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Going Beyond the Judicially Prescribed Boundaries of the Americans with Disabilities Act

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NOTES

GOING BEYOND THE JUDICIALLY PRESCRIBED BOUNDARIES OF THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

Under the Americans with Disabilities Act ("ADA" or "Act")\(^1\), an employer unlawfully discriminates where it fails to make "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."\(^2\) This Note focuses on those accommodations that would require substantial financial undertakings on the part of the employer.

To properly analyze the effectiveness of the ADA, this Note considers what constitutes a "reasonable accommodation," who is a "qualified individual with a disability," and what constitutes "undue hardship" in light of the policy and legislative history of the ADA. The Note then suggests an efficient, cost effective financing method that implements the ADA in a more equitable manner that also protects a greater percentage of the disabled population than the present administration of the Act.

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2. Id. § 12112(b)(5)(A).
II. THE POLICY OF THE ADA

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.3

Specifically, the relevant legislative policy is that there "exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector . . . ."4

The Senate Committee on Labor and Human Resources submitted a report that points to five reasons why such legislation is necessary to mainstream America’s disabled into the workforce as well as other facets of society:

1. Historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
2. Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
3. Current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
4. People with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
5. Discrimination denies people with disabilities the opportunity to compete on an equal basis and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.5

The disabled are subject to the prejudices and evils of society

5. Id. at 6.
seemingly more so than any other minority group in America. This discrimination costs our economy "between $200 billion and $300 billion a year in support payments and lost productivity by not using the skills and talents of workers with disabilities." When Congress was considering the ADA, the common practice of excluding the disabled from the workplace was uncovered. The levels of unemployment among this neglected group of Americans is staggering. According to one survey, "[t]wo-thirds of all disabled Americans between the ages of sixteen and [sixty-four were] not working," although a large majority of them wanted to work. This translated into approximately 8.2 million disabled Americans who wanted to work and could not find a job. The disabled community is not a class of people that wants to live off the taxpayer, but rather a class that wants to be part of the productive machinery of this country. In fact, eighty-two percent of the disabled have said that they would give up the government benefits that they receive in exchange for a full-time job. Today, the statistics are no more encouraging: sixty-five percent of those who are disabled are unemployed although sixty percent of the disabled would prefer to have a job.

The Senate's report on the ADA also revealed that many employers have unfounded fears. The disabled were believed to cause the employer's insurance to dramatically increase, necessitate workplace adjustments at considerable expense, jeopardize safety records, require special privileges, and result in other employees objecting to working with the disabled employees. The report noted that "[t]he continuing effect of mistaken stereotypes across the spectrum of employers, in both small and large enterprises, is likely the single greatest factor in keeping most working age adults with disabilities out of the economic mainstream.

6. Id. at 8-9.
7. Tony Coelho, Disabilities Laws Work, ATLANTA J.-CONST., Aug. 4, 1995, (Letters to the Editor), at A12. Tony Coelho is chairman of the President's Committee on Employment of People with Disabilities. Id.
15. S. REP. No. 116, supra note 4, at 28.
The Senate's report, however, concluded that there is no merit to any of these contentions. To support this conclusion, the report noted a 1973 study in which the performances of 1,452 disabled E.I. duPont de Nemours and Company employees were examined. The study dispelled employers' common misconceptions about the supposed inadequacies of disabled employees. In particular, the study found that ninety-one percent of the disabled employees at DuPont rated average or better in performance; only four percent of the disabled workers had safety records that were below average while more than half were above average; ninety-three percent of the disabled employees rated average or better than average with respect to job stability; and seventy-nine percent of the disabled workers had an average or better than average attendance record. The study also found that "[f]ellow employees did not resent necessary accommodations made for employees with disabilities.

The ADA had very noble beginnings. It attempted to do for disabled Americans what Title VII has accomplished for the other American groups who traditionally have been the victims of discrimination. The ADA covers a very large percentage of the disabled community. However, most of these individuals are not necessarily the members of the disabled community that are the most difficult to assist. In 1982, one study revealed that seventy-eight percent of disabled employees needed no accommodations at all. This left only twenty-two percent of employees who required special accommodations, of which a full fifty-one percent could be achieved at no cost and thirty percent would cost under $500 per worker. The class of disabled employees requiring these workplace modifications is not difficult to accommodate and requires relatively little employer expense. However, fearful of the ramifications of the ADA on their businesses, employ-

26. Id.
27. Id.
ers, in making expenditures associated with complying with the ADA, have sometimes actually spent more than they had to.28

These statistics have not changed much five years after the passage of the ADA. Recently, Sears commissioned a study concerning the cost to employers of reasonable accommodations.29 The study indicated that of 436 reasonable accommodations provided by Sears, only three percent cost more than $1,000 while twenty-eight percent of the accommodations cost less than $1,000 and a full sixty-nine percent cost nothing at all.30 It is this majority of disabled employees, those requiring little or no accommodations, who have been well protected and have been afforded the benefits of the statute such as being better equipped to use the court system to challenge employers in a manner similar to the litigation of Title VII violations.31

This Note focuses on the minority of disabled employees who need accommodations where the cost may be quite significant. This is the class of Americans whom the courts have abandoned. Senator Harkin, during a debate for the passage of the Act, eloquently stated that "[i]t makes no sense for a talented person who has skills to contribute, to sit idly at home receiving [government assistance]."32 The above mentioned minority of individuals among the disabled community is the class of Americans not benefiting from the current interpretation of the ADA. The unfortunate fact is that five years after the enactment of the ADA, employment opportunities for the disabled have not greatly increased.33 "The ADA has not brought lots of people into the mainstream of the work force."34 In fact, according to a recent national poll taken by Louis Harris & Associates, Inc., very little improvement has been made in adding more disabled people into the workplace.35 As will be shown, the courts have made it very difficult for these individuals,

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30. Id.
31. Id.
35. Id. (quoting Kathryn Shane McCarty, associate staff director of the American Bar Association's Committee on Mental and Physical Disabilities Law).
although intended to be protected by the ADA,\textsuperscript{36} to be able to compete in the workplace.

III. REASONABLE ACCOMMODATIONS

The ADA does not specifically define the term "reasonable accommodation" although section 12111(9) of the Act sets forth several examples that are consistent with the philosophy of reasonable accommodation.\textsuperscript{37} These examples include: making existing facilities readily accessible to and usable by people with disabilities; job restructuring; developing part-time or modified work schedules; reassigning employees to vacant positions; acquiring or modifying equipment; modifying or adjusting examinations, training materials, and/or policies; and providing qualified readers or interpreters for blind or deaf employees.\textsuperscript{38} The legal obligation for an employer to provide these accommodations is limited to the extent at which these accommodations would cause the employer undue hardship.\textsuperscript{39}

A majority of disabled Americans do not require any accommodations to perform the essential job functions of the positions they seek.\textsuperscript{40} Thus, equal opportunity and treatment is relatively inexpensive to achieve among these Americans.\textsuperscript{41} It is the disparity of treatment between people with lesser and people with greater degrees of disability that requires correction, so that all disabled Americans receive equal treatment and society achieves the desired equal impact among all who are disabled.

A. Reasonable Accommodation and Substantial Modification

To properly understand the reasons for the varying coverages among the different classes of disabled employees under the ADA, it is necessary to determine the standards courts have applied in deciding when modifications that enable disabled employees to meet the

\textsuperscript{36} Based on the legislative history of the ADA, it appears that Congress intended to give all those disabled individuals who wanted to work the opportunity to work. \textit{See} S. REP. No. 116, \textit{supra} note 4, at 2; 135 CONG. REC. S10791 (1989) (statement of Sen. Dole).
\textsuperscript{38} 42 U.S.C. § 12111(9). \textit{See also} 29 C.F.R. § 1630.2(o)(2).
\textsuperscript{39} \textit{See} 42 U.S.C. § 12111(10) (Supp. V 1994); 29 C.F.R. § 1630.2(p). For a description of what constitutes an undue hardship, see \textit{infra} part III.C.
\textsuperscript{40} Tucker, \textit{supra} note 25, at 930.
\textsuperscript{41} \textit{See} Tucker, \textit{supra} note 25, at 930.
employer’s standards cross the line separating reasonable accommodations from affirmative action. In *Southeastern Community College v. Davis*, 42 the Supreme Court attempted to distinguish between “reasonable accommodation” and affirmative action. 43 *Davis* did not involve the ADA, 44 but it did require the Court to interpret the meaning of “reasonable accommodation” under the Rehabilitation Act. 45 “Reasonable accommodation” under the ADA is modeled after the statutory definition under the Rehabilitation Act and the judicial interpretations of the Rehabilitation Act. 46

In *Davis*, a licensed practical nurse brought an action under the Rehabilitation Act against a college that denied her admission into its registered nursing program due to her hearing disability. 47 Commenting on the interpretation of the Rehabilitation Act by the Department of Health, Education, and Welfare (“HEW”), the Court held that “[a]lthough an agency’s interpretation of the statute under which it operates is entitled to some deference, ‘this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.’” 48 The Court held further that “neither the language, purpose, nor history of [section] 504 reveals an intent to impose an affirmative-action obligation . . . [and] even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.” 49 The Court then labeled the student’s suggested remedies “substantial modifications” and ruled that modifications reaching this level were not among those warranted by the Rehabilitation Act. 50

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42. 442 U.S. 397 (1979) (holding that a registered nurse training program need not make substantial modifications to its program in order to reasonably accommodate a handicapped applicant).
43. *Id.* at 407-11.
44. *Id.* at 400.
45. *See id.* at 408-11.
46. *See, e.g., Americans with Disabilities Act, 1989: Hearings on S.933 Before Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. 54 (1989) (statement of Sen. Harkin) (arguing that “to the extent possible that this legislation can track settled law, settled Supreme Court interpretation, settled regulations, that is what we are going to do.”)). *See also* H.R. REP. NO. 485, *supra* note 3, at 62. Since its enactment, very little case law has developed under the ADA. Janet Reno & Dick Thornburgh, *ADA - Not a Disabling Mandate*, WALL ST. J., July 26, 1995, at A12. “The Justice Department and the Equal Employment Opportunity Commission, together, have averaged fewer than 25 suits during each of the past five years.” *Id.* There have been only 650 ADA cases nationwide. *Id.*
47. *Davis*, 442 U.S. at 400-02.
48. *Id.* at 411 (quoting International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979)).
49. *Id.* at 411-12.
50. *Id.* at 413.
The *Davis* decision, although not stated with complete clarity,51 initiated a series of decisions that consistently differentiated between “reasonable accommodations” and affirmative action.52 Although the distinction has been followed by the courts,53 the distinction is certainly not clear. The *Davis* Court did not enunciate a bright line rule to distinguish affirmative action or substantial modification from reasonable accommodation, and subsequent decisions have failed to clarify the issue.54 The *Davis* decision and its progeny allow no room for consistency of judgments because of the vagueness of the term “substantial modification.” So when does an accommodation cross the line separating “reasonable” from “substantial”?55

The *Davis* Court’s ruling has effectively divided the handicapped population into two classes: those who require less than substantial modifications by an employer and are thus protected under the ADA, and those who require substantial modifications and are therefore denied protection under the ADA. Although the *Davis* Court found that any modifications to the program would be of no assistance to the student,56 the Court’s ruling also declared that it was unnecessary for the college to modify the nursing program, as suggested by the student, because the suggestions comprised substantial modifications that the college was not obligated to make under the Rehabilitation Act.57

Examples given in the ADA itself question the applicability of the *Davis* Court’s reasoning to the ADA. First, some of the ADA’s examples of a reasonable accommodation include providing qualified readers or interpreters for the blind or the deaf, job restructuring, and modifying work schedules.58 Thus, for the school to provide an interpreter or supervisor to the student and to modify the curriculum (as an employer would restructure a job or modify a schedule) would be

52. See, e.g., School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987) (noting that the duty of an employer does not include affirmative action, but “an affirmative obligation to make a reasonable accommodation for a handicapped employee”); Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985) (narrowing the *Davis* decision by holding that reasonable accommodations do not require the employer to make substantial modifications or to fundamentally alter the nature of a program).
54. *See supra* note 52.
55. *Davis*, 442 U.S. at 409.
56. *Id.* at 413-14.
perfectly consistent with the plain meaning of the Act. The facts of *Davis* classically exemplify the situation that Congress envisioned when it drafted the definition of "reasonable accommodation." However, contrary to Congress' intended judicial interpretation of reasonable accommodation, the *Davis* Court reasoned that the student's participation in the program would substantially lower the school's standards. While it is true that *Davis* was decided before the enactment of the ADA, it is still controlling when determining what accommodations are substantial and, thus, unreasonable.

The school's responsibility under the Rehabilitation Act to make reasonable accommodations to the student should have been sufficient for the Court to find that the burden placed upon the school was warranted due to the nature of the accommodations. In the lower court decision in *Davis*, the Fourth Circuit, which based its decision on Section 504, stated that Southeastern "must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability." The proposition of the *Davis* Court is correct in that "reasonable accommodation" should mean equal opportunity, not affirmative action, but the standard was misapplied and the relief being sought by the student was mislabeled. As a result of the *Davis* decision, accommodations which courts interpret as substantial modifications will now be rejected as unreasonable accommodations. Because it has been held that awarding certain affirmative action is not within the province of the courts, employers have relied heavily on convincing the courts that the accommodation sought by the employee would be a substantial modification and therefore cause an undue hardship.

Here, it seems applying the *Davis* Court's decision undermines the

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58. See id.
59. *Davis*, 442 U.S. at 413.
60. Id. at 405.
62. See 42 U.S.C. § 12101(a)(8) (Supp. V 1994); H.R. REP. NO. 485, supra note 3, at 65 (commenting that "the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual’s equal employment opportunity are removed.").
63. *Davis*, 442 U.S. at 413.
64. See *Davis*, 442 U.S. at 410-11.
intended policy of the ADA. Under Davis, where individuals have more severe handicaps or handicaps more difficult to accommodate, courts will deem these modifications substantial. The labeling of an accommodation as a substantial modification will also deny the disabled applicant access to the workplace; thus the individual will be systematically excluded from the protective umbrella of the ADA. Enforcement of the ADA in this manner has the effect of treating handicapped individuals unequally, not as compared to non-disabled Americans, but among themselves. The Court’s use of the “substantial modification” rule as defined in the Davis decision gives employers an excuse to treat different handicapped individuals unequally. It is difficult to imagine that Congress only intended to cover those handicapped individuals who are most convenient to cover.

In addition to an employer’s ability to escape the mandates of the ADA by a showing that the accommodation is unreasonable because it amounts to a substantial modification, the employer has two other avenues to avoid hiring a handicapped individual who requires accommodation or modification.

B. Qualified Individual with a Handicap and Essential Job Function

An employer need only accommodate a “qualified individual with a disability.” A “qualified individual with a disability” is defined in section 12111(8) of the ADA as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Essential job functions under the ADA are those functions that are “fundamental and not marginal.” An employee must be able to perform essential job functions “unaided or with the assistance of a reasonable accommodation.” In an attempt to avoid giving the

67. See Davis, 442 U.S. at 413.
69. See Davis, 442 U.S. 397, 413.
70. Cooper, supra note 51, at 1441-42.
employer complete control in this area, the employer's determination of what constitutes an essential job function is merely given consideration by the courts. Petitioners may offer evidence such as the amount of time spent on the job performing the function to dispute the employer's position regarding a particular duty. The reason not to give the employer more control in this area is obvious - there is a predisposition for employers to save money - and if an employer is faced with spending money to make an accommodation, the employer may be tempted to label as essential job functions those duties that common sense would label as only marginal at best. Congress' refusal to give employers carte blanche in deciding essential job functions does not undermine the employer's right to freely choose the applicant who the employer feels can do the best job. Congress seems to have reached a commendable compromise in this area.

The meaning of "essential job functions" comes from judicial interpretation of the Rehabilitation Act. While it is true that a court must give consideration to what an employer considers an essential job function, a court's fact-specific inquiry should "be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." After the inquiry, the court - not the employer - determines what job functions are essential.

_Nelson v. Thornburgh_ was a seminal case that defined the phrase "essential job function." In _Nelson_, the court noted that a job function may be labeled essential simply because employees previously holding the position had done it in the past. "It is possible to envision situations where an insistence on continuing past requirements and

75. See H.R. REP. NO. 485, supra note 3, at 55.
76. See Hutchinson, 1995 WL 215407 at *4.
77. Cooper, supra note 51, at 1442.
78. Cooper, supra note 51, at 1442.
79. Cooper, supra note 51, at 1442-43.
80. See H.R. REP. NO. 485, supra note 3, at 55.
81. Tuck v. HCA Health Serv., 7 F.3d 465, 472 (6th Cir. 1993). The court held that the employer hospital had not discharged its obligation to make reasonable accommodations. _Id._ at 474.
82. _Id._ at 472 (quoting Hall v. United States Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988)); see also 29 C.F.R. § 1630.2(n) (1995).
83. Tuck, 7 F.3d at 472 (citing Hall v. United States Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988)).
85. See _id._ at 378.
practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program."

In a subsequent case, *Jackson v. Veterans Admin.*, an insightful dissent contested the majority's application of the "otherwise qualified" language in regard to essential job functions. The majority held that unpredictable absences that were the result of the individual's handicap could not be reasonably accommodated and therefore the plaintiff could not be considered a qualified individual with a disability. The dissent first reasoned that the unpredictability of the plaintiff's absenteeism was irrelevant because he had not exhausted all of his allotted sick days. More importantly, the dissent stated that predictability of the plaintiff's presence at work was not an essential job function. When deciding whether a handicapped individual is "otherwise qualified," Judge Birch suggested that the reviewing court must employ a two prong analysis. The court must first make a determination of whether the individual can perform the essential job functions of the position. If the court finds that the applicant cannot, then it must determine if the applicant could perform these functions with the aid of a reasonable accommodation.

The dissent's approach looks more deeply into what constitutes an essential job function. It is easy to label as an essential job function an aspect of a position that at first glance seems important, but when the actual merits of the position are uncovered, is revealed to be merely peripheral. According to Judge Birch, the essential function of the position in *Jackson* was that the work be completed. If the employee was able to do this with the aid of a reasonable accommodation, then he

86. *Id.* at 378.
87. 22 F.3d 277 (11th Cir.), *cert. denied*, 115 S. Ct. 657 (1994).
88. *Id.* at 281 (Birch, J., dissenting).
89. *Id.* at 279-80.
90. *Id.* at 283 (Birch, J., dissenting).
91. *Id.* See Purvis v. United States Postal Serv., No. 01921624 (Aug. 19, 1992), *cited in* Walton v. Runyon, Appeal No. 01934642, 1994 WL 744449, at *3 (E.E.O.C. June 14, 1994) (holding that if attendance is deemed to be an essential job function, any disabled employee with frequent absences would be considered unqualified and no reasonable accommodation must be made). *But cf.* Walton v. Runyon, Appeal No.01934642, 1994 WL 744449, at *3 (E.E.O.C. June 14, 1994) (holding that where the employer is unaware of the employee's disabling condition, after the employee is penalized for frequent absences, the employer cannot be found to have discriminated against the individual).
93. *Id.*
94. *Id.*
95. *Id.* at 283.
must be considered a qualified individual with a handicap. Is this not the very result that Congress intended when enacting the policy of the ADA? Jackson provides another classic example of a disabled American who wanted to work but was stymied by the judicial system.

C. Undue Hardship

Another avenue available to shield the employer from the mandates of the ADA is the concept of “undue hardship.” An employer’s legal obligation to provide an employee with a reasonable accommodation depends on “whether [the] accommodation would impose an undue hardship on” the employer’s business. This factor does not come into play unless the employee or applicant has already been deemed a qualified individual with a disability. This provision, like the concept of “reasonable accommodation,” was meant to be applied and interpreted consistently with decisions regarding “undue hardship” under the Rehabilitation Act. “Undue hardship,” which was originally intended by Congress to merely limit the employer’s monetary contribution, has been used as an escape hatch for the employer to avoid making any contribution at all. Thus the “undue hardship” exception threatens to swallow the rule.

“[U]ndue hardship” means an “action requiring significant difficulty or expense i.e., an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program.” The ADA’s definition of “undue hardship” is supplemented by specific factors that are to be used in the calculation of the employer’s
undue hardship. These factors include:

(1) the overall size of the business of the covered entity with respect to number of employees, number and type of facilities and size of the budget;
(2) the type of operation maintained by the covered entity, including the composition and structure of the entity's workforce; and
(3) the nature and cost of the accommodation needed.

An additional aspect of "undue hardship" that is often ignored, poorly applied, or merely forgotten is the fact that the employer must pay for the portion of the accommodation that would not cause an undue hardship. Ideally, the ADA effects all employers in an evenhanded manner by taking all of the previously stated factors into account. It is certainly possible that Congress had anticipated that agencies or other similar institutions would take the initiative in this area. Congress even proposed an example of an agency that might be a resource for an employer or applicant to draw from once the employer pays up to the amount that would be considered an "undue hardship." The committee report mentions the State Vocational Rehabilitation Agency as an example of an agency that may pay for the cost above what the employer would be expected to provide. Congress' foresight here was exquisite, but all of the pieces were not yet put into place.

For the law to affect the marketplace evenhandedly, each employer confronted with having to make a reasonable accommodation for a qualified individual with a disability would have to pay the portion of the accommodation below their undue hardship level which would be calculated using the many factors involved. Historically, this plan has failed to materialize. Prior to the enactment of the ADA, courts applied the concept of "undue hardship" in an inconsistent manner.

108. S. REP. No. 116, supra note 4, at 36; see also 29 C.F.R. § 1630.2(p).
109. In addition to suggesting possible methods for paying the cost of an accommodation above the employer's undue hardship, the committee report also provides that where the applicant is willing to make arrangements to cover the difference, an employer cannot reject an applicant simply because the employer cannot afford the accommodation. See S. REP. No. 116, supra note 4, at 36. It seems likely that Congress was preparing for the inevitable transition needed for the ADA to be fully implemented. This transition is the move from the employee raising the funds for the accommodation to the cost of the accommodation being spread throughout society.
110. S. REP. No. 116, supra note 4, at 36.
111. S. REP. No. 116, supra note 4, at 36.
112. S. REP. No. 116, supra note 4, at 36; 29 C.F.R. § 1630.2(p).
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according to the varying views of the particular judges. Even today courts recognize that “undue hardship” can be used to escape liability by permitting the employer to prove merely “that a disability accommodation reasonable for a normal employer would break him.” In practice, employers escape responsibility under the ADA when the cost of the accommodation reaches a level above the amount that would be considered an undue hardship by the particular court.

How are courts to make this determination? Shall the judicial system decide every issue related to what accommodations constitute an undue hardship? Potential disaster awaits the court system (both in overloaded dockets and inconsistent decisions) once substantial numbers of the handicapped population begin to assert their rights under the ADA, to battle discrimination, and to obtain the equal opportunities of employment that have long been denied them. In Barth v. Gelb, the court was quite cognizant of the problem the judiciary faces each time it assesses undue hardship based on cost.

Additionally, the current result is unfair to the employer who, in the court’s eyes, can afford a reasonable accommodation. The employer is in effect being penalized; not for having to hire an employee who requires an accommodation, but for being successful enough to afford the accommodation when less successful operations cannot. There is no doubt that a larger company with a bigger budget could bear the cost of an accommodation more easily than a smaller company. If this is to be the guide used by the courts in determining which employers are required to make the same accommodation, it would most certainly lead.

113. See Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv. L. Rev. 997, 1011 n.87 (1984). "[U]ndue hardship' seems in practice to have served simply as a label for accommodations that courts have refused to require in particular cases." Id. at 1011.

114. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995). The court held that, as a matter of law, it was a reasonable accommodation to allow a disabled employee "to work at home, at full pay, subject to only a slight loss of sick leave." Id. at 545.

115. Id. at 543; see S. Rep. No. 116, supra note 4, at 36.


117. In discussing the allocation of the burden of proof under the Rehabilitation Act, the court noted the difficulty the judiciary has in assessing what constitutes an undue hardship by recognizing that “a grey area will arise where a proposed accommodation is so costly or of such a nature that it would impose an undue burden on the employer’s operations.” Id. at 1187.

118. This inference is reasonable because when determining the employer’s undue hardship, the factfinder must necessarily consider the size of the employer’s business with respect to the number of employees, the number and types of facilities, and the size of the budget. See S. Rep. No. 116, supra note 4, at 35-36.
to absurd results.

For example, consider this hypothetical: two employers, one a less efficient, medium sized operation and the other a very efficient, large operation, are each approached by a qualified individual with a handicap for employment and both are called upon to make the same accommodation. If the accommodation is an undue hardship for the medium sized company but not for the large company, the large company will have to make the accommodation. The problem: what if the only reason the more efficient company is larger is because the higher level of efficiency allows it to charge lower prices and in turn sell more products? Now that the court has decided that only the larger company must provide the accommodation, the larger company loses its competitive advantage of lower prices. This would remove the incentive in the marketplace to become more efficient. This example is obviously grossly oversimplified, but illustrates the potential impact on the economy from awarding accommodations based on the employer's ability to pay for them.

Additionally, what becomes of the next qualified individual with a disability who requires a reasonable accommodation once an employer has expended so much on past accommodations that the employer has reached the level just under undue hardship? Does the disabled American who is willing to work then suffer because he or she applied for the position too late? This result would also be unacceptable.

Courts have grossly misapplied this cutting-edge statute partially as a result of the limiting constraints imposed by the case law decided under the Rehabilitation Act and partially as a result of the limited resources for employers to draw from to pay for the accommodations. The ADA has many potential benefits to society that are going unrealized. The approach currently followed by the courts is simply not effectuating the policies of the ADA and is not putting more disabled employees into the workforce.

IV. THE PROPOSED SOLUTION

It is now apparent that there is a major flaw in the implementation of the ADA. The problem is that the end decision as to which accommodations are "undue hardships" will affect the disabled population unequally simply because to be able to perform the essential job

121. See supra notes 34-35 and accompanying text.
functions of a particular position, some handicapped individuals require more expensive accommodations than others.  

A. Using The Social Security Administration

Many ills in society are outside the scope of government intervention. Fortunately, in *Helvering v. Davis*, the Court stated that unemployment is a condition that Congress may try to tame using the "resources of the nation." The majority in *Helvering* used this reasoning to justify the Social Security Act ("SSA"). The court stated that "[t]he hope behind [the Social Security Act was] to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." In *Sayers v. Gardner*, the Sixth Circuit opined that the SSA was adopted "pursuant to a public policy unknown to the common law, designed for the protection of society, and enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability." This hope is further manifested in the Americans with Disabilities Act. 

The Social Security Administration is the logical agency to help subsidize the accommodations that will assist the disabled community in acquiring the positions they desperately want and need. After its enactment, the SSA was subsequently expanded to aid the disabled population as well as the elderly. An individual was no longer

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122. Because the cost of the accommodation as well as the size of the employer are among the factors to be considered in determining an employer's undue hardship, it appears that Congress realized the importance these factors would play in the practical application of the ADA. See S. REP. No. 116, supra note 4, at 36.


124. Id. at 641.

125. Id.

126. Id.

127. 380 F.2d 940 (6th Cir. 1967). The court held that pain in itself may have been enough to constitute a disabling impairment and that the plaintiff may have been eligible for benefits. Id. at 948.

128. Id. at 942.

129. See S. REP. No. 116, supra note 4, at 2.

130. The Social Security Act was the logical starting point to attempt to alleviate the problems of poverty and neglect that were plaguing the elderly and the disabled as a result of their inability to work. *Sayers*, 380 F.2d at 942. Once the effects of the Social Security Act manifested, the setting was right for the beneficiaries of Social Security to take control of their own lives. The purpose of the ADA is to empower them to do so. See S. REP. No. 116, supra note 4, at 2.

required to be a certain age to receive Social Security benefits:132 if a working individual became disabled, that individual was also eligible to receive benefits.133

The SSA was the beginning — it immeasurably improved the unemployed disabled population's lot in life. The ADA now has the potential to mainstream these resilient individuals into America's workforce and let them become productive members of society.134 This makes the Social Security Administration the logical agency to support accommodations beyond the employer's means through diversion of disability benefits.

B. Why The Social Security Administration Is Needed To Level the Playing Field

The unequal effect of the ADA on employers and employees arises as a result of the current unequal treatment of employers under the ADA.135 As stated earlier, an employer need not make a reasonable accommodation if it creates an undue hardship.136 Therefore, if a $5,000 accommodation creates an undue hardship, then the employer need not make it.137 The employer is exonerated from making the accommodation (under the current implementation of the ADA)138 and therefore suffers no financial loss. In contrast, a larger employer who can afford the accommodation without it resulting in an undue hardship must make the accommodation.139 While it is true that the larger employer is better able to financially undertake the accommodation than the smaller employer,140 the results are unfair.

132. See id. at 948.
134. See S. REP. No. 116, supra note 4, at 2.
135. The employer's undue hardship is determined on a case-by-case basis and is wholly dependent on the specific details of the individual employer's operation. See S. REP. No. 116, supra note 4, at 36.
137. See 42 U.S.C. § 12111(10); S. REP. No. 116, supra note 4, at 35.
138. See S. REP. No. 116, supra note 4, at 36.
139. See S. REP. No. 116, supra note 4, at 36.
140. This a logical inference based on the inclusion of a company's size as a factor in determining the employer's undue hardship. See 42 U.S.C. § 12111(10)(B); S. REP. No. 116, supra note 4, at 36.
C. The Suggestion

There is an economical way to remedy this situation. The solution is for the Social Security Administration to subsidize the additional net costs of an accommodation over and above what would create an undue hardship on the employer by diverting disability funds from the individuals to employers to pay for the accommodations. The remainder of this Note will explain how the subsidy would work, will show how it is beneficial in the short term, and will show how it offers long term opportunities for the intended beneficiaries of the ADA.

1. The Provisions

The employer, together with the employee, must apply to the Equal Employment Opportunity Commission ("EEOC") to receive the subsidy.\textsuperscript{141} The EEOC is chosen as the forum in the application process in order to be consistent with 42 U.S.C. § 12117(a) which makes filing with the EEOC a prerequisite to sue under the ADA.\textsuperscript{142} However, instead of the employee filing a charge of discrimination or an unlawful employment practice against the employer,\textsuperscript{143} the employee and the employer will jointly file a request for a subsidy to fund a workplace accommodation.\textsuperscript{144} If the Commission turns down the application for the subsidy, the employee and employer then must make a good faith effort to find an accommodation that is more cost effective or they may appeal the decision. Appeals procedures will be consistent with those presently in place as they relate to unlawful employment practice claims under the ADA.\textsuperscript{145}

First, to qualify for the subsidy, the employee or potential employee must be a qualified individual with a handicap consistent with the

\textsuperscript{141} The EEOC is already one of the governing bodies chosen by Congress to enforce the Act. 42 U.S.C. § 12117 (Supp. V 1994).
\textsuperscript{142} See Osborn v. E.J. Brach, Inc., 864 F. Supp. 56, 58 (N.D. Ill. 1994) (stating that "the language of § 12117(a) is clear and the procedure is equally sensible in the ADA context as in the Title VII universe.").
\textsuperscript{144} The application shall be in writing, under oath or affirmation, and shall contain such information as the Commission requires. See id. All other applicable provisions of 42 U.S.C. § 2000e-5 shall also apply to the application for subsidy.
meaning of the ADA. 146 Second, with the accommodation, the employee must be able to perform the essential job functions of the position. 147 Third, without the accommodation, it must be true that the employee would not be able to perform the essential job functions of the position. 148 Finally, the net cost of the accommodation over and above what would be an undue hardship on the employer may not exceed the present value of what the employee would receive, if unemployed, in disability benefits from the Social Security Administration for the reasonably projected number of years the employee will remain in the work place as a result of the accommodation.

The first three requirements ensure that the requested accommodation is absolutely essential for the employee to be capable of performing the necessary requirements of the job. These requirements allow for an employer to apply to the government for only those absolutely essential accommodations without which the employee would not be able to work. These requirements also act as a safety net to keep the individual from being unemployed because the individual is not employable without the accommodation. Technically, the subsidy becomes the employer’s last step before refusing to hire or accommodate an individual’s particular disability.

The fourth requirement is a further economic safeguard to ensure that Social Security subsidies do not get any larger and, as a result, subsequently decrease. As stated earlier, eighty percent of unemployed handicapped individuals said that they would give up their benefits to be able to work. 149 This last provision puts that statistic to the test. Because the subsidy is only available when it is in effect the employee’s last hope of receiving a necessary accommodation, it is reasonable to infer that the individual would be unemployed but for the accommodation. It is also reasonable to infer that this individual would then collect

146. This requirement is necessary to ensure that the individuals covered under the ADA are the same individuals who would benefit from this legislation. To require that they be qualified individuals who are handicapped ensures that they would be capable of performing the job with the accommodation. See S. Rep. No. 116, supra note 4, at 25-26.

147. This provision further ensures that with the accommodation, the handicapped individual will be able to perform those functions which are fundamental and not merely marginal. See supra notes 72-73 and accompanying text. This provision also limits the subsidy to essential functions and provides that an individual cannot receive the subsidy merely to be able to perform some peripheral function of the position.

148. This provision ensures that this subsidy is provided to the employer as an absolute last resort. There must be no alternative for the employee to be able to perform the essential job functions other than the employer providing the accommodation.

149. See supra note 12 and accompanying text.
disability benefits from Social Security. Therefore, it becomes no additional expense over the long term for the Social Security Administration to subsidize the accommodation as long as the accommodation ends up costing less than the Social Security Administration would pay the individual in disability benefits.

Requiring the employer to be responsible for the cost of the accommodation up to the level of that particular employer’s undue hardship ensures that providing accommodations affects all employers equally. Determining the employer’s undue hardship is partially a function of the employer’s business and the number of employees the employer has. Therefore, under the revised regulation, each employer’s undue hardship would be proportionately equal to every other employer. By making each employer responsible for the cost up to the employer’s undue hardship as specifically mentioned in the ADA, each employer is affected equally.

2. The Form

The employer will be required to fill out a preprinted form to apply to the EEOC and request the net cost of the accommodation beyond the employer’s undue hardship. This net cost will be determined by the EEOC. On the application itself, there shall be a section to explain the reason for and nature of the accommodation as well as how the employee would be able to perform all essential job functions with it and how these functions could not be performed without it. The exact “essential job functions” will be determined by the EEOC. Additionally, the form shall contain a portion dedicated to the computation of the employer’s undue hardship based on a formula which takes into account the size, nature, and resources of the employer. Finally, there shall be a section that computes the net cost of the accommodation over the employer’s previously computed undue hardship; i.e., the requested subsidy.

150. The employer ends up paying the same percentage of the undue hardship as another employer. This provision is the next logical extension to implement the Act as Congress had intended. See S. Rep. No. 116, supra note 4, at 36; see also 29 C.F.R. § 1630.2(p).
151. See S. REP. No. 116, supra note 4, at 36.
152. See S. REP. No. 116, supra note 4, at 36.
153. This is consistent with the fact that the employer must pay for the portion of the modification up to a level of the employer's undue hardship. See S. REP. No. 116, supra note 4, at 36.
154. This portion is dedicated to the factors, that Congress expressly included in the Act, to be used in computing an employer’s undue hardship. See S. REP. No. 116, supra note 4, at 36; 29 C.F.R. § 1630.2(p).
The employer shall also be required to provide any additional accompanying documents that the Social Security Administration deems necessary to make a determination of these factors. These documents may include, but are not limited to, financial statements and tax returns.

3. Review

The EEOC shall examine the reasonableness of the accommodation based on the information contained in the preprinted forms and the accompanying documents.\textsuperscript{155} If the net cost of the accommodation after deducting the cost of the undue hardship is less than the present value of the entitlements the employee would receive during the reasonably calculated amount of time the employee would have left in the workforce, then the accommodation shall be deemed reasonable and the employer will receive the requested subsidy for the accommodation. This provision is necessary to ensure that the subsidy never rises to a level above what the Social Security Administration already entitles the beneficiary to receive. Alternatively, if the cost of the accommodation after deducting the cost of the undue hardship exceeds the present value of the entitlements the employee would receive during the reasonably calculated amount of time the employee would have had left in the work force, then the subsidy will be denied because it will then no longer be cost effective for the taxpayer to support. Rejection by the EEOC because the accommodation is not cost effective does not preclude the employer and employee from reapplying for a cheaper accommodation. In fact, they must make a good faith effort to either find a less expensive accommodation or appeal.

D. Benefits

The potential benefits of legislation consistent with the proposals contained within this Note are vast. Certainly no legislation can solve every problem, but these proposals have the potential for America to

\textsuperscript{155} Undue hardship is now looked at slightly differently in this context. Previously it was only the undue hardship of the employer that was considered. Now the hardship extends to the expenditures of the Social Security Administration. See 42 U.S.C. § 12111(10) (Supp. V 1994). The Seventh Circuit recently held that undue hardship is meant to be considered in relation to "the benefits of the accommodation to the disabled worker as well as to the employer's resources." Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995). Now, undue hardship is to be considered in relation not only to the benefits of the disabled worker and the employer's resources, but also in relation to the employee's prior or potential disability benefits.
come another step closer to reaching the very noble goals contained in the policy of the ADA.

1. To the Employer

There is a decreased risk that the employer will pay more than the employer’s undue hardship in an attempt to avoid litigation because the EEOC would be making these specific calculations to ensure that the employer only pays up to the level of that employer’s undue hardship.\(^{156}\)

2. To the Employee

The benefits are obvious but still worth mentioning. Work for people who want to work. A ladder to climb up from the abyss of poverty for the poorest minority in America.\(^{157}\) Self respect for a class of people who have been denied the chance to earn it.

3. To Future Employees

Situations are conceivable where an employer that is called upon to make an accommodation using the subsidy from the Social Security Administration, makes a workplace modification for an employee and the employee either quits or goes to another employer. There are, however, two built-in safeguards to minimize the risk of wasted expenditures on Social Security subsidized workplace modifications that are no longer necessary. First, if the employee quits and decides to stay home and collect disability benefits, the government assistance may not be as readily accessible to that employee now that the Social Security Administration, (which consequently is the agency funding part of the accommodation), is aware of that employee’s ability to work based on the EEOC's decision on the reasonableness of the accommodation. The disability benefits the employee will now receive will reflect the fact that the employee left a job that the employee was capable of performing. In the case where the employee leaves to go to another employer, the Social Security subsidy to make the accommodation at the workplace of the second employer would be modified as well. The new subsidy

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156. See supra notes 25-30 and accompanying text.
157. S. Rep. No. 116, supra note 4, at 9 (quoting President Bush, “[t]he statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America.”).
would reflect the fact that the employee is capable of working based on the experience with the previous employer and will be taken into account if the individual attempts to receive disability benefits in the future.

Regardless of whether an employee leaves the employer or stays, future employees will benefit from the accommodation. Once employers begin to accommodate employees in their unit, some of these accommodations such as the widening of a doorway or the installation of a ramp will be permanent. These accommodations will not only benefit the employees who are the immediate recipients but also any future employees who may require such accommodations. With some of these accommodations already in place, some of the reservations an employer may have about hiring a handicapped individual may be removed. Although such reservations are often present, discriminating based on these reservations is, of course, illegal.158 Moreover, more and more of America's workplaces will become accessible to the country's disabled workers.

Additionally, an increasing number of requested accommodations will mean more money to the industries that specialize in producing and installing these accommodations. This will eventually lead to better technology for devices that aid the handicapped which will then lead to more efficient, innovative, and less expensive accommodations for future employees. Soon it will lead to additional accommodations being deemed reasonable, and thus, a greater number of handicapped persons being able to enter the work force.

4. To Society

The subsidy solution will lead to a more productive society of workers who want to work which is one of the intended consequences of the Act.159 That an unemployed disabled individual who enters the workforce no longer will need to rely on Social Security disability benefits or Medicare is another intended consequence of the Act.160

V. CONCLUSION

The Americans with Disabilities Act was a further step in the right
direction to mainstream America's handicapped population into the nation's workforce. During a Senate proceeding, it was predicted that the ADA "will ensure that we fully utilize the potential talents of every individual within our society." The ADA has proven to be significant in fostering the inclusion of disabled Americans into the workforce. Unfortunately, the results have fallen short of the intended outcome.

Courts have carved out several exceptions for employers to continue to discriminate against disabled Americans. One loophole allows employers to refuse to hire disabled Americans who are not as convenient to accommodate as are those individuals whose disabilities require accommodations that are less than an "undue hardship" on the employer. Another escape hatch grants courts broad discretion to label accommodations substantial, thus making it unnecessary for an employer to make the modification. Additionally, with respect to what is an "essential job function," courts have tended to lack the proper level of scrutiny when determining what tasks are actually essential to a particular position thus excluding otherwise qualified individuals from performing a job that they would be perfectly capable of performing with a reasonable accommodation. These outcomes do not achieve the level of opportunity for every disabled American that was intended when the ADA was originally enacted.

No law can be perfect at inception, and the ADA is no exception. The ADA, like any statute, needs to be fine-tuned to reach all intended beneficiaries. If a law does not accomplish what has been intended by the legislature, it should not be left to the courts to effectuate a nonexistent policy, but rather it should be revised and updated until it is being applied in the way that was originally intended.

Although the ADA has only been in effect since 1992, it is apparent that it needs to be revised so the outcome reflects the original policy of the Act. Just as the ADA was the perfect complement and logical next step to the Social Security Act, these suggested amendments

161. Id.
162. See supra text accompanying note 114.
163. See supra note 50 and accompanying text.
164. See supra notes 87-96 and accompanying text.
165. 135 CONG. REC. S10790-91 (1989) (noting that the intended consequence of the ADA was to "expand [ ] civil rights so that they embrace every American.").
167. See supra notes 33-34 and accompanying text.
will help the nation come even closer to bringing a brave class of Americans into the mainstream of the workforce and eventually into the mainstream of society.

*Ben Cristal*