>49</sup> The definitions section provides some clues to the meaning of this passage. First, it defines a “qualified individual” as “an individual who, with or without *reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires.”<sup>50</sup> However, the very next sentence of the statute provides a surprise. “The ADA does not define ‘reasonable accommodation.’ Instead, it lists examples of what the term may include.”<sup>51</sup>

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.<sup>52</sup>

While the accommodations in sub-paragraph A require physical changes to the workplace, those in sub-paragraph B are mandatory departures from neutral employer practices.<sup>53</sup> As Professor Weber observes

In the text of the ADA, Congress buttressed its requirement that employers depart from otherwise neutral rules by prohibiting standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability, as well as by outlawing qualification standards, employment tests, or other selection criteria that tend to screen out persons with disabilities unless the standard, test, or other criterion is shown to be job-related and consistent with business necessity. So not only may a variance or departure from an otherwise neutral rule or practice be required as a matter of reasonable accommodation, but also the neutral rule itself may be illegal when applied to an applicant or employee with a disability if it has a discriminatory effect or unjustified negative impact.<sup>54</sup>

Another key part of understanding the duty to provide a reasonable accommodation is the limitation is that it must fall below the threshold of an *undue hardship*. “Unlike reasonable accommodation, ‘undue hardship’ receives a statutory definition.”<sup>55</sup> It includes not only a definition, but also a detailed list of factors to consider when making the determination.

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

#### (B) Factors to be considered

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

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>56</sup>

Reading these portions of the statute together, “[t]he text and structure of the statute suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer.”<sup>57</sup>

#### B. EEOC Interpretation

Under the familiar *Chevron* doctrine, courts must grant deference to the EEOC’s interpretation of the ADA where it is reasonable.<sup>58</sup> “With regard to

reasonable accommodation and undue hardship, the EEOC regulations for Title I of the ADA repeat the prohibition in the statute, stating that it is unlawful for covered entities to fail to make reasonable accommodations unless they can demonstrate that the accommodation would impose an undue hardship on the business operations of the employer.”<sup>59</sup> Without providing a more detailed definition or factors to consider, “[l]ike the statute, the regulations rely more on example or typology than definition when discussing reasonable accommodation.”<sup>60</sup> The EEOC regulations state that

[t]he term reasonable accommodations means: (i) [m]odifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) [m]odifications or adjustments to the work environment, or the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) [m]odifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

The regulations save their definitional language for undue hardship, and essentially track the statute when they provide the definition. The regulations specifically list difficulties imposed on co-workers, not as part of what may make an accommodation unreasonable, but as part of what may make hardship undue for the employer.<sup>61</sup>

The EEOC Interpretative Guidance does go a bit deeper and provides additional examples and categories of possible accommodations.

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or *modified work schedules*;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.<sup>62</sup>

The Interpretive Guidance goes further in describing the requirements related to modifying work schedules as a reasonable accommodation in question and answer format with three examples of how it applies.

Must an employer allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship?

Yes. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.

Example A: An employee with HIV infection must take medication on a strict schedule. The medica-

tion causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule. Employers should carefully assess whether modifying the hours could significantly disrupt their operations — that is, cause undue hardship — or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m.–3:00 p.m. to 10:00 a.m.–6:00 p.m. because of her disability. The day care center is open from 7:00 a.m.–7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function

of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.<sup>63</sup>

“The Supreme Court views EEOC interpretations of this type as less than controlling authority but notes that they ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”<sup>64</sup> However, they do establish the guideposts for how the administrative agency responsible for enforcing the ADA views an employer's responsibility in making adjustments to work schedules, and the types of cases the EEOC might choose to pursue.

### C. *The Supreme Court Standard from U.S. Airways, Inc v. Barnett*

Although many aspects of ADA have come before the Supreme Court,<sup>65</sup> only one case addresses the reasonable accommodation requirement of the act, *U.S. Airways, Inc v. Barnett*.<sup>66</sup> “Robert Barnett injured his back while working as a cargo handler for U.S. Airways and transferred to a mailroom position that was less physically demanding. Two years later, Barnett's position became open for seniority-based employee bidding, and Barnett learned that employees senior to him planned to bid for it.”<sup>67</sup> At this point, he became “[c]oncerned that he would be forced to transfer back to his cargo position.”<sup>68</sup> “Barnett asked U.S. Airways to accommodate his disability under the ADA by granting him an exemption from seniority rules so that he could remain in the mailroom. U.S. Airways denied Barnett's request, and shortly thereafter Barnett lost his job.”<sup>69</sup>

The Ninth Circuit initially affirmed the district court's grant of summary judgment for U.S. Airways, but upon rehearing en banc, the full panel reversed and remanded. Rejecting the notion that a seniority system always trumps reasonable accommodation considerations, the panel held that the presence of a

seniority system is merely “a factor in the undue hardship analysis.” The panel demanded that courts undertake a “case-by-case fact intensive analysis” to ascertain whether the requested reassignment would impose an undue hardship on the employer. Reviewing the record, the court concluded that a trial was needed to resolve the factual dispute in Barnett’s case.<sup>70</sup>

The Supreme Court decided in a 5-4 decision to vacate the Ninth Circuit’s en banc ruling and remanded.<sup>71</sup>

Writing for the Court, Justice Breyer rejected both parties’ “radically different” views and adopted a compromise position. He began his analysis by criticizing U.S. Airways’ interpretation of the ADA as requiring only “equal” (as opposed to preferential) treatment of disabled workers. On the contrary, the ADA’s focus on “accommodation” implies the need for differential treatment, and therefore “preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.” Bolstering this interpretation is the fact that neither Congress nor the lower courts have suggested that neutral work policies—such as neutral furniture budget rules—justify automatically exempting employers from ADA requirements. The Court then launched an equally disapproving attack on Barnett’s interpretation of “reasonable accommodation” as “effective accommodation.” It is not enough, the Court wrote, for an employee to prove that her proposed accommodation will effectively meet her disability-related needs. The employee must also demonstrate that the proposed accommodation “seems reasonable on its face,” meaning that the

accommodation would be reasonable “in the run of cases.”

Having concluded that the ADA may mandate preferential treatment but requires proof of reasonableness, the Court then applied its analysis to the particularities of Barnett’s seniority system challenge. Concurring with other courts, the majority recognized the beneficial effects of seniority systems on employee-management relations: most notably, they cabin management discretion, thereby inducing employee expectations of fair, standardized treatment. It follows that employers and nondisabled employees would suffer greatly if courts granted disabled employees automatic superseniority rights for reassignment purposes under the ADA. Therefore, the Court held, it would not “ordinarily” be reasonable for an ADA job reassignment to trump seniority rules, and an employer’s showing that an assignment would violate the rules of a seniority system would warrant summary judgment for the employer “in the run of cases.”

But in keeping with its compromise analysis, the Court also held that an employee could avoid summary judgment by demonstrating that “special circumstances” exist. Such special circumstances might include evidence that the seniority system already contains so many exceptions, or is altered unilaterally by the employer so frequently, that allowing an exception for disabled employees would not significantly alter employee expectations. Because Barnett had not yet had the opportunity to make such a showing, the Court remanded the case for further proceedings.<sup>72</sup>

The close 5-4 decision drew a concurrence and two dissents.<sup>73</sup> Justice Souter's dissent sided with Barnett, and argued in favor of the Ninth Circuit's case-by-case, fact-intensive approach, under which a seniority system would be merely one factor in a court's analysis of undue hardship limitation.<sup>74</sup> His dissent notes nothing in the ADA insulates seniority rules from the reasonable accommodation requirement which is in marked contrast to the Age Discrimination in Employment Act of 1967 (ADEA) and Title VII.<sup>75</sup> Admitting that statutory silence is ambiguous, Justice Souter cited legislative history that used the "factor" formula as evidence to support his position that seniority rules do not automatically trump reassignment rights.<sup>76</sup>

However, the ADA is distinct from other civil rights statutes due to its emphasis on "reasonable accommodation."<sup>77</sup>

Because Barnett was the Court's first stab at interpreting this core term, one might have expected the opinion to address the special implications of the phrase and the additional responsibilities and costs employers must assume to respond adequately to the distinct problem of disability discrimination. Instead, the Court treated the ADA as more of the same—as if in drafting the ADA, Congress merely intended to add disability to the long list of classifications already protected by Title VII and the ADEA, and to restate the Rehabilitation Act with only slight modification. Accordingly, the Court simply imported case law from other areas of civil rights law and cited it as persuasive authority without fully justifying its application to an ADA claim. . . .

To be sure, reasoning by analogy often drives our legal system forward and is frequently an indispensable tool for statutory interpretation of recently passed legislation. But a critical component of reasoning by analogy is an explanation of why it is appropriate to treat the issue at

bar in accordance with the already-decided issue. That the Barnett majority neglected to include this component leaves it open to the charge that it imply overlooked—instead of considering and rejecting—differences between the ADA and other antidiscrimination statutes.

The analogies to other civil rights statutes are especially strained in light of the evidence that Congress intended the ADA to perform somewhat differently. As Justice Souter noted in his Barnett dissent, Title VII and the ADEA explicitly insulate seniority rules from the reasonable accommodation requirement; in marked contrast, the ADA does not. While the ADA's silence certainly does not, on its own, mandate less deference to seniority systems under the ADA, legislative history suggests the possibility. The House and Senate Reports for the ADA explicitly limit an employer's ability to use collective bargaining agreements to avoid compliance with the ADA. Moreover, the Senate Report explains that courts should consider a collective bargaining agreement that reserves certain jobs for senior employees as only "a factor" in the decision whether to require the requested accommodation, and the House Report clarifies that "the agreement would not be determinative on the issue." Barnett's presumption that seniority rights trump the ADA's reasonable accommodation provision seems to ignore these statements.<sup>78</sup>

"The Barnett Court's holding is a relatively narrow one: an employer generally need not reassign a disabled employee as a reasonable accommodation if doing so would conflict with the terms of an employer's seniority policy, unless special circumstances justify a different result."<sup>79</sup> As such, it

does not provide any clear black-letter law on which to analyze the facts of *Colwell v. Rite Aid*. As Professor Befort concludes

The fundamental shortcoming of the Barnett decision . . . is in the Court's failure to provide adequate guidance for future controversies. The Court is imprecise with respect to the type of "special circumstances" that will overcome the presumption of unreasonableness in requiring a reassignment in the face of a conflicting seniority system. The Court does not explain how its ruling will impact the balance of reassignment and other types of transfer and assignment policies. The Court fails to articulate a clear allocation of the burden of proof responsibilities with respect to establishing a reasonable accommodation. And, finally, the Court falls short of demarcating when, if ever, an accommodation should be deemed unreasonable by virtue of the fact that it requires the provision of preferential treatment for the disabled.

....

Justice O'Connor's concurring opinion in Barnett provides an appropriate touchstone for the unanswered questions relating to the reassignment accommodation. According to [her], reassignment is unreasonable if someone other than the disabled employee seeking a transfer has a legally enforceable entitlement to the position in question. This standard provides a predictable basis for determining Barnett's special circumstances exception to the presumption favoring seniority systems. More broadly, this standard calls for an undue hardship-based test for determining whether reassignment

should prevail over other types of transfer and assignment policies.<sup>80</sup>

#### D. *The Facts of Colwell v. Rite Aid*

Jeanette Colwell worked as a part-time cashier at a Rite-Aid pharmacy<sup>81</sup>. She would primarily work weekday shifts from 5 p.m. to 9 p.m.<sup>82</sup> Her personal preferences were listed as 9 a.m. to 2 p.m. or 5 p.m. to 9 p.m.<sup>83</sup> During her employment, she was recognized by her superiors for good performance.<sup>84</sup> She subsequently developed a vision impairment that caused her to lose sight in her left eye; but this did not affect her ability to fully perform all of the essential functions of her job.<sup>85</sup> Colwell informed her supervisor that her impairment made it dangerous and difficult for her to drive at night and requested that she be assigned only to the day shifts.<sup>86</sup> Her supervisor denied her request, stating that allowing her to work only day shifts "wouldn't be fair" to other employees.<sup>87</sup> In the meantime, Colwell had family members drive her to and from work. Although she did not miss any work, Colwell claimed this arrangement posed a hardship to her family, and renewed her request for a day shift only schedule.<sup>88</sup> Rite-Aid continued to schedule her for a mixture of day and night shifts.<sup>89</sup> After unsuccessfully engaging her union representative in the dialogue, Colwell ultimately submitted her resignation complaining of unfair treatment.<sup>90</sup>

The District Court granted summary judgment for Rite Aid on the ADA claim, concluding that while Colwell was an individual with a disability, she did not suffer any adverse employment action cognizable under the ADA.<sup>91</sup> Specifically, the District Court found that because Colwell did not need any reasonable accommodation in order to perform the essential functions of her job, Rite Aid had no obligation to consider her shift transfer request and "had no duty to accommodate her commute to work."<sup>92</sup> It viewed such a request as "tantamount to making an employer responsible for how an employee gets to work, a situation which expands the employer's responsibility beyond the ADA's intention."<sup>93</sup> On Colwell's appeal, the Third Circuit reversed. It held that "as a matter of law that changing her working schedule to day shifts in order to alleviate her disability-related difficulties in getting

to work is a type of accommodation that the ADA contemplates.”<sup>94</sup>

### **E. A Review of other ADA Commuting cases preceding *Colwell***

The year before *Colwell*, a different three judge panel in the Third Circuit ruled in the unpublished commuting related ADA case of *Parker v. Verizon Pennsylvania, Inc.*<sup>95</sup> In this case, Verizon had conformed to a number of components of Parker’s accommodation request, but denied a transfer to a location that would have shorted his commute as suggested by his physician.<sup>96</sup> The Third Circuit stated that “Verizon’s failure to accommodate Parker by limiting his commute was not required.”<sup>97</sup> With no Third Circuit precedent on point, the Court cited two cases from other circuits it found persuasive.<sup>98</sup> The first was *Kvorjak v. Maine*, holding that “the [employer’s] decision to reject an accommodation based on [the employee’s] commute does not demonstrate a disregard for its obligations under the ADA.”<sup>99</sup> The facts and holding are distinguishable from both *Parker* and *Colwell* in that the basis for the courts decision was actually predicated on Kvorjak’s inability to perform the essential functions of his job at home, not that the accommodation requested was unreasonable because it rose to the level of undue hardship.<sup>100</sup> The second case was *LaResca v. American Telephone & Telegraph*, holding that “commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate.”<sup>101</sup> LaResca suffered from bouts of epilepsy and therefore could not drive himself to work. Although he could nonetheless perform all essential functions of the job, he was denied this accommodation under the New Jersey State Law Against Discrimination, not the ADA.<sup>102</sup>

Another example from a different circuit decision where the commute to work was excluded from the potential reasonable accommodations was in Florida. There, a school guidance counselor was denied a transfer to a closer school to reduce her commute in the case of *Salmon v. Dade County School Board*.<sup>103</sup> The Court reasoned that “the commute to and from work is an activity that is unrelated to and outside of her job. While an employer is required to provide reasonable accommodations that eliminate

barriers *in* the work environment, an employer is not required to eliminate those barriers which exist *outside* the work environment.”<sup>104</sup>

Before *Colwell*, the only recorded case going against precedent was the Second Circuit case *Lyons v. Legal Aid Society*, which held that employers must consider an accommodation related to the commute.<sup>105</sup> Lyons was an attorney who was injured in a near fatal automobile accident, and her resulting condition severely limited her ability to walk long distances.<sup>106</sup> Because her condition precludes her from taking public transportation, she asked her employer to pay for parking near her office and the courts in which she would practice.<sup>107</sup> The court reversed the summary judgment for the employer, holding that there is nothing “inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified employee with assistance in getting to work,” and remanded the case back to the trial court to establish a factual record as to whether this requested accommodation rose to the level of undue hardship for the employer.<sup>108</sup>

The Third Circuit in *Colwell* found the infrequently cited fifteen year old Second Circuit *Lyons* reasoning to be persuasive, stating

At least one other court of appeals has recognized this principle. In *Lyons v. Legal Aid Society* an employee who suffered severe physical impairments due to a car accident that prevented her from walking long distances sued her employer, Legal Aid, under the ADA in part for refusing to provide her financial assistance to pay for a parking space close to work. The Second Circuit held that the employee stated an ADA claim because, depending on the circumstances, such an accommodation might be reasonable. Although we voice no comment on that court’s holding that a reasonable accommodation could include funds to pay for an employee’s parking space, we agree with the court’s observation that “there is nothing inherently unreasonable, given the stated views of Congress and the agencies

responsible for overseeing the federal disability statutes, in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work.”<sup>109</sup>

#### **F. The Ninth Circuit follows *Colwell***

In an unpublished opinion, the Ninth Circuit recently followed *Colwell* in *Livingston v. Fred Meyers Stores, Inc.*<sup>110</sup> Similar to Jeanette Colwell, Michelle Livingston suffers from a vision impairment that affects her ability to safely drive and walk outside after dark.<sup>111</sup>

In the fall of 2005, Livingston’s supervisor granted Livingston’s request to work a modified schedule during the fall and winter months so that she could minimize driving after dark. In the fall of 2006, however, Fred Meyer Stores denied Livingston’s request for a modified schedule, even though the store had not experienced any hardship the previous year when Livingston was permitted to work under a modified schedule. In fact, Livingston was credited with increasing wine sales and improving the store’s ranking when she worked under the modified schedule.” When Livingston refused to work her scheduled shift, Fred Meyer fired her.<sup>112</sup>

The Court reversed the district court order granting summary judgment in favor of the employer and held that that Livingston had “raised a triable issue of material fact that Fred Meyer Stores failed to reasonably accommodate her and failed to engage in the interactive process in good faith.”<sup>113</sup>

#### **IV. Other Circuits Should Adopt the Holding and Reasoning of *Colwell***

##### *A. The Legislative History of the ADA Compels Adoption*

*Colwell* utilizes legislative history to reach the conclusion that an accommodation for a disability can extend to the workplace commute. It notes

Congress acknowledged that “modified work schedules can provide useful accommodations” and noted that “persons who may require modified work schedules are persons with mobility impairments who depend on a public transportation system that is not currently fully accessible.” ...Thus, the ADA does not strictly limit the breadth of reasonable accommodations to address only those problems that an employee has in performing her work that arise once she arrives at the workplace.<sup>114</sup>

When introducing the ADA, cosponsor Senator D’Amato specifically noted the daily struggles that people with disabilities face in getting to and from work.<sup>115</sup> “The barriers the disabled must overcome in order to meet basic needs are many. Activities accomplished with ease by most— communicating, *commuting*, or entering the workplace—are often significant hurdles for those with disabilities. This legislation (sic), Mr. President, will break down these barriers once and for all.”<sup>116</sup> Congress also considered that improvements to public transportation would help people with disabilities commute to work.<sup>117</sup> Also, it knew that handicapped parking spaces<sup>118</sup> and architectural improvements to the workplace such as ramps<sup>119</sup> would make it possible for people with disabilities to get into the workplace. Clearly, by enacting the ADA, Congress was concerned not only with accommodating workers once they somehow miraculously arrived inside the workplace, but they were also cognizant they needed to help people with disabilities to arrive at exterior of and to enter the workplace. Commuting to work is an important prerequisite to reducing the unemployment rate for people with disabilities, one of the key aims for the ADA.<sup>120</sup>

##### *B. Adopting Colwell is Consistent with Current Workplace Employment Trends and is Sound*

### *Public Policy*

It is well established that “[i]ssues related to getting to work keep many potential employees with disabilities from working to their fullest potential,”<sup>121</sup> and that the ADA was intended to be construed broadly.<sup>122</sup> Since the employment objectives of the ADA were never achieved,<sup>123</sup> construing the statute to cover situations such as those that arose in *Colwell* can help eliminate a key barrier to accomplishing those goals.

Outside of the realm of ADA accommodations, employers have been accommodating the needs of their employees with more workplace flexibility. For example, a recent study found that

[t]here are two changes in the provision of flexibility between 2008 and 1998: 79 percent of employers now allow at least some employees to periodically change their arrival and departure time, up from 68 percent. In addition, 47 percent of employers allow at least some employees to move from full-time to part-time work and back again while remaining in the same position or level, down from 57 percent.<sup>124</sup>

Considering work hour flexibility as a reasonable accommodation for people with disabilities would not be an unusual accommodation since it is offered to a large proportion of employees including those without disabilities. Public policy would be served by a broad adoption of *Colwell*.

### *C. Employers Retain the Undue Hardship Defense*

Holding that as a matter of law that issues related to the workplace commute must be considered within the realm of possible reasonable accommodations does not mean that the employer must automatically accommodate requests such as those made by Jeanette Colwell; employers still retain the undue hardship defense.<sup>125</sup> “An accommodation is *not* reasonable if it would impose an ‘undue hardship’ on the employer’s business.”<sup>126</sup> As described in Section II.B *supra*, this term ‘undue hardship’ is defined in the statute. “The cost for an employer must be more than *de minimus* before the undue hardship test will

be satisfied. . . . Each case must be decided on an individual basis.”<sup>127</sup>

In addition to cost, employer concerns in providing accommodations also include a threat to employee morale if some workers are provided with more flexibility in some workplace rules.

With respect to the impact on other employees, the undue hardship test will not be satisfied if the disruption to them results from fears or prejudices towards the individual’s disability and not from the provision of the accommodation. Nor is there an undue hardship if the accommodation negatively impacts on the morale of the other employees but does not affect those employees’ ability to perform their jobs.<sup>128</sup>

The courts have already addressed the issue of when changes to work schedules such as changing shifts for non-commute related commutes rise to the level of undue hardship,<sup>129</sup> so determining when this category of request reaches the level of undue hardship could be easily integrated with existing law and employer practices. Also, this reasonable accommodation-undue hardship determination requires close attention to the specific facts related to workplace characteristics for both the employer and the employee.<sup>130</sup> For example, more will be expected of larger employers, and less of smaller employers.<sup>131</sup> Because of the fact specific nature of the inquiry, juries should be the ones making the determination of what constitutes undue hardship instead of judges making a determination about reasonableness as a matter of law.<sup>132</sup>

### *D. Engaging in the Interactive Process on Work Schedules Makes Good Business Sense*

Employers have been providing flexible work schedules to their entire employee population on an increasingly frequent basis.<sup>133</sup> The benefits of these flexible work schedules benefit both the employee and the employer. One example is the Results-Only Work Environment (ROWE) program implemented at electronics retailer *Best Buy*. “The premise of

ROWE is that employees can do ‘whatever they want whenever they want as long as the work

gets done.”<sup>134</sup> Although the program was in response to employee feedback, it also provided benefits to the employer.<sup>135</sup> “ROWE teams at Best Buy report an average 3.2 percent lower voluntary turnover rates than non-ROWE teams and employees report that ROWE has changed their personal and work lives for the better. ROWE teams are also experiencing an average 35% increase in productivity.”<sup>136</sup> Other studies have also demonstrated the link between workplace flexibility, increased employee engagement, and reduced turnover.<sup>137</sup> Another example is that research suggests that providing employees more flexibility over their working patterns is likely to improve their health.<sup>138</sup> The improved outcomes were in the areas of “systolic blood pressure and heart rate, tiredness, mental health, sleep duration, sleep quality and alertness and self-rated health status,”<sup>139</sup> and was “also noted in well-being, such as co-workers’ social support and sense of community.”<sup>140</sup>

Since technology and workplace expectations change, employers should not rely on either past precedent or how they decided internally in a similar situation in the past. They should engage in the interactive process with each request for flexibility. Under the ADA, it is “clear that the [undue-hardship] burden should be viewed as dynamic, one that will change over time depending on what courts and juries consider appropriate as technology and social expectations change. If the social context of the statute has any significance at all, it is that accommodations that seemed beyond the pale yesterday will be considered ordinary tomorrow.”<sup>141</sup>

## V. Conclusion

In the introduction, this author admits to using hyperbole in choosing to say that *Colwell* “breaks new ground.” Although it is a break from the case law, the subsequent golf analogy of “replacing a divot” is also introduced to characterize the change as a shift back to the original meaning and intent of the ADA as passed by Congress and signed into law by President Bush. *Colwell* and *Livingston* are simply returns to an interpretation of the statute in harmony with Congress’s broad goal under Title I of the ADA in helping enable people with disabilities participate in the job market.

Judge Harold Leventhal is credited with saying that citing legislative history is akin to “looking over a crowd and picking out your friends.”<sup>142</sup> However, accommodating needs related to the workplace commute are not circumstances in which there are conflicting messages in the legislative history. There is no evidence that Congress intended to preclude the commute to the workplace from consideration as a possible reasonable accommodation; legislative history and the text of the statute both provide evidence to the contrary. Judge Sloviter was right when he wrote in *Colwell* that “changing Colwell’s working hour schedule . . . is a type of accommodation the ADA contemplates. The statute expressly says so.”<sup>143</sup>

The ADAAA of 2008 reduced the threshold for coverage under the act back to Congress’s original intent two decades earlier.<sup>144</sup> With increased coverage, I anticipate that there will be more opportunity for employers, and ultimately the courts to decide whether flexibility related to the workplace commute can be accommodated without creating undue hardship on the employer.<sup>145</sup> Employers should engage in the interactive process with employees or applicants with disabilities that have difficulty with commuting for two reasons. It not only makes good business sense, but is also what Congress commands.

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## Endnotes

<sup>1</sup> Frederick Melkey is a part-time evening student at the University of Connecticut School of Law. He has a Bachelors of Science Degree in Industrial Engineering from Purdue University and a Masters of Business Administration from the Anderson School of Management at the University of New Mexico. He was a founding board member of the Center for Corporate Equality. Over the past seven years, he has managed the Affirmative Action Program for two Fortune 500 companies. In that capacity, one of his responsibilities has been to ensure compliance with § 503 of the Rehabilitation Act.

<sup>2</sup> 42 U.S.C. §§ 12101-12213 (2006).

<sup>3</sup> *Disability Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/disability.cfm> (last visited Dec. 8, 2010).

<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> E.g. Charles A. Sullivan, *Getting to Work*, THE WORKPLACE PROF BLOG, (Aug. 3, 2010), [http://lawprofessors.typepad.com/laborprof\\_blog/2010/08/getting-to-work.html](http://lawprofessors.typepad.com/laborprof_blog/2010/08/getting-to-work.html) (“Both cases implicate the EEOC’s guideline which indicate that the ADA does not require an employer to make accommodations primarily for the employee’s personal benefit. Now, getting to work is not exactly for personal benefit, but both cases illustrate the occasional difficulty of drawing the work/personal line. Certainly, many employers view their workers’ commutation as their own responsibility.”).

<sup>6</sup> *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998).

<sup>7</sup> *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010) (holding that “the ADA contemplates that employers may need to make reasonable shift changes in order to accommodate a disabled employee’s disability-related difficulties in getting to work”).

<sup>8</sup> *Id.* at 505.

<sup>9</sup> *Parker v. Verizon Pa., Inc.*, 309 Fed. App’x. 551, 561 (3d Cir. 2009) (“[h]owever, Verizon’s failure to accommodate Parker by limiting his commute was not required.”); see *Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001) (holding that “the [employer’s] decision to reject an accommodation based on [the employee’s] commute does not demonstrate a disregard for its obligations under the ADA.”); see also *LaResca v. Am. Tel. & Tel.*, 161 F. Supp. 2d 323, 333 (D.N.J. 2001) (holding that “commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate.”).

<sup>10</sup> E.g., Fredric C. Leffler & Jurate Schwartz, *Third Circuit Holds that the ADA Can Obligate an Employer to Reasonably Accommodate an Employee’s Disability-Related Difficulties in Getting to Work*, MARTINDALE.COM (June 2, 2010), [http://www.martindale.com/labor-employment-law/article\\_Proskauer-Rose-LLP\\_1039204.html](http://www.martindale.com/labor-employment-law/article_Proskauer-Rose-LLP_1039204.html). Lisa Carey-Davis & Ashley G. Eddy, *Are Your Employees Asking for too Much? Recent Cases Highlight the Challenges Employers Face When Asked to Accommodate an Employee’s Disability*, SCHIFFHARDINLLP (April 20, 2010), [http://www.schiffhardin.com/publications/labor\\_apr20\\_10/labor\\_apr20\\_10index.html](http://www.schiffhardin.com/publications/labor_apr20_10/labor_apr20_10index.html); Michael Soltis, *Alleviating Commuting Woes as a Reasonable Accommodation Under the ADA*, DISABILITY, LEAVE & HEALTH MGMT. BLOG (July 29, 2010), [\[woes-as-a-reasonable-accommodation-under-the-ada/\]\(http://www.disabilityleavelaw.com/2010/07/articles/ada/alleviating-commuting-woes-as-a-reasonable-accommodation-under-the-ada/\).](http://www.disabilityleavelaw.com/2010/07/articles/ada/alleviating-commuting-</a></p></div><div data-bbox=)

<sup>11</sup> *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. App’x. 738 (9th Cir. 2010).

<sup>12</sup> Charles A. Sullivan, *Getting to Work*, THE WORKPLACE PROF BLOG, (Aug. 3, 2010), [http://lawprofessors.typepad.com/laborprof\\_blog/2010/08/getting-to-work.html](http://lawprofessors.typepad.com/laborprof_blog/2010/08/getting-to-work.html).

<sup>13</sup> *Id.*

<sup>14</sup> See *infra* Part III.E.

<sup>15</sup> See *infra* Part II.C; see also Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 1000–07 (2008) (detailing the courts’ failure to notice ambiguity in the ‘regarded-as’ prong of the definition of a disability).

<sup>16</sup> See generally U.S. GOLF ASSOCIATION, <http://www.usga.org/etiquette/tips/Golf-Etiquette-101/> (part of golf etiquette is to repair the ground damaged by either a player’s club or ball, colloquially called a “divot” by golfers).

<sup>17</sup> SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 491 (3d ed. 2008).

<sup>18</sup> *Id.* (referring to H.R. REP NO. 101-485, pt. 2 at 32 (1990)).

<sup>19</sup> *The Employment Situation-November 2010*, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 18 (2010), [http://www.bls.gov/news.release/archives/empsit\\_12032010.pdf](http://www.bls.gov/news.release/archives/empsit_12032010.pdf) (current disability unemployment statistics are regularly updated and posted at <http://www.bls.gov/news.release/empsit.t06.htm>).

<sup>20</sup> U.S. Department Seeks Public Input to Strengthen Disability Regulations, U.S. DEP’T OF LABOR (June 9, 2010), <http://www.dol.gov/opa/media/press/ofccp/ofccp20101015.htm>.

<sup>21</sup> ESTREICHER, *supra* note 16, at 492.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 493.

<sup>27</sup> 29 U.S.C. §§ 701–795(i) (2000).

<sup>28</sup> ESTREICHER, *supra* note 16, at 493.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> 29 U.S.C. § 701(b)(2) (2000).

<sup>31</sup> ESTREICHER, *supra* note 16, at 493.

<sup>32</sup> 29 U.S.C. § 794(a) (2000).

<sup>33</sup> Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1131 (2010).

<sup>34</sup> ESTREICHER, *supra* note 16, at 493 (“[b]y enacting the Title I of the ADA in 1990, however, congress took the additional step of imposing on all employers subject to Title VII the duty not to discriminate against any ‘qualified individual with a disability.’”); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

<sup>35</sup> *Tennessee v. Lane*, 541 U.S. 509, 516-17 (2004).

<sup>36</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331 (1990) (emphasis added).

<sup>37</sup> *Id.* at 332.

<sup>38</sup> ESTREICHER, *supra* note 16, at 493.

<sup>39</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *see* 42 U.S.C.A. § 12101 (2009) (quoting to U.S.C.A. since this came into effect after 2006.)

<sup>40</sup> Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendment Acts of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 229 (2008).

<sup>41</sup> *Id.* at 217-18.

<sup>42</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553, 3554 (2008) (rejecting the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures); § 2(b)(3), 122 Stat. at 3554 (rejecting the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County, Florida v. Airline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973); § 2(b)(4), 122 Stat. at 3554 (rejecting the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that

prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives); § 2(b)(5), 122 Stat. at 3554 (conveying congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for “substantially limits”, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis).

<sup>43</sup> § 2(b)(1), 122 Stat. at 3554.

<sup>44</sup> Long, *supra* note 39, at 228 (“[b]y amending the ADA’s definition of disability, Congress has assured that more individuals will qualify as having disabilities.”).

<sup>45</sup> *Id.* at 225.

<sup>46</sup> *Id.* (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(1), 122 Stat. 3553, 3557 (2008)).

<sup>47</sup> 42 U.S.C. §§ 12111-12117 (2006). This article focuses on the employment Title of the Americans with Disabilities Act, Title I, §§ 12111-12117. Therefore, an “employer” will be the “covered entity” covered by the act. *Id.* at § 12111(2) (“[t]he term ‘covered entity’ means an employer, employment agency, labor organization, or joint labor-management committee.”). An employer must reach a particular size and scope before they are covered by the statute. *Id.* at § 12111(5)(A) (“[t]he term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.”). There are several exceptions for the federal governments and non-profit clubs. *Id.* at § 12111(5) (B) (“[t]he term ‘employer’ does not include— (i)

the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.”). Other titles cover state and local government activities and public transportation (Title II), business and non-profit providers of public accommodations (Title III), and telecommunications (Title IV). *See A Guide to Disability Rights Laws*, U.S. DEP’T OF JUSTICE, (Sep. 2005), available at <http://www.ada.gov/cguide.htm#anchor62335>.

<sup>48</sup> Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 27 BERKELEY J. EMP. & LAB. L. 59, 60-61 (2008) (footnote omitted).

<sup>49</sup> 42 U.S.C. § 12112(b)(5)(A) (2006) (emphasis added).

<sup>50</sup> 42 U.S.C. § 12111(8) (2006) (emphasis added).

<sup>51</sup> *Id.* at § 12111(9); Weber, *supra* note 32, at 1129–30. (citing examples in n. 32, “[e]ven those who disagree with this proposition seem ultimately to change their minds when they consider the text and structure of the law.”); *see, e.g.*, Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 145 (2d Cir. 1995) (Newman, J., concurring) (“[T]he ADA contains a definition of ‘reasonable accommodation’ [in § 12111(9)]. However, this definition explains only the sorts of modifications and assistance that are included within the phrase ‘reasonable accommodation’ and provides no guidance as to whether, or to what extent, the cost[s] of such items are relevant to a determination of their reasonableness.”).

<sup>52</sup> 42 U.S.C. § 12111(9) (2006) (emphasis added).

<sup>53</sup> Weber, *supra* note 32, at 1130.

<sup>54</sup> *Id.* (footnotes omitted).

<sup>55</sup> *Id.* at 1131.

<sup>56</sup> 42 U.S.C. § 12111(10) (2006).

<sup>57</sup> Weber, *supra* note 32, at 1131.

<sup>58</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (establishing the rule that when an agency is interpreting a statute, and it is ambiguous or silent on the precise issue, courts must accept the agency’s interpretation as long as it is a reasonable one. “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the

challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”); *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (holding that when Congress has explicitly left a gap for an agency to fill, any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute).

<sup>59</sup> Weber, *supra* note 32, at 1140; *see id.* n. 86 (“29 C.F.R. § 1630.9(a) (2009). The following subsection repeats the statutory prohibition on denying employment opportunities to otherwise qualified applicants or employees with disabilities based on the need to make reasonable accommodations. § 1630.9(b). Other subsections provide that failure to receive technical assistance is no excuse for failure to accommodate and that a person with a disability need not accept an accommodation but may lose the status of a qualified individual if unable to perform the essential functions of the job without the accommodation. § 1630.9(c)-(d).”).

<sup>60</sup> Weber, *supra* note 32, at 1140.

<sup>61</sup> *Id.*; 29 C.F.R. § 1630.2(o)(1) (2010); 29 C.F.R. § 1630.2(p) (2010).

<sup>62</sup> *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html> (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> Weber, *supra* note 32, at 1141 n.90 (indicating that although the interpretive guidance does not necessarily warrant *Chevron* deference, they at the very least warrant *Skidmore* deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

<sup>65</sup> ADA Amendments Act of 2008, *supra* note 41.

<sup>66</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

<sup>67</sup> *Leading Cases: III. Federal Statutes and Regulations*, 116 HARV. L. REV. 342, 342-43 (2002) (footnotes omitted).

<sup>68</sup> *Id.* at 343 (footnote omitted).

<sup>69</sup> *Id.* (footnotes omitted).

<sup>70</sup> *Id.* (footnotes omitted).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 343-45 (footnotes omitted).

<sup>73</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

<sup>74</sup> *Leading Cases: III. Federal Statutes and Regulations*, 116 HARV. L. REV. 342, 347 (2002) (footnotes omitted).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 347-49.

<sup>78</sup> *Id.*

<sup>79</sup> Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 983 (2003).

<sup>80</sup> *Id.* at 983-84.

<sup>81</sup> Colwell v. Rite Aid Corp., 602 F.3d 495, 498 (2010).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 499.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 500.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 504.

<sup>95</sup> Parker v. Verizon Pa., Inc., 309 Fed. App’x. 551 (3d Cir. 2009).

<sup>96</sup> *Id.* at 561.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Kvorjak v. Maine, 259 F.3d 48, 53 (1st Cir. 2001).

<sup>100</sup> *Id.* (“[T]he record cannot support a finding that he is able to perform the essential functions of the claims adjudicator position at his home.”).

<sup>101</sup> LaResca v. Am. Tel. & Tel., 161 F. Supp. 2d 323, 333 (D.N.J. 2001).

<sup>102</sup> *Id.* at 334.

<sup>103</sup> Salmon v. Dade Cnty. Sch. Bd., 4 F.Supp.2d 1157, 1162 (S.D. Fla. 1998).

<sup>104</sup> *Id.* at 1163.

<sup>105</sup> Lyons v. Legal Aid Soc., 68 F.3d 1512, 1517 (2d Cir. 1995).

<sup>106</sup> *Id.* at 1513.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1517.

<sup>109</sup> Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (2010).

<sup>110</sup> *See generally* Livingston v. Fred Meyer Stores, Inc., 388 Fed. App’x. 738 (9th Cir. 2010).

<sup>111</sup> *Id.* at 739.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 742.

<sup>114</sup> Colwell, 602 F.3d at 505 (citation omitted); H.R. Rep No. 101-485(II), at 62-63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 345.

<sup>115</sup> 101 CONG. REC. S933 (daily ed. Aug. 1, 1989) (remarks by Sen. D’Amato)

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Hearings: Americans with Disabilities Act, To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability, Comm. on Pub. Works and Transp.* (1989) (statement of John Winske) (“[i]t should also be noted that if the Americans with Disabilities Act is passed, it will increase employment opportunities for the disabled. This increase in employment would result in more people using intercity buses to commute to work. Most disabled people, particularly those beginning work, will not have the money to purchase a vehicle, and will thus have to rely on public transportation.”).

<sup>118</sup> *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 101st Cong. 116 (1988) (statement of Rima Sutton, Service Coordinator for the Multiple Sclerosis Society) (“[d]isabled people depend greatly on provided handicapped parking spaces. But every day I see spaces filled by cars without handicap plates or stickers. If a disabled person can’t park their car, [in an accessible spot] they can’t get out [of there car].”).

<sup>119</sup> *Joint Hearing on H.R. 2273, the Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Educ. and Emp't Opportunities of the Comm. on Educ. and Labor*, 101st Cong. 42 (1989) (statement of Reverend Jesse Jackson, President, National Rainbow Coalition) (“[i]n a sense that there are things you can anticipate. We know that we need riding ramps for public transportation; you can anticipate that, that the people need access to buildings for work or living. We can anticipate that.”).

<sup>120</sup> See *supra* Part I.B. (the unemployment rate for people with disabilities was a key part of the rationale for the passage of the Title I of ADA).

<sup>121</sup> Basas, *supra* note 47, at 115.

<sup>122</sup> See *supra* Part II.C.

<sup>123</sup> *Id.*

<sup>124</sup> James T. Bond, Ellen Galinsky, Nicole Giuntoli, Stacy S. Kim & Kelly Sakai, 2008 *National Study of Employers*, FAMILIES AND WORK INST., 6 (2008), <http://www.familiesandwork.org/site/research/reports/2008nse.pdf>.

<sup>125</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (“[o]nce the plaintiff has made this showing [that the accommodation is reasonable on its face], the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”).

<sup>126</sup> RUTH COLKER & ADAM A. MILANI, *FEDERAL DISABILITY LAW IN A NUTSHELL* 103 (4th ed. 2010).

<sup>127</sup> *Id.* at 104–05.

<sup>128</sup> *Id.* at 105 (citing 29 C.F.R. § 1630.15(d) (2010)).

<sup>129</sup> *E.g.* *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 n.9 (7th Cir. 2000) (“[a]s the district judge noted, ‘the only imaginable accommodation would be an open-ended schedule that would allow Jovanovic to come and go as he pleased.’ We would be hard-pressed to imagine a manufacturing facility that could operate effectively when its employees are essentially permitted to set their own work hours, and we thus reject such a schedule as an unreasonable accommodation under the circumstances of this case.”) (citation omitted); see *Turco v. Hoescht Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (rejecting as unreasonable a plaintiff’s request to work day-time instead of rotating shifts).

<sup>130</sup> Weber, *supra* note 32, at 1151.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (“[a]s Professors Pamela S. Karlan and George Rutherglen noted, the accommodations

determination process ‘resembles, in some important respects, the common-law process of developing and applying standards of negligence.’ The use of juries is a particularly apt means to be certain that the law conforms to widespread understandings of what constitutes an undue hardship for an employer and that finders of fact will update that understanding as technology and social attitudes advance.”) (footnotes omitted).

<sup>133</sup> See *supra* Part IV.B.

<sup>134</sup> Catalyst D&I Practices, *Best Buy—Enhanced Flexibility: Results-Only Work Environment at Best Buy* (Sep. 2010), <http://www.catalyst.org/publication/437/best-buyenhanced-flexibility-results-only-work-environment-at-best-buy>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Chiung-Ya Tang & Shelly MacDermid Wadsworth, *Time and Workplace Flexibility*, FAMILIES AND WORK INST. 2008 NAT’L STUDY OF CHANGING WORKFORCES, 3 (2008), [http://www.familiesandwork.org/site/research/reports/time\\_work\\_flex.pdf](http://www.familiesandwork.org/site/research/reports/time_work_flex.pdf) (“[e]mployers that provide flexibility and that have more supportive supervisors have employees who are more satisfied with their jobs, more engaged, more likely to remain and in better mental health. As has been found in previous National Studies of the Changing Workforce, there is considerable evidence that supportive supervisors and access to flexibility are strongly related to employee behavior that is important to employers. In 2008, employees with both above-average supervisor support AND flexibility are more than twice as likely to report high job engagement and job satisfaction as employees with below-average support and flexibility. Employees with above-average flexibility are less likely to report that they are looking for another job. More than three quarters of employees with above-average flexibility AND support say that they are “not at all” likely to look for another job, compared with 57% of employees with low flexibility. Employees with BOTH more flexibility and support are also significantly more likely to report good mental health.”).

<sup>138</sup> Stephen Miller, *Flexible Work Might Improve Employees’ Health*, SOC’Y FOR HUMAN RES. MGMT. (Mar. 10, 2010), <http://www.shrm.org/hrdisciplines/benefits/Articles/Pages/FlexWorkHealth.aspx> (last visited Jan. 29, 2010).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Weber, *supra* note 32, at 1149.

<sup>142</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

<sup>143</sup> Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (2010).

<sup>144</sup> *See supra* Part II.C. *See supra* note 41.

<sup>145</sup> *Charge Statistics FY 1997 Through FY 2010*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Apr. 2, 2011) (there is evidence beginning to emerge that the ADAAA has resulted in increased coverage. Recently released EEOC charge statistics reveal that the charges under the ADA have been growing faster than other forms of discrimination. Total ADA related charges have grown by 22.7% from Fiscal Year (FY) 2008 to FY2010, while total EEOC charges for all forms of discrimination grew only 4.5% during the same time frame. ADA charges in FY2010 accounted for 25.2% of all EEOC charges, up from 20.4% in FY2008. ).