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Comment

Determining Reasonable Accommodations under the ADA: Why Courts Should Require Employers to Participate in an “Interactive Process”

I. INTRODUCTION

When Congress enacted the Americans with Disabilities Act (“ADA”) in 1990, approximately 43,000,000 Americans had one or more physical or mental disabilities.¹ As the population grows older, the number of disabled Americans is increasing.² These disabled Americans often face discrimination in several areas, including the workplace.³

1. See William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of “Reasonable Accommodation” After Eckles*, 9 ST. THOMAS L. REV. 359, 360 (1997) (citing 42 U.S.C. § 12101(a)(1)(1994)). In determining the number of disabled Americans,

[t]he [United States] Census Bureau defines a disability as difficulty in performing functional activities (seeing, hearing, talking, walking, climbing stairs and lifting and carrying a bag of groceries) or activities of daily living (getting in or out of bed or a chair, bathing, getting around inside the home, dressing, using the toilet and eating) or other activities relating to everyday tasks or socially defined roles.

Census Bureau, U.S. Dep’t of Commerce Press Release CB97-148, *One in 10 Americans Reported a Severe Disability in 1994-95*, CENSUS BUREAU REP. 1 (1997) <<http://www.census.gov/Press-Release/cb97-148.html>> [hereinafter Census Bureau].

2. See McDevitt, *supra* note 1, at 360 n.6. According to 1991-92 Census Bureau data, the number of disabled Americans was nearly 49 million. See CENSUS BUREAU, *supra* note 1, at 1. Data collected between October 1994 and January 1995 revealed an increase in disabled Americans to approximately 54 million (about one in five Americans). See *id.*

3. See McDevitt, *supra* note 1, at 360. Congress stated in its findings that “census data, national polls, and other studies . . . documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” *Id.* at 360 n.3 (quoting 42 U.S.C. § 12101(a)(6)). Congress also stated that disabled individuals:

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 . . . beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals’ [ability] to participate in, and contribute to, society [sic].

Id. (quoting 42 U.S.C. § 12101(a)(7)). It is estimated that over eight million people with disabilities desire employment, but are unable to find jobs. See Rose A. Daly-

Discrimination has prevented individuals with disabilities from competing equally with others in employment, and has thus led to an overall decrease in society's productivity and efficiency.⁴ To eliminate this widespread discrimination against disabled individuals and to ensure their full participation in the workplace, Congress enacted the ADA.⁵

The ADA requires employers to provide some "reasonable accommodation"⁶ to applicants or employees with known physical or mental disabilities who are otherwise qualified individuals, unless doing so will create an undue hardship for employers.⁷ The ADA, however, fails to specify whether employers are required to help employees find these reasonable accommodations.⁸ The Equal Employment Opportunity Commission ("EEOC") suggests that employers participate in an "interactive process"⁹ to help their employees find reasonable accommodations.¹⁰ The EEOC regulations

Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89, 89 (1994).

4. See McDevitt, *supra* note 1, at 360 n.3. According to Congress,

The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a)(9).

5. See McDevitt, *supra* note 1, at 361 (quoting 42 U.S.C. § 12101(b)(1)) (Congress hoped to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . ."); see also *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997).

6. See Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I — Workplace Accommodations*, 46 DEPAUL L. REV. 877, 892 (1997). A reasonable accommodation is a "modification or adjustment to a workplace process or environment that makes it possible for a qualified person with a disability to perform essential job functions, such as physical modifications to a work space, flexible scheduling of duties, or provision of assistive technologies to aid in job performance." *Id.*; see also *infra* note 70 and accompanying text (providing other definitions of "reasonable accommodations").

7. See *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998); *infra* note 68 (providing the text of 42 U.S.C. § 12112(b)(5)(A)).

8. See *Barnett*, 157 F.3d at 748; *infra* note 70 and accompanying text (providing the text of 42 U.S.C. § 12111(9) and discussing the ADA's general guidance regarding reasonable accommodations).

9. See *Barnett*, 157 F.3d at 752 ("The phrase 'interactive process' refers to discussions between the employer and the disabled employee regarding the employee's limitations and possible accommodations."); see also *infra* notes 80-86 and accompanying text (discussing the interactive process).

10. See *Barnett*, 157 F.3d at 752 (quoting 29 C.F.R. § 1630.2(o)(3), app. § 1630.9 (1998)); *infra* note 80 (providing the text of 29 C.F.R. § 1630.2(o)(3)); *infra* note 82

and interpretive guidance, however, are vague about the extent and scope of an interactive process.¹¹ Moreover, the EEOC regulations and interpretive guidance are not binding on courts.¹²

Because of the ambiguities in the ADA's reasonable accommodation provision and in the EEOC regulations and interpretive guidance, courts remain divided on the question of whether employers must participate in an interactive process and, if so, what comprises the scope of an interactive process.¹³ Recently, the Ninth Circuit has joined several other federal circuits in not requiring employers to participate with employees in the interactive process of finding a reasonable accommodation.¹⁴ Other federal circuit courts have required employers to participate in this process.¹⁵

This Comment examines the ADA's reasonable accommodation provision, focusing on whether courts should require employers to participate in an interactive process of finding a reasonable accommodation. The Comment first discusses the background of the ADA¹⁶ and its relation to Title VII of the Civil Rights Act of 1964,¹⁷ the Federal Rehabilitation Act of 1973,¹⁸ and the EEOC regulations interpreting the ADA.¹⁹ In doing so, the Comment identifies the ADA's shortcomings in the treatment of the reasonable accommodation clause.²⁰ The Comment then explores the conflicting federal circuit positions concerning employer involvement in the interactive process,²¹ specifically examining the reasons courts have chosen either

(providing the text of 29 C.F.R. app. § 1630.9).

11. See *Barnett*, 157 F.3d at 753. Although the EEOC interpretive guidance does provide a four-part process for employers to follow in the interactive process, see *id.* at 752, it leaves several questions unanswered, see *id.* at 753.

12. See Matthew Graham Zagrodzky, Comment, *When Employees Become Disabled: Does the Americans with Disabilities Act Require Consideration of a Transfer as a Reasonable Accommodation?*, 38 S. TEX. L. REV. 939, 948 (1997). The United States Supreme Court stated that "while not controlling upon the courts by reason of their authority, [the EEOC Guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

13. See *infra* Part III.

14. See *Barnett*, 157 F.3d at 752; *infra* Part III.A.

15. See *infra* Part III.B.

16. See *infra* Part II.A-C.

17. See *infra* Part II.A.

18. See *infra* Part II.B.

19. See *infra* Part II.D.

20. See *infra* Part II.C-D.

21. See *infra* Part III.A-B.

to adhere to a traditional burden-shifting framework in ADA cases²² or to require employer participation in an interactive process.²³ Next, the Comment explains why an interactive process is an overall better approach,²⁴ why employees should initiate it,²⁵ why employees need only show that they are disabled,²⁶ and why courts should determine liability based on a good faith participation analysis.²⁷ Finally, the Comment proposes that Congress amend the ADA to require an interactive process and recommends that the EEOC revise its regulations and interpretive guidance to end the confusion over the reasonable accommodation issue.²⁸

II. BACKGROUND

In the latter half of the twentieth century, Congress has taken significant steps to end discrimination.²⁹ Congress enacted the Civil Rights Act of 1964 to provide for equal treatment of individuals based on their membership in specific protected classes.³⁰ This legislation, however, failed to protect disabled Americans, as a class, from discrimination.³¹ The Federal Rehabilitation Act of 1973 attempted to provide for such protection, but was limited because it only applied to public sector employees.³² Consequently, in 1990, Congress passed the ADA, which extended protection to individuals in the private sector from discrimination in all areas of their lives, including employment.³³ Since Congress enacted the ADA in response to deficiencies in previous legislation, an understanding of the preceding legislation is important when analyzing the ADA.

22. *See infra* Part III.A.

23. *See infra* Part III.B.

24. *See infra* Part IV.A.

25. *See infra* Part IV.B.1.

26. *See infra* Part IV.B.2.

27. *See infra* Part IV.B.3.

28. *See infra* Part V.

29. *See Zagrodzky, supra* note 12, at 942 (citing The Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. (1994) and The Equal Pay Act, 29 U.S.C. § 206 (1994)). The legislation enacted to “reduc[e] the divisive effect of discrimination in America . . . was not necessarily a new concept . . .” *Id.* For example, “[t]he Civil Rights Act of 1866 (as amended by the Civil Rights Act of 1991) created a cause a action against race discrimination . . .” *Id.* at 942 n.23.

30. *See infra* Part II.A.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. *See infra* Part II.C.

A. *Title VII of the Civil Rights Act of 1964*

Congress enacted the Civil Rights Act of 1964³⁴ to eliminate discrimination in several areas of public life.³⁵ These areas include public accommodations and facilities, participation in any program that receives federal financial assistance, education, and employment.³⁶ Title VII of this Act protects individuals from discrimination in employment based on their race, color, religion, national origin, and sex.³⁷ Specifically, Title VII prohibits employers from considering an individual's membership in one of the five protected classes when deciding "terms, conditions, or privileges of employment," such as hiring, firing, and job classification.³⁸

To determine whether an employer has intentionally discriminated against an individual based on one of the five aforementioned protected

34. 42 U.S.C. §§ 1971, 1975e-d, 2000e.

35. JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 28 (3d ed. 1993). Congress passed this Act in response to the rising pressure it faced from the civil rights movement of the 1960s. *See generally* BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* xi-xviii (3d ed. Am. Bar Ass'n 1996) (discussing the legislative history of the Civil Rights Act of 1964). During this time period, national demonstrations took place to protest discrimination they experienced in several areas of their lives. *See id.* at xii. State and local government representatives repeatedly used violent force against these well-behaved demonstrators. *See id.* Eventually the American people realized "that there was something radically wrong in their country; that an intolerable injustice existed about which something had to be done . . . Suddenly, . . . the time had come for consideration by the country and by Congress of major civil rights legislation." *Id.* Thus, Congress passed the Civil Rights Act of 1964. *See id.* at xiii.

36. *See* FRIEDMAN & STRICKLER, *supra* note 35, at 28 n.a. In 1963, the most immediate and pressing civil-rights problem before the country was the public-accommodations problem. It was that problem which had given rise to the 'sit-ins' in the South, and it was the denial of rights in that area — in restaurants, hotels and other public places — that seemed least defensible and most outrageous not only to blacks but to most of the people in the nation.

LINDEMANN & GROSSMAN, *supra* note 35, at xiii.

37. *See* FRIEDMAN & STRICKLER, *supra* note 35, at 28. Title VII also created the Equal Employment Opportunity Commission, which is the federal agency charged with administering and interpreting Title VII's provisions. *See id.*

38. 42 U.S.C. § 2000e-2(a). Under Title VII, [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or (2) to limit, segregate, or classify his employees or applicants for employment . . . because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a). It is also unlawful for employers to "fail or refuse to refer for employment" or "to classify or refer for employment" an individual based on race, color, religion, sex, or national origin. *Id.* § 2000e-2(b).

classes in violation of Title VII, courts have allowed plaintiffs to prove their claims by presenting either direct or circumstantial evidence of discrimination.³⁹ Plaintiffs often have difficulty providing direct evidence of discrimination because employers generally avoid making clearly discriminatory statements or policies.⁴⁰ Thus, courts developed the burden-shifting framework for proving discrimination, which allows plaintiffs to prove discrimination with only circumstantial evidence.⁴¹ Under a burden-shifting framework, the plaintiff has the

39. See LINDEMANN & GROSSMAN, *supra* note 35, at 10-11. Direct evidence "directly prove[s] a fact of consequence to the determination of an action . . ." *Id.* at 11. It can consist of facially discriminatory employment policies, such as policies that adversely treat employees of a certain group. See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 187 (1997). It can also consist of employer statements or admissions that are discriminatory in nature. See *id.* at 188; Robert J. Smith, *The Title VII Pretext Question: Resolved in Light of St. Mary's Honor Center v. Hicks*, 70 IND. L.J. 281, 282 (1994). An example of direct evidence is an employer's statement that the employer would never promote the employee because the employee was black. See Smith, *supra*, at 282 n.9.

Circumstantial evidence, alternatively, "does not directly prove a fact of consequence to the determination of an action; rather, it permits the factfinder to infer the existence of such a fact." LINDEMANN & GROSSMAN, *supra* note 35, at 11. An example of circumstantial evidence is a record demonstrating that an employer has never hired applicants from a specific group of people although those applicants have been qualified. See *id.*

40. See Smith, *supra* note 39, at 282 ("[A]s employers become increasingly sophisticated about the law, [direct] evidence is generally unavailable to the plaintiff. Employers are careful about what they say or document when taking adverse employment action and will seldom display prejudice blatantly.").

41. See Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed under Title VII in Disparate Treatment Cases to Claims Brought under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 98 (1997). The United States Supreme Court initially set forth this burden-shifting framework for Title VII cases in *McDonnell Douglas Corp. v. Green*. See *id.* at 103 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The Supreme Court created the framework for situations where an employer has intentionally treated individuals differently because of their race, color, religion, sex, or national origin, see FRIEDMAN & STRICKLER, *supra* note 35, at 93, but where the plaintiff has only circumstantial evidence of such discrimination. See Williams, *supra*, at 101. Such claims of intentional discrimination are called "disparate treatment" claims. See FRIEDMAN & STRICKLER, *supra* note 35, at 93. The framework thus allows a plaintiff with no direct proof of intentional discrimination under Title VII to prove indirectly that his employer discriminated against him based on one of five aforementioned factors. See Williams, *supra*, at 101.

[The] framework is designed to enable the factfinder to ascertain whether the employer-defendant took adverse action against the employee-plaintiff based on one of the prohibited factors in the statute (e.g., race, color, religion, sex, or national origin), or whether the employer took such action for some reason wholly unrelated to these factors.

Id. at 98.

initial burden of proving a prima facie case of employment discrimination.⁴² Once the plaintiff has established a prima facie case, the employer must come forward with a “legitimate, nondiscriminatory reason for the employer’s adverse decision.”⁴³ If the employer shows such a reason, the plaintiff then has the opportunity to show that this reason was only a pretext for the employer’s decision.⁴⁴ Even if the plaintiff proves pretext, the employer may still prevail if the trier of fact is unpersuaded that discrimination was the actual motivation for the adverse employment action.⁴⁵ Regardless of whether the employer’s given reason is true, the plaintiff has the ultimate burden of persuading the trier of fact that the employer discriminated against the plaintiff.⁴⁶

42. See Williams, *supra* note 41, at 103. To prove a prima facie case of employment discrimination under Title VII, the plaintiff must show:

(1) The plaintiff is a member of the protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff’s qualifications, the employer rejected the plaintiff; and (4) after the plaintiff’s rejection, the position remained open and the employer continued to seek applicants from persons possessing the plaintiff’s qualifications.

Id. (citing *McDonnell Douglas*, 411 U.S. at 792-93).

43. *Id.*

44. See *id.* A plaintiff can show pretext by demonstrating that the employer’s rebuttal was simply false. See Brodin, *supra* note 39, at 191. For example, a plaintiff terminated for excessive absenteeism can show that he was not excessively absent. See *id.* A plaintiff may also show pretext by demonstrating that the employer did not treat people outside of the plaintiff’s protected class similarly to the way he treated the plaintiff. See *id.* at 191-92; Williams, *supra* note 41, at 103. For example, a plaintiff terminated for excessive absenteeism may alternatively show that the employer failed to terminate other employees who were of a different class but also excessively absent. See Brodin, *supra* note 39, at 191.

45. See Williams, *supra* note 41, at 104-08; see *infra* note 46 and accompanying text (discussing how plaintiffs have the ultimate burden of persuasion in Title VII employment discrimination cases).

46. See Williams, *supra* note 41, at 104-08. The United States Supreme Court elaborated on the *McDonnell Douglas* Title VII burden-shifting framework in *Texas Department of Community Affairs v. Burdine* and *St. Mary’s Honor Center v. Hicks*. See *id.* In *Burdine*, the Court explained that the plaintiff has the ultimate burden of persuading the trier of fact that the employer discriminated against him; the employer does not have the burden of persuasion, but merely has the burden of producing evidence that his employment decision “was based on some reason unrelated to the impermissible factor.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-54 (1981). In *Hicks*, the Court added to the plaintiff’s burden of proof by requiring the plaintiff to prove that the employer’s “proffered reason [for the employment decision] was not the true reason for the employment decision, and that race was.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (emphasis added).

B. Federal Rehabilitation Act of 1973

Although Title VII applies to several classes of people, it does not protect the class of disabled people because they are not protected as a class under the statute's plain meaning.⁴⁷ To remedy this shortcoming, Congress passed the Federal Rehabilitation Act of 1973 ("Rehabilitation Act")⁴⁸ to prohibit public sector employers from discriminating against mentally and physically disabled individuals.⁴⁹ Under the Rehabilitation Act, disabled individuals include those workers with physical or mental impairments that limit one or more major life activities,⁵⁰ such as walking, seeing, or working.⁵¹

47. See FRIEDMAN & STRICKLER, *supra* note 35, at 63. Title VII will only protect disabled individuals from employment discrimination if employers also discriminate against them because of their race, color, religion, sex, or national origin. See *id.*

48. 29 U.S.C. § 701 (1994).

49. See FRIEDMAN & STRICKLER, *supra* note 35, at 960. The Rehabilitation Act covers employees of the federal government, the United States Postal Service, federal contractors, and employers who accept federal funds. See *id.* The Rehabilitation Act provides that:

Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services . . . for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities.

29 U.S.C. § 793(a). The Rehabilitation Act also states that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. § 794.

It should also be noted that the Rehabilitation Act originally prohibited discrimination against "handicapped" individuals. See ROBERT L. BURGENDORF JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 17 (1995). Several disabled individuals and groups representing them, however, objected to the use of the word "handicap." See *id.* (citing S. REP. NO. 116, 101st Cong., 1st Sess. at 21 and H.R. REP. NO. 485, 101st Cong., 2d Sess. pt. 2, at 51 (1990) (Education and Labor Committee)). Thus, when Congress enacted the ADA in 1990, it used the term "disability," rather than "handicap." See *id.* In 1992, consequently, Congress amended the Rehabilitation Act, replacing each of the references to "handicap" with "disability." See *id.* (citing Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §§ 102(f)(2)(B), 102(f)(3), and 102(p), 106 Stat. 4344, 4348, 4349, 4356-58 (1992)).

50. See Zagrodzky, *supra* note 12, at 943. An individual with a disability is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

51. See 29 C.F.R. § 32.3 (1998) ("Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, . . . [and] working . . .").

When originally enacted, the Rehabilitation Act failed to define what constituted discrimination against disabled individuals.⁵² The regulations for the portion of the Rehabilitation Act applying to employers who receive federal assistance,⁵³ however, provided guidance by requiring such employers to provide “reasonable accommodations” to qualified individuals with disabilities.⁵⁴ When drafting the ADA, legislators used the reasonable accommodation language from the Rehabilitation Act regulations for the ADA’s definition of discrimination.⁵⁵ Consequently, in 1992, Congress amended the Rehabilitation Act to apply the standards from the newly enacted ADA, including the reasonable accommodation requirement.⁵⁶ Mirroring the ADA, employers covered under the Rehabilitation Act are liable for discrimination for failure to provide reasonable accommodations to qualified individuals with disabilities.⁵⁷ The regulations

52. See Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1616 (1991); see also *supra* note 49 (providing portions of Rehabilitation Act prohibiting discrimination against disabled individuals).

53. The Office of Civil Rights at the Department of Health, Education, and Welfare (HEW) initially issued these model regulations. See Murphy, *supra* note 52, at 1608 n.9 (1991). The Department of Justice took over this responsibility in 1980. See *id.*

54. See Zagrodzky, *supra* note 12, at 944; Murphy, *supra* note 52, at 1616. The regulations provide that:

(a) A [covered employer] shall make reasonable accommodation to the known physical or mental limitation of an otherwise qualified handicapped applicant or employee

...

(d) A [covered employer] may not deny an employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

45 C.F.R. § 84.12 (1996).

55. See BURGENDORF, *supra* note 49, at 276 (“Title I of the Americans with Disabilities Act (ADA) established the first explicit statutory reasonable accommodation requirement in the employment context and provided considerably more statutory guidance about the requirement’s context and implications.”); *infra* note 68 (providing the text of ADA’s definition of discrimination).

56. See *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) (citing 29 U.S.C. § 794(d)); BURGENDORF, *supra* note 49, at 72 (quoting Pub. L. No. 102-569, §§ 503(b)(g), 505(c)(d), 506(d), 106 Stat. 4424, 4427, 4428 (1992) (codified at 29 U.S.C. §§ 791(g) (§ 501), 793(d) (§ 503), and 794(d) (§ 504)) (“[I]n complaints alleging employment discrimination [under the Rehabilitation Act], the standards under ADA Titles I and V that relate to employment are ‘[t]he standards to be used in determining whether this section has been violated.’”) (third alteration in quoting source).

57. See Zagrodzky, *supra* note 12, at 943 (citing 29 U.S.C. § 706 (1998)). Federal employers must provide these accommodations to the extent that the disabled workers can “compete for . . . position[s] as though there [were] no disability.” See *id.* at 944 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979)).

for the Rehabilitation Act, however, failed to mention the interactive process that the EEOC suggests in its ADA regulations.⁵⁸

C. *The ADA*

The Rehabilitation Act suffers from diminished efficacy since it applies only to public sector employees, federal contractors, and private sector employers receiving federal funds.⁵⁹ In 1990, Congress enacted the ADA to extend discrimination coverage to disabled workers⁶⁰ in the private sector.⁶¹ Congress used much of the language from the Rehabilitation Act in drafting the ADA because the Rehabilitation Act and the ADA both apply to disabled workers.⁶² As such, the ADA defines a disability as a physical or mental impairment that limits one or more of a person's major life activities.⁶³

58. See *supra* note 54 (providing the text of the Rehabilitation Act regulations). It should be noted, however, that the regulations for the portion of the Rehabilitation Act applying to government contractors and subcontractors, also apply the same standards as Title I of the ADA as well as the respective EEOC regulations and interpretive guidance. See 41 C.F.R. § 60-741.1; see *supra* note 49 (providing the text of section of Rehabilitation Act applying to federal contractors). These regulations provide:

Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act of 1990, or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title. The Interpretive Guidance on Title I of the Americans with Disabilities Act . . . may be relied upon for guidance in interpreting the parallel provisions of this part.

Id. § 60-741.1(c)(1) (citations omitted). Thus, although the regulations for employers receiving federal financial assistance do not suggest an interactive process, see *supra* note 54 (providing the text of these regulations), the regulations for government contractors and subcontractors arguably do make such a suggestion. See *infra* notes 73-86 and accompanying text (discussing the EEOC's regulations and interpretive guidance for the ADA).

59. See FRIEDMAN & STRICKLER, *supra* note 35, at 960; Zagrodzky, *supra* note 12, at 943.

60. See *supra* note 63 and accompanying text (defining "disability" under the ADA); *infra* notes 50-51 and accompanying text (defining "disability" under the Rehabilitation Act).

61. See FRIEDMAN & STRICKLER, *supra* note 35, at 960. In addition to protecting disabled individuals from discrimination in employment, the ADA prohibits disability discrimination in public accommodations, transportation, and communication. See McDevitt, *supra* note 1, at 360-61 (citing 42 U.S.C. § 12101(a)(2) (1994) (communication); 42 U.S.C. §§ 12111-12117 (employment); 42 U.S.C. §§ 12141-12165 (transportation); 42 U.S.C. §§ 12181-12189 (public accommodations)).

62. See FRIEDMAN & STRICKLER, *supra* note 35, at 961.

63. See 42 U.S.C. § 12102(2). Under the ADA, a disability is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*; see also *supra* note 50 (defining "disability" under the Rehabilitation Act).

Title I of the ADA prohibits covered employers⁶⁴ from discriminating against qualified individuals with disabilities.⁶⁵ Qualified individuals with disabilities are applicants or employees who can perform the essential functions of a position with or without a reasonable accommodation.⁶⁶ With regard to essential functions, the ADA grants great deference to the employer's judgment in such matters.⁶⁷ The ADA defines discrimination as failing to make reasonable accommodations to the known physical or mental limitations of a disabled individual, unless providing such accommodations will create an undue hardship on the employer.⁶⁸ An undue hardship is an action that causes an employer great difficulty or expense when considered with regard to the employer's overall business needs.⁶⁹

64. Since July 5, 1994, "[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 of preceding calendar year, and any agent of such person" 42 U.S.C. § 12111(5)(A).

65. *See id.* § 12112(a). The ADA specifically states: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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." *Id.*

66. *See id.* § 12111(8) (defining a "qualified individual with a disability").

67. *See id.* ("[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."). *See, e.g.,* *Frix v. Florida Tile Indus., Inc.*, 970 F. Supp. 1027, 1035 (N.D. Ga. 1997) (holding that "lifting items weighing more than 25 pounds is an essential function of [a] storeroom coordinator position"); *Gore v. GTE S., Inc.*, 917 F. Supp. 1564, 1572 (M.D. Ala. 1996) (holding that "regular and reliable attendance is an essential function of the job of telephone operator"); *McDaniel v. Allied-Signal, Inc.*, 896 F. Supp. 1482, 1489 (W.D. Mo. 1995) (holding that security clearance was an essential function of a position at the U.S. Department of Energy).

68. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998). Discrimination includes:

Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity

42 U.S.C. § 12112(b)(5)(A).

69. *See id.* § 12111(10). Undue hardship is:

An action requiring significant difficulty or expense, when considered in light of . . . (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility . . . 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

Rather than defining exactly what an employer must do to comply with the reasonable accommodation requirement, the ADA simply gives examples of what a reasonable accommodation might possibly include.⁷⁰ Congress failed to articulate many important details concerning reasonable accommodations, such as whether the employer or the employee must request a reasonable accommodation, how the party must request the accommodation, or when the party must make such a request.⁷¹ Thus, while an employer may know that he must provide a reasonable accommodation, the ADA gives the employer little guidance about determining the reasonable accommodation, particularly the extent to which the employer must be involved in the process of finding the accommodation.⁷²

D. EEOC Regulations

Congress charged the EEOC with issuing regulations to carry out the goals of the ADA.⁷³ These regulations further clarify the ADA by defining and elaborating on several of the terms used in the ADA, including “physical or mental impairment,”⁷⁴ “major life activity,”⁷⁵

entity with respect to the number of its employees; the number, type, and location of facilities; and (iv) the type of operation . . . 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 . . . in question to the covered entity.

Id.

70. See *Barnett*, 157 F.3d at 748. According to the ADA,

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). “In general, an ‘accommodation’ is the consideration of making changes in usual work rules, or terms or conditions of employment to enable a disabled person to work.” Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LAB. L.J. 499, 499 (1998).

71. See *Barnett*, 157 F.3d at 753; 42 U.S.C. § 12111(9).

72. See *Barnett*, 157 F.3d at 752-53.

73. See 42 U.S.C. § 12116 (stating that the EEOC “shall issue regulations . . . to carry out this subchapter . . .”).

74. See 29 C.F.R. § 1630.2(h) (1998) (defining “physical or mental impairment” as “any physiological disorder, . . . cosmetic disfigurement, or anatomical loss” that affects one or more of certain body systems, including the neurological, reproductive, or digestive systems, or “any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

“substantially limits,”⁷⁶ and “reasonable accommodation.”⁷⁷ With regard to reasonable accommodations, the EEOC regulations, like the ADA, discuss potential accommodations in terms of what they might include.⁷⁸ The regulations provide some additional guidance concerning employer participation in the process of finding a reasonable accommodation.⁷⁹ The regulations suggest that “it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability” to determine whether a reasonable accommodation exists or to select a specific reasonable accommodation.⁸⁰

The EEOC has also issued an “interpretive guidance” appendix to its ADA regulations.⁸¹ According to the appendix, an employer has a duty to make reasonable efforts to determine an appropriate accommodation once an employee has requested an accommodation.⁸² The interpretive guidance specifically states that employers need only

disabilities.”).

75. *See id.* § 1630.2(i) (defining “major life activities” as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”).

76. *See id.* § 1630.2(j) (defining “substantially limits” as “[u]nable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population . . .”).

77. *See Barnett*, 157 F.3d at 752 (citing 29 C.F.R. § 1630.2(o)(3)).

78. *See id.*; *see also supra* note 70 (providing reasonable accommodation language from the ADA).

79. *See Barnett*, 157 F.3d at 752; *see also infra* note 80 (providing the text of 29 C.F.R. § 1630.2(o)(3)).

80. *See Barnett*, 157 F.3d at 752. The regulations, in full, provide that a reasonable accommodation may require an employer:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3).

81. *See Barnett*, 157 F.3d at 752 (citing 29 C.F.R. app. § 1630.9).

82. *See id.* The interpretive guidance provides:

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.

29 C.F.R. app. § 1630.9.

accommodate “known” disabilities.⁸³ The guidance notes the importance of communication between the employer and employee in order to determine a reasonable accommodation.⁸⁴

The interpretive guidance further suggests that employers follow a four-step process to determine a proper reasonable accommodation.⁸⁵ The suggested process involves (1) the employer analyzing a job’s essential functions; (2) the employer consulting with the disabled individual to determine the employee’s limitations and the ways to accommodate those limitations; (3) the employer further consulting with the disabled employee to weigh the potential effectiveness of the conceivable accommodations; and (4) the ultimate selection of a reasonable accommodation that does not create an undue hardship for the employer.⁸⁶

83. 29 C.F.R. app. § 1630.9. The interpretive guidance provides:

Employers are obligated to make reasonable accommodations only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is *known* to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer *may* inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.

Id. § 1630.9 (emphasis added).

84. *See Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). The interpretive guidance of the regulations provide:

[I]n some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual’s disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation.

Id. (quoting 29 C.F.R. app. § 1630.9).

85. *See Barnett*, 157 F.3d at 756 (Fletcher, J. dissenting).

86. *See id.* (Fletcher, J., dissenting) (discussing the interpretive guidance to the EEOC regulations). The interpretive guidance suggests a four-step interactive process:

(1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for the employee and the employer.

29 C.F.R. app. § 1630.9.

III. DISCUSSION

Although the EEOC developed its regulations to eliminate some of the ambiguities in the ADA, the regulations instead have added to the confusion surrounding the interpretation of the ADA.⁸⁷ By further defining the language of the ADA, the regulations increase the duties on employers by suggesting that employers actively participate in the process of finding a reasonable accommodation.⁸⁸ Nevertheless, the regulations do not provide necessary details about this interactive process, such as who is liable for a break-down in the process and when the appropriate party incurs such liability.⁸⁹ Furthermore, these regulations are not legally binding.⁹⁰

Because of this lack of clarity, courts have ruled differently on the issue of employer participation in an interactive process.⁹¹ Some courts do not defer to the regulations⁹² and consequently do not require employers to participate in the EEOC's suggested interactive process.⁹³ These courts have instead applied the traditional Title VII burden-shifting formula⁹⁴ to ADA cases, requiring disabled individuals to show the existence of actual accommodations as part of their prima facie cases.⁹⁵ Under the burden-shifting formula, employees first must prove that a reasonable accommodation is possible.⁹⁶ The burden then shifts to the employers to show that providing such an

87. See Howard A. Simon & Alison J. Morbey, *The ADA's "Interactive Process" for Determining Reasonable Accommodations: How Much Interaction is Enough?*, 24 EMPLOYEE RELATIONS L.J. 5, 6-7 (1998).

88. See *supra* text accompanying notes 78-86 (discussing employers' suggested active role in determining appropriate accommodations).

89. See Simon & Morbey, *supra* note 87, at 7; *supra* note 9 and accompanying text (discussing the "interactive process" in which employers must engage).

90. See Zagrodzky, *supra* note 12, at 948 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)) (explaining that courts do not consistently rely on EEOC regulations for the ADA when interpreting the ADA because the Supreme Court has instructed that the EEOC guidelines are an administrative interpretation of the ADA and thus are "not controlling upon courts by reason of their authority . . .").

91. See Simon & Morbey, *supra* note 87, at 7.

92. For a discussion of the various reasons courts do not defer to the regulations, see *infra* Part III.A.

93. See *infra* Part III.A (discussing cases that do not require employer participation in the interactive process).

94. See *supra* notes 41-46 and accompanying text (discussing the burden-shifting framework).

95. See *infra* Part III.A (discussing cases that do not require an interactive process); *infra* note 99 para. 3 (comparing an ADA plaintiff in a court using a burden-shifting framework to an ADA plaintiff in a court requiring an interactive process).

96. See *White v. York Int'l Corp.*, 45 F.3d 357, 361 (10th Cir. 1995) (stating that the plaintiff must "produce evidence sufficient to make a facial showing that accommodation is possible").

accommodation would create an undue hardship for the employer.⁹⁷ The employees must then ultimately show that they could perform the job and that the employers failed to provide the accommodation.⁹⁸

Other courts, alternatively, have reasoned that the ADA substantially differs from Title VII, and thus have refused to apply the burden-shifting framework.⁹⁹ These courts place a lesser burden on employees by requiring employers to work with disabled employees, through an interactive process, to find reasonable accommodations.¹⁰⁰ Thus, while designed to clarify the vague language in the ADA, the EEOC regulations and court interpretations of the Act have added to, rather than eliminated, the controversy surrounding the ADA's reasonable accommodation provision.¹⁰¹

97. *See id.*

98. *See id.* (stating that the ultimate burden of persuasion rests on the employee-plaintiff).

99. *See infra* Part III.B (discussing cases that require employer participation in the interactive process). Under a traditional burden-shifting framework, to prove a prima facie case, a plaintiff must first show that he is a member of a protected class. *See Williams, supra* note 41, at 130. Under Title VII, this ordinarily is not problematic because a plaintiff's membership in a protected class is generally uncontested. *See id.* at 131. Furthermore, if such membership is not controversial, Title VII plaintiffs usually do not have to spend extravagant resources proving that they are members of a specific class. *See id.* at 132. For example, when a woman is trying to prove sex discrimination under Title VII, she generally does not have a problem providing evidence that she is a woman. *See id.* at 131.

With the ADA, however, a plaintiff might face more obstacles to proving membership in a protected class. *See id.* In fact, class membership may be the only issue in dispute. *See id.* Under the ADA, a plaintiff must prove that he is a "qualified individual with a disability." *See id.* Because the definition of this "class" is not as clear as those of the five Title VII protected classes, plaintiffs claiming discrimination under the ADA often must spend extravagant resources to show their membership in this class. *See id.* at 132. Consequently, ADA plaintiffs typically face "unprecedented and seemingly insurmountable proof barriers as a result of this complexity." *Id.* at 133.

For example, under the Title VII burden-shifting framework, an ADA plaintiff may not satisfy his burden of proof by merely showing that he has a disability. *See Barnett v. U.S. Air, Inc., 157 F.3d 744, 749 (9th Cir. 1998).* Instead, in addition to showing that he is disabled, the ADA plaintiff would also have to show that a specific reasonable accommodation existed at the time of the plaintiff's disability, which the employer failed to consider. *See id.* Under this framework, if the plaintiff fails to show the existence of such an accommodation, the plaintiff has not satisfied his requisite burden. *See id.*

100. *See infra* Part III.B (discussing cases requiring employer participation in the interactive process). These courts do not require ADA plaintiffs to prove that a specific accommodation exists which the employer failed to consider. *See infra* Part III.B. Rather, they merely require the plaintiff to be disabled; once the employer knows this, the employer must then participate in an interactive process with this disabled worker to find him a reasonable accommodation. *See infra* Part III.B.

101. *See Simon & Morbey, supra* note 87, at 6.

Circuit courts are split over whether to require employers to participate in the interactive process of finding a reasonable accommodation under the ADA.¹⁰² Consequently, covered individuals and entities are in limbo about their rights and responsibilities.¹⁰³ Three federal circuit courts have not followed the EEOC's recommendations suggesting employer participation in the interactive process.¹⁰⁴ Alternatively, three other federal circuits have deferred to the EEOC, and thereby have mandated employer participation in the interactive process.¹⁰⁵

A. Courts Not Requiring Employer Participation in the Interactive Process

Circuit courts not requiring employer participation in the interactive process have not deferred to the EEOC's regulations suggesting such participation.¹⁰⁶ Rather, they have applied a traditional burden-shifting framework used in Title VII cases.¹⁰⁷ Although these courts provide different reasons for not deferring to the EEOC regulations, all agree that courts should not require employers to participate in an interactive process.¹⁰⁸

In a recent case, the Ninth Circuit did not require an employer to participate in the interactive process of finding a reasonable accommodation for a disabled employee.¹⁰⁹ In this case, Barnett, an employee of U.S. Air, injured his back in 1990 while handling cargo at work.¹¹⁰ Because his back injury hindered him from performing his cargo handling position, he used his seniority to obtain a position in the mail room.¹¹¹

Two years later, while pulling a mail cart for his mail room position, he again injured his back.¹¹² At that time, his doctor prohibited him from performing any strenuous work, such as bending excessively,

102. *See id.* at 7.

103. *See infra* Part III.A-B (discussing the split in the Circuit courts).

104. *See infra* Part III.A (discussing decisions by the Ninth, Tenth, and Eleventh Circuits).

105. *See infra* Part III.B (discussing decisions by the Third, Fifth, and Seventh Circuits).

106. *See infra* notes 109-43 and accompanying text (discussing decisions by the Ninth, Tenth, and Eleventh Circuits).

107. *See infra* notes 109-43 and accompanying text.

108. *See infra* notes 109-43 and accompanying text.

109. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752-53 (9th Cir. 1998).

110. *See id.* at 746.

111. *See id.*

112. *See id.*

twisting, turning, standing or sitting for long periods of time, and from lifting twenty-five pounds or more.¹¹³ Fearing that he would lose his mail room job because of U.S. Air's established seniority bidding system, Barnett asked his manager for an ADA accommodation to allow him to remain in the mail room.¹¹⁴ For the next five months, U.S. Air allowed Barnett to remain in the mailroom, but subsequently placed Barnett on job injury leave because he was unable to perform his cargo position duties.¹¹⁵ One month later, U.S. Air stopped paying his salary.¹¹⁶ Barnett then requested that U.S. Air provide special lifting equipment or modify the cargo position to avoid the lifting requirement, but U.S. Air refused to make such accommodations.¹¹⁷

The Ninth Circuit applied a burden-shifting framework¹¹⁸ and held that Barnett failed to satisfy his burden of proof because he did not show the existence of a specific position to serve as a reasonable accommodation.¹¹⁹ In deciding this, the court relied on previous Ninth Circuit decisions requiring plaintiffs in ADA cases to prove that they "can perform the essential functions of the job with or without reasonable accommodation."¹²⁰ The court expanded this previously defined burden to now require plaintiffs to show that at least one *specific* reasonable accommodation existed at the time the employer learned of the employee's limitations,¹²¹ but that the employer failed to pursue it.¹²²

113. *See id.*

114. *See id.* at 746-47.

115. *See id.*

116. *See id.* at 747.

117. *See id.*

118. *See id.* at 748-49; *see also supra* notes 41-46 and accompanying text (discussing the burden-shifting framework).

119. *See Barnett*, 157 F.3d at 752.

120. *Id.* at 749 (citing *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)).

121. *See id.* "In order to be reasonable, an accommodation cannot be merely hypothetical." *Id.* The court also referred to *Foreman v. Babcock Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563-64 (7th Cir. 1996); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996); and *White v. York Int'l Corp.*, 45 F.3d 357, 361 (10th Cir. 1995), which all placed the burden on plaintiffs to show that actual accommodations existed at the time period in question, but which the employers refused to provide as part of their *prima facie* cases. *See id.*

122. *See id.* Only after the plaintiff has shown that this specific accommodation exists does the burden shift to the employer to show that providing such an accommodation would pose an undue hardship. *See id.* (citing 42 U.S.C. § 12112(b)(5)(A) (1994)).

The court further held that an employer's failure to participate in the interactive process to find a reasonable accommodation does not create an independent basis for liability under the ADA.¹²³ The court stated that the EEOC regulations use permissive, not mandatory, language concerning an employer's participation in the interactive process.¹²⁴ Such language also warns employers of potential liability which might result from failure to participate in the process, but does not in and of itself form an independent basis for employer liability.¹²⁵ The court noted that holding employers automatically liable for failing to participate in the interactive process is irrational because it potentially subjects employers who successfully provided reasonable accommodations to liability.¹²⁶ The court also expressed its apprehension about how a rule imposing automatic employer liability would work, noting that the point at which an employer incurs process liability is unclear.¹²⁷ The court did, however, recognize that an employer's participation in the interactive process may lead to "optimal" reasonable accommodations and thus may be important in determining liability.¹²⁸ Nevertheless, the court held that the employer's failure to make reasonable accommodations, not the process of ascertaining these accommodations, ultimately determines liability.¹²⁹

The dissent disagreed with the majority's view of the EEOC's language concerning the interactive process.¹³⁰ According to the dissent, while the EEOC regulations state that it "may" be necessary

123. *See id.* at 752.

124. *See id.* The court stated, "[t]he regulations, however, state only that an interactive process 'may be necessary.' The regulations do not state that it is necessary." *Id.* (citing 29 C.F.R. § 1630.2(o)(3) (1998)) (emphasis added by the court).

125. *See id.* The permissive language used in the EEOC Regulations "serves as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make reasonable accommodation," but "do[es] not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation." *Id.*

126. *See id.* at 753.

127. *See id.* Specifically, the court asked whether an employer would incur liability for "fail[ing] to perform one of the recommended steps in the interactive process" or for being "merely slow" in its involvement in the process. *Id.*

128. *See id.*

129. *See id.* The court noted that the proper "inquiry is whether the employer failed to make required reasonable accommodations for the employee. A failure to engage in an interactive process may be relevant to that inquiry; it is not a separate inquiry." *Id.*

130. *See id.* at 755 (Fletcher, J., dissenting). The dissent then specifically cited the EEOC's suggested four-step requirements for the interactive process. *See id.* at 756 (Fletcher, J., dissenting); *see also supra* note 86 (providing the text of EEOC's suggested four-step process).

for employers to participate in the interactive process, the use of “may” merely refers to limited situations that do not warrant employer participation.¹³¹ The dissent argued that in a world faced with informational barriers, courts should require employer and employee participation in the interactive process because both parties ultimately benefit from shared information about reasonable accommodations.¹³² Furthermore, the dissent maintained that a mandatory interactive process would not unduly burden employers because an employer’s participation may be as minor as simple communication with the employee about the problem.¹³³

Similar to the majority opinion in *Barnett*,¹³⁴ the Eleventh Circuit does not require an employer to participate in the interactive process of finding a reasonable accommodation for a disabled employee.¹³⁵ The

131. See *Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting). According to the dissent, “[o]nly if it is clear that a reasonable accommodation is available, or clear that there is no reasonable accommodation available, may an employer not initiate an interactive process with the disabled employee. In cases where the accommodation may be possible, the interactive process is required.” *Id.* (Fletcher, J., dissenting). The dissent also argued that the EEOC’s use of “mandatory language” in the interpretative guidance concerning reasonable accommodations further shows its intent for employer participation in the interactive process. See *id.* (Fletcher, J., dissenting).

132. See *id.* at 755-56 (Fletcher, J., dissenting). The dissent stated:

If this were an ideal world peopled by well intentioned employers, clever employees and no informational barriers, the use of an interactive process to determine whether a reasonable accommodation exists could be optional. We do not live in such a world. Some employers are unwilling to accommodate disabled workers. Some employees can propose only limited ideas for accommodation because they lack sufficient knowledge, skill or ability to identify a workable accommodation. Informational barriers are high. . . . Determinations of reasonable accommodations also require information about the worker’s disability and the limitations that the disability imposes. Since the determination of a reasonable accommodation usually will require the sharing of information between employer and employee . . . the interactive process is not optional except in the rare cases where the answer is clear.

Id. (Fletcher, J., dissenting).

133. See *id.* at 756 (Fletcher, J., dissenting).

134. See *id.* at 746-54; see also *supra* notes 109-29 and accompanying text (discussing the majority opinion in *Barnett*).

135. See *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997). Willis was an employee at Lever Brothers (“Conopco”) and was sensitive to enzymes in the laundry detergent she packaged. See *id.* at 283. Conopco attempted to accommodate Willis’ sensitivities by minimizing her exposure to the enzymes, including transferring her to a new position. See *id.* Willis provided Conopco with a doctor’s letter stating that she suffered from an immune system abnormality and thus could no longer work at her new assignment. See *id.* She refused to return to work, and requested that Conopco either reassign her to a new building or enclose the area in which she worked. See *id.* After a Conopco-arranged doctor determined that Willis was able to work at her present position, Conopco fired Willis for failing to show for work. See *id.* at 284. The

Eleventh Circuit has also adopted a burden-shifting framework in which the plaintiff carries the ultimate burden of producing evidence of the availability of a reasonable accommodation which would have enabled the employee to successfully perform the employee's job.¹³⁶ The court specifically stated its fear of potential employer liability for failing to engage in the interactive process in cases where an investigation into reasonable accommodations "would have been fruitless."¹³⁷ The Eleventh Circuit noted that the employers' fear of liability will often provide enough incentive for them to partake in the interactive process before firing a disabled worker.¹³⁸ The court also found that the punitive approach of automatic employer liability for failure to participate in the interactive process is inconsistent with the basic remedial goals of the ADA, which work to "ensur[e] that those with disabilities can fully participate in all aspects of society, including the workplace."¹³⁹

Similarly, the Tenth Circuit has not required an employer to participate in the interactive process to find a reasonable accommodation for a disabled employee.¹⁴⁰ By also applying a burden-shifting framework,¹⁴¹ the Tenth Circuit rejected the EEOC's recommendations that employers engage in the interactive process.¹⁴²

Eleventh Circuit affirmed the district court's granting of summary judgment in favor of Conopco. *See id.* at 287.

136. *See id.* at 284-85. Because Willis failed to present competent evidence that a reasonable accommodation existed, she failed to meet her requisite burden of proof. *See id.* at 286.

137. *Id.* at 285 (quoting *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996)).

138. *See id.*

139. *Id.* (citing 42 U.S.C. § 12101(a)(8) (1994)) (stating further that the ADA is "not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made").

140. *See White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995). White, an employee who worked for York International Corporation ("York") in positions requiring lifting and continuous standing, injured his ankle on two non-work related occasions. *See id.* at 358-59. After undergoing surgery for this, White presented York with a doctor's note restricting his physical activities to: "work as tolerated; no standing for longer than four hours; and no lifting more than fifteen pounds." *Id.* at 359. After a York-appointed doctor subsequently determined that White was unable to return to work, York terminated White. *See id.* York argued that it terminated White because of his excessive absenteeism and because they were unaware of possible reasonable accommodations for his disability. *See id.* The Tenth Circuit affirmed the district court's granting of summary judgment in favor of York. *See id.* at 363.

141. *See id.* at 361. The court noted that White did not meet his required burden of proof by making "bald conclusions" that he could have performed his job with reasonable accommodations. *See id.* at 362. Instead, White needed to provide evidence of possible accommodations. *See id.*

142. *See id.* at 363.

The court stated that EEOC recommendations are not statutory requirements and, if an employer chooses to follow them, they only suggest employer participation once an employee has proven himself to be “qualified.”¹⁴³

B. Courts Requiring Employer Participation in the Interactive Process

Courts requiring employer participation in the interactive process defer to the EEOC’s regulations recommending participation.¹⁴⁴ These courts differ regarding whether the employer or employee bears the initial burden of commencing the interactive process, but all agree that courts should require employers and employees to partake in such a process.¹⁴⁵

The Seventh Circuit has held that the employer and employee must work together in the interactive process to determine whether a specific reasonable accommodation exists.¹⁴⁶ An employer becomes obligated to participate in the interactive process once an employee notifies the employer of his disability.¹⁴⁷ The Seventh Circuit has imposed a duty on the employer and employee to participate in the interactive process “in good faith” and “to make reasonable efforts to help the other party determine what specific accommodations are necessary.”¹⁴⁸ The party

143. *See id.* To be “qualified,” an employee must propose a reasonable accommodation, which White failed to do. *See id.* Thus, even if York chose to follow the non-statutory EEOC recommendations, a court would not require York to participate in the interactive process, as White had not proven himself to be “qualified.” *See id.*

144. *See infra* notes 146-67 and accompanying text (discussing the Third, Fifth, and Seventh Circuits’ practice of requiring some level of employer involvement in the interactive process outlined by the EEOC).

145. *See infra* notes 146-67 and accompanying text.

146. *See Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). Beck, a secretary at the University of Wisconsin (“University”), took four leaves of absence from her job, first because of various medical conditions, and later because of osteoarthritis and depression. *See id.* at 1132-33. The second and third time she returned to work, she presented a doctor’s note restricting her activities or suggesting that the University provide a reasonable accommodation for her condition. *See id.* While the University repeatedly tried to accommodate her illness, Beck did not provide the necessary information they requested to determine such accommodations. *See id.* at 1133. After her fourth leave of absence, Beck sued the University, claiming discrimination for failure to provide a reasonable accommodation under the ADA. *See id.* The Seventh Circuit affirmed the district court’s summary judgment in favor of the University. *See id.* at 1137.

147. *See id.* at 1134-35.

148. *Id.* at 1135. Failure to act in good faith includes obstructing or delaying the interactive process. *See id.* “A party that fails to communicate, by way of initiation or response, may also be acting in bad faith.” *Id.* Failure to provide information that only one party can provide can be considered an obstruction of the interactive process. *See id.* at 1136.

that fails to do so is liable for causing the breakdown in the interactive process.¹⁴⁹ The Seventh Circuit specifically cited the EEOC recommendations, noting that they anticipate that a lack of shared information among employers and employees may cause such a breakdown.¹⁵⁰ Accordingly, once a trial court can isolate the cause of the breakdown, it should then assign responsibility.¹⁵¹

The Seventh Circuit has further expanded the employer's duty to participate in the interactive process.¹⁵² In cases involving mentally ill employees, an employer must both initiate and participate in the interactive process if the employer has reason to assume the employee may need an accommodation.¹⁵³ In so holding, the Seventh Circuit also rejected the traditional burden-shifting method.¹⁵⁴

149. *See id.* at 1135. Because the University repeatedly attempted to accommodate Beck, and requested medical information from Beck in order to better accommodate her, it satisfied its part of the interactive process. *See id.* at 1136. Because Beck, however, was the only party who could provide such information and failed to do so, the court held that Beck caused the breakdown in the interactive process. *See id.* at 1137. Thus, although the University did not provide a reasonable accommodation for Beck, it was not liable because it did not cause the breakdown of the interactive process. *See id.*

150. *See id.* at 1135-36 (citing 29 C.F.R. app. § 1630.9 (1998)).

151. *See id.* at 1135.

152. *See Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1285-86 (7th Cir. 1996).

153. *See id.* at 1286. Bultemeyer, a custodian for the Fort Wayne Community Schools ("FWCS"), had taken disability leave from his limited-duty custodial job for serious mental illness. *See id.* at 1281-82. After notifying FWCS that he was ready to return to work and touring the new school where FWCS would place him, Bultemeyer expressed anxiety that working at such a large school would be too stressful. *See id.* at 1282. Bultemeyer obtained a doctor's letter suggesting placement in a less stressful school, but FWCS had already terminated Bultemeyer for failure to report to work. *See id.*

The Seventh Circuit reversed the district court's granting of summary judgment in favor of FWCS. *See id.* at 1287. The court cited its holding in *Beck*, requiring both parties to work together to determine a reasonable accommodation, and stated:

[P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee halfway, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.

Id. at 1285 (citing *Beck*, 75 F.3d at 1135).

Because Bultemeyer was mentally ill, and because FWCS knew this, FWCS had the duty to initiate the process of finding a reasonable accommodation for Bultemeyer. *See id.* at 1286. Because FWCS neither considered the doctor's note nor inquired with Bultemeyer or his doctor about how to reasonably accommodate Bultemeyer, FWCS acted in bad faith and thus caused the interactive process to break down. *See id.*

154. *See id.* at 1283-84. The court reasoned that it should treat disparate treatment claims differently than reasonable accommodation claims. *See id.* at 1283. Because Bultemeyer's claim was regarding reasonable accommodation, the disparate treatment

The Fifth Circuit rulings are not as broad as the Seventh Circuit's, but they do require an employer to participate in, though not initiate, the interactive process.¹⁵⁵ The Fifth Circuit specifically rejected the expansive view of the Seventh Circuit and required employer participation in the interactive process only after the employee has initially requested an accommodation.¹⁵⁶ Moreover, the court did not allow an exception for mentally ill employees.¹⁵⁷ The court noted the importance of distinguishing between an employer's knowledge of a disability and an employer's knowledge of limitations caused by the disability.¹⁵⁸ Specifically, the court held that an employer only has a duty to reasonably accommodate an employee when the employer knows of limitations resulting from the employee's disability, because the ADA "requires employers to reasonably accommodate limitations, not disabilities."¹⁵⁹ The court also emphasized that the EEOC's interpretative guidance to the ADA supports such a distinction because this guidance specifically states that some impairments may limit certain individuals but not others.¹⁶⁰

burden-shifting model is both "unnecessary and inappropriate." *See id.* at 1284.

155. *See Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996). Taylor was office manager for Principal Financial Group ("Principal Mutual"). *See id.* at 158. Taylor's bipolar and anxiety disorders negatively affected his productivity at work. *See id.* at 158-59. In discussions with Principal Mutual about this productivity problem, Taylor mentioned that he suffered from mental illnesses, yet never stated that this prevented him from doing his job. *See id.* at 159. When Principal Mutual ultimately fired Taylor for unsatisfactory productivity, Taylor sued under the ADA, alleging Principal Mutual's failure to reasonably accommodate him. *See id.* at 161. The Fifth Circuit affirmed the district court's granting of summary judgment in favor of Principal Mutual. *See id.* at 166.

156. *See id.* at 165. The court stated, "it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one." *Id.* (citing 29 C.F.R. app. § 1630.9) (1998)). Because Taylor failed to inform Principal Mutual of the limitations caused by his illness, and instead merely informed them of his disability, Taylor failed to "trigger" Principal Mutual's duty to participate in the interactive process. *See id.* at 165.

157. *See id.* The court refused the mentally ill exception seen in *Bultemeyer* because an employee's health-care providers, not the employer, "are best positioned to diagnose an employee's disabilities, limitations, and possible accommodations." *Id.*; *see also supra* notes 152-54 and accompanying text (discussing the *Bultemeyer* decision).

158. *See Taylor*, 93 F.3d at 164.

159. *Id.* To illustrate its point, the court provided the following example: while a hearing impairment is a disability, it probably would not limit an assembly line worker in his ability to do the job, but probably would limit a telephone operator in her ability to do the job. *See id.* Thus, while both workers suffer from a disability, only the telephone operator requires a reasonable accommodation to allow the worker to perform the essential functions of the job. *See id.*

160. *See id.* The EEOC's interpretive guidance states that "[s]ome impairments may be disabling for particular individuals, but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the

Although arising in the context of the Rehabilitation Act cause of action, the Third Circuit also requires employers to participate in the interactive process to find a reasonable accommodation.¹⁶¹ The court held that both parties have a duty to participate in good faith in the interactive process under the Rehabilitation Act.¹⁶² The court highlighted the relevance of ADA case law to Rehabilitation Act decisions, noting that in 1992, the Rehabilitation Act incorporated the “reasonable accommodation” section from the ADA.¹⁶³ Relying on several other circuit decisions, the Third Circuit required employer participation once notified of the need for an accommodation in ADA cases.¹⁶⁴ The court reasoned that an employer’s participation will better serve the employee because it will provide the employee with information otherwise difficult or impossible for him to obtain.¹⁶⁵ It then argued that the interactive process more effectively furthers the goals of both the Rehabilitation Act and the ADA by securing access to employment for the disabled.¹⁶⁶ The court also noted that, even under the interactive process, employers need not fear liability where reasonable accommodations are impossible.¹⁶⁷

impairment disabling, or any number of other factors.” *Id.* (quoting 29 C.F.R. app. § 1630.2(j)).

161. *See Mengine v. Runyon*, 114 F.3d 415, 418-20 (3d Cir. 1997). Mengine, a disabled letter carrier for the United States Postal Service (“Postal Service”), requested reassignment to a position requiring less strenuous work. *See id.* at 416-17. He objected to the Postal Service’s original employment offers because they did not meet his physical limitations. *See id.* at 417. He later identified possible suitable positions, but was informed that they were not vacant. *See id.* Eventually, Mengine filed for disability retirement, and sued the Postal Service for failure to reasonably accommodate him under the Rehabilitation Act. *See id.* The Third Circuit affirmed the district court’s granting of summary judgment in favor of the Postal Service. *See id.* at 421.

162. *See id.* at 420. Because the Postal Service offered Mengine several positions and continually worked with him to try to determine reasonable accommodations, the Postal Service satisfied its good faith duty to engage in the interactive process. *See id.* at 421.

163. *See id.* at 420. “Although *Beck* discussed this issue in the context of the ADA, it is relevant to our analysis of the Rehabilitation Act because in 1992 the Rehabilitation Act was amended to incorporate the standards of several sections of the ADA, including the section defining ‘reasonable accommodation.’” *Id.* (citing 29 U.S.C. § 794(d) (1994)); *see also supra* notes 146-51 and accompanying text (discussing *Beck*).

164. *See Mengine*, 114 F.3d at 420; *see also* notes 146-54 and accompanying text (discussing other similar rationales of other Circuit courts).

165. *See Mengine*, 114 F.3d at 420.

166. *See id.* Information sharing allows employers and employees to better identify suitable positions to accommodate disabilities, thereby advancing the goals of the Rehabilitation Act and the ADA. *See id.*

167. *See id.* If a reasonable accommodation is impossible, an employer avoids liability by simply communicating this fact to the employee. *See id.*

IV. ANALYSIS

Court holdings of whether the interactive process is a necessary aspect of the ADA's reasonable accommodation requirement range from not mandating employer participation in the interactive process¹⁶⁸ to requiring an employer-initiated interactive process.¹⁶⁹ The best approach, however, is one requiring employers to participate in the interactive process once employees request a reasonable accommodation from the employer.¹⁷⁰ Specifically, once an employee informs his employer of his disability and need for an accommodation, the employer and employee should work together in good faith to determine whether a reasonable accommodation is possible.¹⁷¹ The employer and employee should then discuss how the employee's disability limits his ability to do his job and what the specific accommodation should be.¹⁷² Because such an approach would be most consistent with the language of the ADA, the EEOC regulations, the goals of the ADA, and public policy in general, it is the optimal approach.

A. *The Optimal Approach: The Interactive Process*

The ADA requires employers to provide reasonable accommodations to disabled individuals to ensure that employers do not treat disabled individuals adversely and to foster integration of disabled individuals in the workplace.¹⁷³ The reasonable accommodation provision in the ADA, however, is vague.¹⁷⁴

168. See *supra* notes 106-43 and accompanying text (discussing how the Ninth, Tenth, and Eleventh Circuits do not require employer participation in the EEOC's recommended interactive process).

169. See *supra* notes 152-54 and accompanying text (discussing a Seventh Circuit holding requiring employers to initiate the interactive process with mentally ill individuals).

170. See *supra* notes 146-67 and accompanying text (discussing decisions in the Third, Fifth, and Seventh Circuits that require employer participation in the EEOC's suggested interactive process once an employee has requested a reasonable accommodation); *infra* Part IV.A (positing that the optimal approach to the interactive process is one in which the employer's duty to participate is triggered when the employee requests an accommodation, albeit, not a specific one).

171. See *infra* Part IV.B (discussing the components of the optimal interactive process, specifically that the employees should initiate the process by showing employers that they are disabled).

172. See *infra* Part IV.B.3 (arguing that the liability for the breakdown in the interactive process should attach to the party who acts in bad faith).

173. See Michael Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?*, 13 LAB. L.J. 149, 150 (1997).

174. See *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998) (stating that

Consequently, employers often do not know how they should provide such accommodations.¹⁷⁵ To assist in resolving the ADA's ambiguity, courts often turn to the EEOC, the agency charged with enforcing the statute.¹⁷⁶ While the EEOC has not specifically addressed every statutory ambiguity in the ADA,¹⁷⁷ the EEOC has issued guidelines regarding employer participation in providing reasonable accommodations.¹⁷⁸ These guidelines suggest employer participation in the interactive process to find a reasonable accommodation for a disabled worker once the worker has requested an accommodation.¹⁷⁹

Some courts argue that the EEOC's statement that it "may be necessary" to have an interactive process implies that such a process is not mandatory.¹⁸⁰ The EEOC's meaning, however, is evident from its interpretive guidance section, which states that employers "must" participate in the interactive process once employees have requested accommodations.¹⁸¹

"[t]he ADA gives only general guidance" concerning "what constitutes a 'reasonable' accommodation."); *see also supra* note 70 and accompanying text (providing the text of ADA's reasonable accommodation provision).

175. *See Barnett*, 157 F.3d at 748.

176. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (stating that the EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 826 (4th ed. 1997) (explaining that the "courts are likely to defer to ADA regulations that provide 'reasonable interpretations' of ambiguous ADA provisions").

177. *See Zagrodzky, supra* note 12, at 949 (discussing how the EEOC has not specifically addressed the issue of whether the ADA requires an employer to transfer a disabled employee who requests a different position as a reasonable accommodation).

178. *See* 29 C.F.R. § 1630.2(o)(3), app. § 1630.9 (1998); *see supra* notes 80 and 82 (providing the text of EEOC regulations and interpretive guidance, respectively).

179. *See* 29 C.F.R. § 1630.2(o)(3), app. § 1630.9; *see supra* notes 80 and 82 (providing the text of EEOC regulations and interpretive guidance).

180. *See Barnett*, 157 F.3d at 752 (discussing how "may be necessary" is permissive language that only warns employers of the potential for liability for failing to participate in an interactive process).

181. *See id.* at 755 (Fletcher, J., dissenting). Although the regulations state "may," the EEOC's interpretive guidance suggests that "may" applies to only narrow circumstances where reasonable accommodations clearly are or are not available. *See id.* "The term 'may' describes the fact that sometimes there may be the necessity to engage in an interactive process. When it is necessary, it is not optional In cases where accommodation may be possible, the interactive process is required." *Id.*

Additionally, while "may" is usually construed as implying permissiveness, the "context in which the word appears must be [the] controlling factor." BLACK'S LAW DICTIONARY 676 (6th ed. 1991). Thus, while the regulations use the word "may," the interpretive guidance clarified the meaning of "may" by requiring employer participation. *See Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting). Therefore, when interpreted in context, "may" is not permissive. *See id.*

Although the regulations are not binding, the EEOC guidelines represent the expertise of an experienced law-enforcing agency.¹⁸² Courts, consequently, often defer to these guidelines to assist in statutory interpretation.¹⁸³ Thus, because the EEOC has addressed the issue at hand, and because the EEOC constitutes a sound body of experience, courts should defer to the EEOC's recommendations concerning reasonable accommodation.

Moreover, courts should defer to the EEOC's recommendations because they are consistent with the remedial goals of the ADA—to ensure disabled workers' full participation in the workplace.¹⁸⁴ The interactive process involves employers and employees sharing information typically more accessible to one side than the other. Thus, the process ultimately allows parties to break through many existing information barriers to determine optimal reasonable accommodations.¹⁸⁵ For example, employers tend to have better knowledge than employees of important areas to consider in determining reasonable accommodations, such as the company's overall operations, work flow, staffing needs, and available technology for their company's specific jobs.¹⁸⁶ Alternatively, employees often have better information, or access to information, about their particular medical conditions and inherent limitations.¹⁸⁷ Thus, without an interactive process, employees might lack the knowledge, skill, or ability to determine optimal, or even adequate, reasonable accommodations.¹⁸⁸ Likewise, employers might be unable to provide such accommodations without knowing the employee's specific medical condition and requirements.¹⁸⁹ By requiring an

182. See *Zagrodzky*, *supra* note 12, at 948 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). The EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

183. See *Meritor*, 477 U.S. at 65.

184. See *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) ("When the interactive process works well, it furthers the purposes of the . . . ADA.").

185. See *Barnett*, 157 F.3d at 755-56 (Fletcher, J., dissenting); see also *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996).

186. See *Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting); *Beck*, 75 F.3d at 1135-36; *supra* note 84 (providing language from 29 C.F.R. app. § 1630.9 regarding information sharing).

187. See *Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting); *Beck*, 75 F.3d at 1135-36; *supra* note 84 (containing text from 29 C.F.R. app. § 1630.9); see also *Simon & Morbey*, *supra* note 87, at 21 (noting that a disabled person's health care provider is "likely to have the most complete understanding of the employee's condition").

188. See *Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting).

189. See *id.* at 755-56 (Fletcher, J., dissenting).

interactive process, both employers and employees are able to break through these information barriers and determine the best possible reasonable accommodations for the specific situations.¹⁹⁰

Although fear of liability drives most employers to participate in the process,¹⁹¹ some employers have not participated in the process.¹⁹² While the employers who participate in the process further the ADA's remedial goals, those who do not choose to participate effectively inhibit the successful implementation of the ADA.¹⁹³ Employers not participating in the interactive process, and the circuit courts not requiring them to do so, have cited reasons for their positions.¹⁹⁴ None of the cited reasons, however, comports with the goals of the ADA.¹⁹⁵ For employers who already participate in the process, a requirement to participate will not be a change and thus will not place new burdens on them.¹⁹⁶ For those employers who do not already engage in the interactive process, such a requirement will merely require them to adhere to the practices of the numerous other employers who do participate and, ultimately, to comply with the

190. See *id.* at 756 (Fletcher, J., dissenting).

191. See *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997). "[T]he possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee." *Id.* (quoting *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996)). See, e.g., *Mengine v. Runyon*, 114 F.3d 415, 421 (3d Cir. 1997) (finding that an employer participated in interactive process by communicating in good faith with its employee regarding possible reasonable accommodations); *Beck*, 75 F.3d at 1135-36 (concluding that an employer engaged in interactive process by taking numerous steps to accommodate its employee based on information the employee had provided); James G. Sotos, *ADA Accommodation Rule Applies to Both Worker, Employer*, CHI. DAILY L. BULL., Aug. 13, 1998, at 1 (citing *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998) (finding that the employer had engaged in the interactive process by asking the employee for continual updates on the employee's medical condition)).

192. See, e.g., *Barnett*, 157 F.3d at 755-56 (Fletcher, J., dissenting) ("Some employers are unwilling to accommodate disabled workers . . . Here, U.S. Air never even bothered to talk with Barnett."); *Willis*, 108 F.3d at 285 (discussing how the court was "troubled by evidence that the employer [in *Moses*] had failed to investigate accommodating the plaintiff") (citing *Moses*, 97 F.3d at 448). In *Moses v. American Nonwovens, Inc.*, the employer failed to investigate possible accommodations for an epileptic employee who had informed the employer of his epilepsy. 97 F.3d at 448.

193. See *Barnett*, 157 F.3d at 755 (Fletcher, J., dissenting).

194. See *supra* Part III.A (discussing why some courts do not require employer participation in the interactive process).

195. See generally *Barnett*, 157 F.3d at 755-56 (Fletcher, J., dissenting) (discussing why employer participation in an interactive process is appropriate and not unduly burdensome on employers).

196. See, e.g., *cases cited supra* note 191 (providing examples of employers who have participated in the interactive process).

remedial goals of the ADA.¹⁹⁷

In requiring employer participation in the interactive process, courts reject a traditional burden-shifting framework because such a framework “provides great potential for causing precisely what the ADA was designed to prevent.”¹⁹⁸ Under a burden-shifting approach, employees with substantial knowledge of their workplace can likely point to specific accommodations and thus will receive reasonable accommodations.¹⁹⁹ Most employees, however, do not have such an information advantage.²⁰⁰ Rather, these employees will merely inform their employers that they need an accommodation, and not receive reasonable accommodations because they have failed to satisfy their burdens of proof.²⁰¹ Thus, by requiring plaintiffs to show specific accommodations, courts, in effect, exclude many disabled workers from receiving reasonable accommodations, and thereby frustrate the ADA’s remedial goals.²⁰² An interactive process, however, would advance the remedial goals of the ADA by requiring employers to help employees find reasonable accommodations.²⁰³

B. Components of the Interactive Process

An optimal interactive process should involve three components. First, employees should initiate the process.²⁰⁴ Second, courts should require employees to show only that they are disabled.²⁰⁵ Third, parties should be liable if they do not participate in the process in good faith.²⁰⁶

1. Employees Should Initiate Process

While courts should require employers to participate in the interactive process of finding reasonable accommodations for disabled workers, this duty should only arise when a disabled worker has made

197. *See, e.g.*, cases cited *supra* note 192 (providing examples of employers who have not participated in the interactive process).

198. Williams, *supra* note 41, at 155 (citing 42 U.S.C. § 12101(a)(7) (1995)); *see supra* notes 1-5 and accompanying text (discussing the remedial goals of the ADA).

199. *See* Williams, *supra* note 41, at 154 (discussing how a burden-shifting framework “demands omniscience on the part of the plaintiff before the employer has a duty to reasonably accommodate [the employee].”).

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.* at 154-55.

204. *See infra* Part IV.B.1.

205. *See infra* Part IV.B.2.

206. *See infra* Part IV.B.3.

it “known” that he requires an accommodation. Such an approach is consistent with the language of the ADA, with the EEOC regulations, and with overall public policy.²⁰⁷ First, the ADA’s requirement that employers reasonably accommodate employees’ “known”²⁰⁸ physical or mental limitations implies that employers only have the duty to reasonably accommodate employees when they are actually aware of the need for accommodation.²⁰⁹ Moreover, the EEOC’s interpretive guidance section specifically states that employers must only participate once the employee has requested an accommodation.²¹⁰

Additionally, courts should not require employers to initiate the interactive process in cases with mentally ill employees because employees and their health care providers will have better information about employees’ specific medical conditions and needs.²¹¹ Such a requirement would also be unduly burdensome to implement because employers would have to spend substantial time and money determining who needs accommodations.²¹²

2. Employees Need Only Show Disability

Although some courts require employees to show both their disabilities and their resulting job limitations,²¹³ courts should only

207. *See infra* notes 208-12 and accompanying text (discussing an employer’s right to be informed of an employee’s disability before being subjected to potential liability for violation of the ADA).

208. “Known” is defined as “perceived; recognized; . . . generally understood.” BLACK’S LAW DICTIONARY 604 (6th ed. 1991).

209. *See Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (quoting 42 U.S.C. § 12112(b)(5)(A) (1994)). Other ADA provisions also imply the knowledge prerequisite to employer liability. *See id.* (quoting 42 U.S.C. § 12112(b)(4) (prohibiting “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual.”)).

210. *See* 29 C.F.R. app § 1630.9 (1998); *supra* notes 83-84 (providing portions of EEOC’s interpretive guidance concerning the “known” requirement).

211. *See Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (finding no employer liability because the plaintiff’s request for a reasonable accommodation “[was] too indefinite and ambiguous to constitute a formal request for accommodation under the ADA.”).

212. *See id.* For example, mental illness is not always facially apparent. *See id.* at 165. Thus, because employers do not automatically know which employees are mentally ill, employers would have to contact each employee to determine this. *See id.* This communication would probably have to be in writing and performed on a regular basis, and thus require substantial money and time to be spent. If employees initiate the process, however, employers will spend their time and money more efficiently, as they will only start the reasonable accommodation process when they know that an accommodation is needed.

213. *See id.* at 164.

require employees to show that they are disabled.²¹⁴ The requirement to show limitations has the same flaws as the requirement to show specific accommodations under the burden-shifting framework.²¹⁵ The importance of information sharing based upon the respective knowledge of employers and employees necessitates that both employers and employees work together to determine how the employee is limited in his ability to perform the job.²¹⁶ Furthermore, courts should not construe the EEOC's statement that some disabilities do not always limit employees' abilities to perform their jobs to imply that employers should require employees to inform their employers of the limitations resulting from their disabilities.²¹⁷ Rather, courts should read this statement as a mere warning that certain impairments limit some employees more so than others.²¹⁸ By also suggesting an interactive process, the EEOC intended for employers and employees to work together to determine whether a disability in fact limits a particular employee in his ability to do his job.²¹⁹

3. Liability if No Good Faith Effort in Interactive Process

While it is relatively easy to determine when an employee has come forward with a disability, thereby requiring the employer to participate in an interactive process, it is harder to determine the exact point in the interactive process at which employers should incur liability.²²⁰ As a result, no circuit that has mandated employer participation in the

214. *See* Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996).

215. *See supra* notes 198-203 and accompanying text (discussing why the burden-shifting framework should not apply to ADA plaintiffs).

216. *See supra* note 84 (providing the portion of the EEOC's interpretive guidance that discusses the necessity of information sharing).

217. *But see supra* notes 158-60 and accompanying text (listing arguments in support of requiring plaintiffs to show disabilities and limitations).

218. *See supra* note 160 and accompanying text (discussing the EEOC's statement concerning disabilities and impairments).

219. *See supra* notes 73-86 and accompanying text (discussing the EEOC's suggested interactive process). As the employer typically knows more about the job classifications and essential functions, and the employee knows more about his specific disability, the two parties should work together to determine whether the specific disability creates a limitation for the employee and whether a reasonable accommodation is necessary. *See* Barnett v. U.S. Air, Inc., 157 F.3d 744, 755-56 (9th Cir. 1998) (Fletcher, J., dissenting) (discussing why information sharing is necessary for determining optimal reasonable accommodations). For example, employers can send form letters to doctors or talk with employees in great detail about their disabilities, limitations, and potentially reasonable accommodations. *See* Simon & Morbey, *supra* note 87, at 21.

220. *See* Barnett, 157 F.3d at 753.

interactive process has developed a “hard and fast rule”²²¹ for process liability.²²² Requiring both employers and employees to participate in good faith in the interactive process once the employee initiates the process is most sensible, as it is consistent with the ADA, the EEOC, and public policy.²²³ Since the good faith requirement subjects both employers and employees to potential liability, both parties have an incentive to communicate with each other and share information that is vital to providing optimal reasonable accommodations.²²⁴ This information sharing will ultimately lead to better reasonable accommodations, thereby furthering the ADA’s remedial goal of ensuring full participation of disabled workers in the workplace.²²⁵

A good faith liability requirement is also consistent with the EEOC’s intentions. The EEOC did not suggest a detailed process liability scheme, but instead provided a four-step process suggesting how employers should satisfy the interactive process by merely communicating with an employee about his situation.²²⁶ Moreover, a good faith requirement for both parties is consistent with public policy because it only punishes parties actually responsible for the breakdown in the interactive process.²²⁷ It is further consistent with public policy because it does not punish employers who participate in the process in good faith but are unable to provide accommodations that are possible or reasonable.²²⁸

221. See *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). “No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. . . . The determination must be made in light of the circumstances surrounding a given case.” *Id.* at 1135-36.

222. See *supra* Part III.B (discussing the circuit decisions requiring some level of employer participation in the interactive process).

223. See *Beck*, 75 F.3d at 1135; *supra* note 148 (discussing what constitutes good faith).

224. See *Beck*, 75 F.3d at 1135-36; *Williams*, *supra* note 41, at 159.

225. See *Barnett*, 157 F.3d at 755-56 (Fletcher, J., dissenting).

226. See *supra* note 86 (providing the text of the EEOC’s suggested four-part process to determine reasonable accommodations). Because an employer can satisfy his duty of participation by merely consulting with a disabled employee about his disability and possible accommodations, the interactive process does not unduly burden employers. See *Barnett*, 157 F.3d at 756 (Fletcher, J., dissenting) (citing *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1286-87 (7th Cir. 1996)).

227. See *Beck*, 75 F.3d at 1137 (finding no employer liability because the plaintiff actually caused the breakdown in the interactive process by not continuing to communicate with employer); *Sotos*, *supra* note 191, at 1 (discussing the *Steffe* court’s finding of no employer liability because plaintiff caused the breakdown in the interactive process by failing to provide medical updates to employer).

228. See *Williams*, *supra* note 41, at 159. Employer liability, however, arises if an accommodation were possible or reasonable, but the employer failed to participate in

V. PROPOSAL

Since the reasonable accommodation provision of the ADA is very general and therefore controversial, Congress should amend the statute to require employer participation in the interactive process of finding a reasonable accommodation. Specifically, it should supplement the current provision defining discrimination with language requiring an interactive process to determine reasonable accommodations.²²⁹ This language must clearly establish that the process requires both parties to participate in good faith once the qualified individual with a disability has shown that he is disabled.²³⁰ Congress should explain that a breach of good faith involves one party failing to help the other party make reasonable accommodations, and that either party can incur liability²³¹ for a lack of good faith that causes the interactive process to break down.²³² By making these changes, Congress will clarify much of the existing confusion regarding how employers should provide reasonable accommodations, and thus permit employers to further the remedial goals of the ADA.

Although the EEOC regulations and interpretative guidance are not binding, the EEOC should revise these guidelines to reflect the suggested statutory changes.²³³ Specifically, the EEOC should use

the process and thereby failed to provide such an accommodation. *See id.*

229. A possible solution might be to amend Part (5)(C) of the Discrimination provision of Title I of the ADA to read: "To determine a reasonable accommodation, both employers and qualified individuals with disabilities must participate in good faith in a flexible, interactive process, once the qualified individual with a disability has informed his employer of his disability." *See Beck*, 75 F.3d at 1135-36; 29 C.F.R. app. § 1630.9.

230. *See supra* note 229 (providing a sample of such language).

231. If the employer causes the breakdown in the interactive process, the employee has a valid cause of action under the ADA. *See, e.g.,* cases cited *supra* note 192. If, however, the employee causes the breakdown in the process, he simply has no cause of action; the employer is thus not liable for failing to provide a reasonable accommodation. *See, e.g.,* cases cited *supra* note 227.

232. For example, Congress might adopt the good faith language from *Beck* and state:

A failure to participate in good faith means "failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."

Beck, 75 F.3d at 1135 (citation omitted). Failure to communicate can include failure to provide "information . . . of the type that can only be provided by one of the parties." *Id.* at 1136.

233. *See supra* note 182 and accompanying text (discussing the reasons why courts should defer to EEOC guidelines). The EEOC is presently developing new guidance for

mandatory, not permissive, language in the portions of the regulations²³⁴ and interpretive guidance²³⁵ concerning employer participation in the interactive process once the employee has initiated the procedure. Such mandatory language will further eliminate any remaining confusion over whether employers are required to participate in an interactive process. The interpretive guidance should also clarify that an employee need only inform his employer of his disability, and not of his resulting limitations.²³⁶ In doing so, the EEOC will also clarify the exact point at which an employer is obliged to participate in the interactive process.²³⁷

While the amended ADA will define the scope of liability for the interactive process in terms of good faith participation, the EEOC can provide further guidance by amending and clarifying its current four-step process for employer participation.²³⁸ First, concerning the identification of the essential functions of jobs, the EEOC should advise employers to prepare thorough job descriptions before they

the ADA which will address the controversial reasonable accommodation provision. See Fawn H. Johnson, *EEOC's ADA Enforcement is Lauded; Commissioner Says New Guidance Pending*, 11 *Empl. Discr. Rep. (BNA)* 605, 605-06 (Nov. 4, 1998). One issue this guidance may address is "how an employee should ask for an accommodation." *Id.* at 606.

234. See *supra* note 80 (providing the current text of the EEOC's regulations suggesting employer participation in an interactive process). For example, rather than saying that "it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation," the regulations might read "[t]o determine the appropriate reasonable accommodation," employers *must* participate in an interactive process once a qualified individual with a disability has shown he is in need of an accommodation. 29 C.F.R. § 1630.2(o)(3) (1998).

235. See *supra* note 82 (providing the current text of the EEOC's interpretive guidance that suggests employer participation in an interactive process). Thus, rather than saying that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process," the EEOC should change the words "is best determined" to "are," thereby modifying the interpretive guidance to "appropriate reasonable accommodation[s] [are] determined through a flexible, interactive process." 29 C.F.R. app. § 1630.9.

236. For example, the EEOC might add to the interpretive guidance a statement: "To initiate the interactive process, a qualified individual with a disability need only inform his employer that he is disabled. Once the employer knows the individual is disabled, the two parties must work together to determine how the disability limits the employee's ability to do his job and how the employer can reasonably accommodate the employee." See *supra* note 82 (providing the present text of the EEOC's interpretive guidance suggesting employer participation in an interactive process).

237. See *supra* note 236 (providing language that would require an employer to participate in the interactive process "once the employer knows the individual is disabled").

238. See *supra* note 86 and accompanying text (describing the EEOC's suggested four-step process); Simon & Morbey, *supra* note 87, at 17-18.

advertise or interview individuals for the positions, and to continually update these job descriptions.²³⁹ Second, regarding employer consultation with employees about their disabilities and limitations, the EEOC should instruct employers to first explain to the employee that the employer needs to know whether the employee is disabled and, second, that the employer will require medical information to determine this disability and subsequent limitations.²⁴⁰ The EEOC should also advise employers, upon consent from the employee, to personally contact the employee's health care provider for this information.²⁴¹ Third, regarding identification of accommodations, the EEOC should warn employers to document all meetings and conversations throughout the process, as this is evidence of the employer's good faith effort.²⁴² Last, concerning the selection of an appropriate accommodation, the EEOC should remind employers that they need only provide reasonable accommodations if they do not create undue hardships for the employers, but warn them to carefully analyze each situation to avoid ultimate liability.²⁴³

VI. CONCLUSION

Congress enacted Title I of the ADA to prevent employers from discriminating against disabled workers. While Congress stated in the ADA that employers who do not provide reasonable accommodations to disabled workers will be liable for discrimination, it failed to specify whether employers must help employees find such reasonable accommodations. The EEOC regulations and interpretive guidance on this section assist parties in construing the statute, but they too are ambiguous.

Moreover, these regulations are not legally binding. Courts are split over whether to require employers to participate in the interactive

239. See Simon & Morbey, *supra* note 87, at 19. By doing so, employers will better protect themselves from future accusations that certain requirements are not essential functions of the job. See *id.*

240. See *id.* at 21.

241. See *id.* Although health care providers are those likely to best understand employees' specific medical conditions, they invariably will not provide employees with the most adequate and complete reports of their medical conditions. See *id.* If, however, employers send letters asking specific questions about the employees and their disabilities, the health care providers are more likely to provide the necessary information. See *id.* If the health care providers fail to respond to the letters by an employer-specified date, employers can then have their own health care providers examine the employees. See *id.* The EEOC could provide samples of letters that employers can send to employees' health care providers. See *id.*

242. See *id.* at 23; see also Comisky, *supra* note 70, at 508.

243. See Simon & Morbey, *supra* note 87, at 23.

process of finding a reasonable accommodation for a disabled worker. While some courts adhere to a traditional burden-shifting framework, other courts defer to EEOC regulations and interpretive guidance, which suggest an interactive process. Because requiring an interactive process is most consistent with the ADA's language, the EEOC's regulations and interpretive guidance, the goals of the ADA, and public policy in general, an interactive process is the better approach. Thus, the most logical solution to the reasonable accommodation controversy is to amend the ADA to require employer participation in an interactive process, and to revise the EEOC regulations and interpretive guidance accordingly. Such changes will lead to optimal reasonable accommodations, and thereby further the remedial goals of the ADA.

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