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A Call For Clarification: Achieving A Uniform Proof Structure In Reasonable Accomodation Cases Under the Americans With Disabilities Act

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NOTES

A CALL FOR CLARIFICATION: ACHIEVING A UNIFORM PROOF STRUCTURE IN REASONABLE ACCOMMODATION CASES UNDER THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

Congress drafted the Americans with Disabilities Act ("ADA") with the noble goal of proscribing discrimination against disabled individuals. Nevertheless, as critics have pointed out, the majority of plaintiffs have been frustrated in their efforts to prove that they should be entitled to relief for the discrimination they have allegedly suffered. In particular, employees have had very little success litigating claims seeking a reasonable accommodation for their disability that would enable them to perform the essential functions of their job.

Significant factors contributing to the vastly pro-defendant outcomes in reasonable accommodation cases arise from the well-recognized ambiguities embodied in the ADA. Specifically, one prominent ambiguity is the failure to provide a clear proof structure. Under the ADA, an employer unlawfully discriminates where it fails to make "reasonable accommodations to the known physical or mental

2. Id. § 12101(b)(1).
3. E.g., Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 109 (1999) (arguing that since its inception, the ADA has not been enforced consistently with its goal of eliminating discrimination against disabled individuals).
4. Id. (demonstrating that employers win approximately 93% of both trial and appellate court decisions).
5. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1533 (2002) (5-4 decision) (Souter, J., dissenting) (pointing out that Congress' failure to replicate integral provisions of Title VII while relying upon it to draft the ADA has rendered the ADA ambiguous); see also Steven S. Locke, The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act, 68 U. COLO. L. Rev. 107, 108 (1997) (illustrating the response of the courts to the ambiguous provisions found within the ADA).
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 . . . .”

This language ostensibly requires employees simply to prove that they were not afforded a reasonable accommodation for their disability, while requiring employers to demonstrate that the proposed accommodation would impose an undue hardship under the circumstances. While the ADA attempts to define the terms reasonable accommodation and undue hardship, the statute is silent as to the precise manner in which they should be allocated and proved at various points in the litigation process. Additionally, the ADA fails to quantify the amount of proof required to carry each burden and fails to define demonstrate altogether.

Despite how minor these omissions may seem, they have been a source of significant confusion. Consequently, the allocation and quantum of burdens of proof in reasonable accommodation cases has naturally resulted in varying interpretations amongst the courts. Attempting to resolve this quandary, the Equal Employment Opportunity Commission ("EEOC") has interpreted the statute with respect to reasonable accommodations in a manner that logically allocates the relevant burdens of proof amongst the parties. The EEOC's interpretations of the problematic proof structure and the term reasonable accommodation have been viewed by the courts as too pro-plaintiff and against the plain meaning of the statute. As a result, the EEOC has not been given deference. Instead, the courts adopted their

6. 42 U.S.C. § 12112(b)(5)(A). The Act defines “covered entity” as “an employer, employment agency, labor organization, or joint labor-management committee.” Id. § 12111(2).

7. Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258-60 (1st Cir. 2001) (discussing the employee’s burden of showing an accommodation is reasonable vis-à-vis the employer’s burden of showing undue hardship).

8. 42 U.S.C. § 12111(9).

9. Id. § 12111(10).

10. Significantly, Congress resolved a similar ambiguity by amending Title VII to expressly define the word demonstrate to mean “meets the burdens of production and persuasion.” 42 U.S.C. § 2000e(m) (2000) (emphasis added). This simple change was very effective in clarifying burdens of proof under Title VII.

11. See infra Part III.

12. The EEOC was mandated by Congress to be the administrative agency to enforce Title I of the ADA, 42 U.S.C. § 12116.

13. 29 C.F.R. § 1630.2(o)-(p) (2002); 29 C.F.R §§ app. 1630.2(o), 1630.9; Brief of Amici Curiae The Equal Employment Opportunity Commission at 9-16, Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001) (No. 00-1966) [hereinafter EEOC’s Amicus Brief].

14. See infra Part IV.
own proof structures, leaving the ADA’s application at odds on a national level. For example, one approach shifts either the burden of production or persuasion between the parties. Another approach utilizes what are herein referred to as "traditional burdens of proof." The variations in the proof structures utilized by the courts exhibit the inconsistent application of the ADA.

Further complicating the matter is the Supreme Court’s five-to-four decision in US Airways, Inc. v. Barnett. In Barnett, the Court defined a meritless reasonable accommodation claim as one that is neither facially reasonable, nor reasonable in the "run of cases." This vague standard has left lower courts with little guidance. Although the Barnett proof structure is aimed at dismissing meritless claims, courts are now confronted with the new problem of interpreting what constitutes facially reasonable or reasonable in the run of cases. If pre-Barnett precedent continues to be relied upon, that which is considered facially reasonable or reasonable in the run of cases in one circuit may not be deemed reasonable in another.

As a federal statute, the ADA should be uniformly applied throughout the country. Therefore, the allocation and quantum of burdens of proof in reasonable accommodation cases should be

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15. See infra Part III.
16. For further discussion of this approach, see infra Part III.A.
17. For further discussion of this approach, see infra Part III.B.
18. 122 S. Ct. 1516. With two concurring opinions and two dissents, the Court barely arrived at a compromise in holding that a bona fide seniority system provided for under a collective bargaining agreement will usually take precedence over a disabled employee’s request for reassignment as a means of accommodating his or her disability. Id.
19. Id. at 1523. The Court created a proof structure that is contrary to EEOC and statutory guidance. The Court’s proof structure cannot be criticized as being unfair to employees as it affords employees with colorable claims their day in court. No case would be dismissed, as a matter of law, where the proposed accommodation is at least facially reasonable, or would be reasonable in light of foregoing precedent (i.e., “in the run of cases”), even if the proposed accommodation is not listed as a reasonable method of accommodation in the ADA or in the EEOC’s interpretations. Id. The Barnett decision may be aligned with legislative history, which reveals that “the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case.” S. REP. No. 101-116, at 31; see also H.R. REP. No. 101-485, pt. 2, at 62 (1990) (indicating legislative intent). However, this history is plainly at odds with the standards sought in the ADA’s purpose section, i.e., to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities ....” 42 U.S.C. § 12101(b)(2) (2000).
20. 122 S. Ct. at 1523; 42 U.S.C. § 12101(b)(2); Stephen S. Churchill, A Fly in the Web: The Developing Law of Reasonable Accommodations, 46 B.B.J. 10 (2002) (arguing the courts’ attempts to determine when a reasonable accommodation must be provided often raise just as many questions as they answer); see infra Part III (discussing the split amongst the circuit courts with regard to allocating and quantifying burdens of proof under the ADA).
consistently applied.\textsuperscript{21} To achieve uniform interpretation of similar statutory language, the Supreme Court is willing to overturn its own decisions "to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation."\textsuperscript{22} Accordingly, the word "demonstrate"\textsuperscript{23} as it appears in the ADA should be construed uniformly with the definition of the word "demonstrate" as it appears in Title VII.\textsuperscript{24} Such an interpretation suggests that employers would bear the burdens of production and persuasion to show the unreasonableness of the proposed accommodation(s). This simple inferential step would help resolve the disparity in interpretation amongst the courts, promoting an environment in employment discrimination law that is more conducive towards achieving equal treatment for disabled workers. As it stands, the Supreme Court is unlikely to overturn the \textit{Barnett} decision because it is not a seriously erroneous interpretation of the ADA. Therefore, this note calls upon Congress to clarify the proof structure in reasonable accommodation cases under the ADA.

This note analyzes the issue of allocating and quantifying burdens of proof in reasonable accommodation cases under the ADA. The approaches articulated by the courts, as well as the EEOC, are questioned based upon the theory that parties litigating such cases should bear burdens of proof that are uniform in the manner in which they are allocated and in the quantum of proof required to satisfy the burden imposed. Part II identifies and explains the ambiguous provisions of the ADA that give rise to this burden of proof quandary. Part III illustrates the various judicial interpretations of the ADA's ambiguous language and argues for an equitable interpretation of the ADA. Part IV considers the EEOC's interpretations of the ADA and the lack of judicial deference to the agency's views on this matter. Part V proposes a means of resolving the issue by analogizing it to Title VII's modification by the Civil Rights Act of 1991.

\textsuperscript{21} In other words, the amount of evidence that a party must offer to satisfy its burden should be the same, regardless of the jurisdiction in which the case is being litigated.


\textsuperscript{23} 42 U.S.C. § 12112(b)(5)(A).

\textsuperscript{24} 42 U.S.C. § 2000e(m) (2000).
II. INTERPRETING THE ADA’S AMBIGUOUS STANDARDS

Congress enacted the ADA to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” The ADA was drafted broadly so as to reach a multitude of disability discrimination cases, and it was passed with considerable bipartisan support. In the employment context, the ADA prohibits discrimination against a qualified individual with a disability in all employment practices, including “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” The ADA defines “discrimination” as:

(A) 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; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

Thus, an employer must reasonably accommodate a qualified employee with a disability unless the employer can prove that doing so would cause an undue hardship on the operation of its business.

On their face, the foregoing provisions might seem logical and simple to implement. However, a closer reading reveals a complicated issue of statutory interpretation: courts must somehow reconcile the term reasonable as modifying the term accommodation even though the unreasonableness of a proposed accommodation is, in itself, the essence

26. Id. § 12101(a)(3). In addition to employment, the broad scope of the ADA also prohibits discrimination in “housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” Id.
27. Miranda Oshige McGowan, Reconsidering the Americans with Disabilities Act, 35 GA. L. REV. 27, 30 n.2 (2002). In fact, 93.8% of Senators and 93.1% of Representatives present and voting supported passage of the Act. Id.
29. Id. § 12112(b)(5)(A)-(B). To avoid liability for discrimination under the ADA, employers must provide reasonable accommodations for employees that qualify as individuals with a disability under the Act. Significantly, an employer that would experience an undue hardship by accommodating a particular disability is not required to do so. Id.
of proving an undue hardship. In *Barnett*, the Supreme Court tried to resolve this quandary by defining a reasonable accommodation as one which "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." Such circular reasoning perpetuates the ADA's ambiguity. Although the *Barnett* language might diminish frivolous and meritless claims by giving judges broad discretion, it may also cause employees to request only traditionally accepted accommodations as opposed to other viable alternatives.

Interpreting legislative ambiguities is the function of the judiciary and the duly delegated administrative agencies. Thus, the ambiguities and gaps found within the ADA should be resolved by the courts and the relevant agencies. As one commentator has pointed out:

Courts, in response to initial concerns that too many people with minor conditions were qualifying as disabled, have been ratcheting up the prima facie standard for plaintiffs in order to weed out the allegedly undeserving. However, in their efforts to eradicate frivolous lawsuits, courts have effectively steered the analytical focus away from the ADA's original aim of aiding disadvantaged individuals' integration into the job market. As a consequence, what was once touted as "the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act," has become increasingly narrowed to the point where it is in danger of becoming ineffective.

To that end, one disability group has argued that the ADA's reach and effectiveness has been so limited by the courts that employees must rely on state discrimination laws for protection.

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31. *Id.* at 1523. If courts continue to rely on pre-*Barnett* decisions to determine what constitutes reasonable in the run of cases, inconsistent rulings throughout the circuits are bound to persist. Churchill, *supra* note 20, at 10 (noting that inconsistencies have resulted from courts' attempts to determine when a reasonable accommodation must be provided).
33. *See infra* Part IV.
34. Locke, *supra* note 5, at 108-09 (citations omitted).
III. SILENCE IN THE ADA BREEDS CONFUSION AMONGST THE COURTS: REASONABLE ACCOMMODATION LAW PRE-BARNETT

The ADA has rightfully come under fire because of its ambiguous standards. Although the statute attempts to define both reasonable accommodation and undue hardship by giving practical examples and listing factors to be considered, the statute is not clear as to their limits and relation to each other. In addition, the statute is unclear as to precisely what proof structure should be used to apply these vague standards. Absent a clear standard, circuit courts have developed and implemented different methods of burden allocation on their own, in many cases borrowing standards from analogous statutes such as Title VII and the Rehabilitation Act.

The Supreme Court first attempted to resolve the issue of burden allocation in reasonable accommodation cases in Barnett. The Court only considered approaches taken by the First, Second and District of Columbia Circuit Courts of Appeals without accounting for the

36. Bonnie Poitras Tucker, The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm, 62 OHIO ST. L.J. 335, 343-62 (2001) (addressing the conflict between the traditional concept of civil rights and the ADA's requirement of reasonable accommodations, as well as judicial decisions weakening the ADA's power of enforcement); Cheryl L. Anderson, "Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement, 65 MO. L. REV. 83, 109-29 (2000) (arguing the ADA treats persons with disabilities different from others in a way that undermines the goals of civil rights theory and the very concept of a disability); Colker, supra note 3 (noting disabled employees' overwhelming failure in litigating employment discrimination claims under the ADA).


38. Id. § 12111(10).


43. 122 S. Ct. 1516 (2002).

44. Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258-59 (1st Cir. 2001).


existence of alternative approaches. In fact, the Court is of the opinion that the only significant difference between the circuit courts’ various approaches is the language used to employ them, because “their results are functionally similar.” This is a questionable position to take given that the Court fails to examine even one outcome in light of the differing approaches. Moreover, the proof structure for reasonable accommodation cases set by the majority is vague in itself, lending little clarity to an already complex and confusing issue of statutory interpretation.

The two basic models of burden allocation created pre-Barnett are shifting burdens of proof and traditional burdens of proof. In the traditional burdens model, the plaintiff must plead the requisite elements of a prima facie case, and, having succeeded, the defendant then has the opportunity to refute any of those elements or plead an affirmative defense. In contrast, in the burden-shifting model, there are shifting burdens of production and shifting burdens of persuasion. While each of these models has its own advantages and disadvantages, the different standards imposed on plaintiffs in reasonable accommodation claims indicates that the ADA is not being implemented consistently with its aims.

Furthermore, the creation of different standards and proof structures has had adverse effects on employees bringing such claims. Notably, an empirical study conducted over a six-year period after the statute was enacted shows that employers overwhelmingly prevailed in employment

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47. Barnett, 122 S. Ct. at 1523.
48. Id. The following analysis of the diverging methods will show that this is not the case.
49. In addition, the standard set by the majority for reassignment cases involving bona fide seniority systems in a union setting is also unclear. The Court ultimately held that a legitimate seniority system will usually trump a disabled employee’s request for reassignment as a method of reasonably accommodating the employee’s disability regardless of the existence of a collective bargaining agreement, unless the employee can show special circumstances warranting the reassignment to supersede the seniority system. Barnett, 122 S. Ct. at 1523-25; see also Vikram David Amar & Alan Brownstein, Reasonable Accommodations Under the ADA: The Supreme Court in Barnett, 5 GREEN BAG 2d 361 (2002).
52. Reed, 244 F.3d at 258-59; Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 681-83 (5th Cir. 1996).
53. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999) (shifting the burden of production).
54. Jackan v. N.Y. State Dep’t of Labor, 205 F.3d 562 (2d Cir. 2000) (shifting the burden of persuasion).
A Call for Clarification

Discrimination cases at the appellate as well as the trial court level. Congress could not have intended this result in drafting the ADA. Rather, the ADA was enacted to be a “comprehensive national mandate” invoking the “sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”

The following examines the two general methods of burden allocation created by the circuit courts pre-Barnett, and argues that employees should not be forced to prove the unreasonableness of a proposed accommodation.

A. Shifting Burdens

The first general approach to burden allocation pre-Barnett involves shifting either the burden of production or persuasion between the parties. The employee must carry the initial burden of proof; if the employee is successful, the burden then shifts to the employer. Depending upon which party bears the ultimate burden of persuasion, the burden might then shift back to the employee.

“The burden-shifting model was introduced into employment law in order to allow indirect proof of the often elusive ‘intent’ to discriminate.” In McDonnell Douglas Corp. v. Green, the Supreme Court set the standard for burden allocation in discrimination claims

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56. Colker, supra note 3, at 99-103, 107 (1999) (noting that between July 1992 and July 1998, employers won 93% of employment discrimination cases decided on the merits at the trial court level, and 84% of such claims on appeal).

57. Consider how broadly the ADA defines disability in conjunction with the statute’s stated purpose. Compare 42 U.S.C. § 12102(2) (defining disability) with 42 U.S.C. § 12101(b) (detailing the purpose of the ADA). See also Lisa Eichhorn, Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils, 31 ARIZ. ST. L.J. 1071 (1999) (arguing for a broader interpretation of disability under the ADA to protect more individuals from discrimination than those traditionally viewed as disabled). “The ADA is a shield against discrimination on the basis of disability . . . .” Haulbrook v. Michelin N. Am., Inc., 252 F.3d 696, 705 (4th Cir. 2001). It was not intended to be used by non-disabled employees as a sword against their employers. See id.


59. Id. § 12101(b)(4).

60. Reed, 244 F.3d at 259 n.3.

Several circuit courts adopted the burden-shifting approach for reasonable accommodation claims under the ADA, including the Second, Third, Eighth, and Tenth circuits.

1. Shifting Burdens of Production

In *Fjellestad v. Pizza Hut of America, Inc.*, the Eighth Circuit adopted a method of burden allocation that shifts the burden of production between the parties, while imposing the ultimate burden of persuasion on the employee. Specifically, the court required the employee to make "a facial showing that reasonable accommodation is possible," then shifted the burden of production to the employer to show either that it is "unable to accommodate" the employee or that the employee could not perform the essential functions of the job even with a reasonable accommodation. Then the burden shifts back to the employee to rebut the employer's evidence with proof of the employee's individual capabilities. Proving one's individual ability to perform the job with an accommodation is a critical step in the process of litigating reasonable accommodation claims. It is noteworthy that other circuits did not expressly provide for such an inquiry.

In *White v. York International Corp.*, the Tenth Circuit also adopted a burden-shifting model similar to that taken in *Fjellestad*.
The similarity lies in that the burden of production shifts once the employee’s burden is carried, yet the employee retains the ultimate burden of persuasion. In the court’s opinion, the employee’s burden only requires a “facial showing that accommodation is possible,” whereupon the burden shifts to the employer. This proof structure favors employees in that it does not force them to prove the unreasonableness of the accommodation in their initial burden. Instead, it is the employer who must conduct the unreasonableness part of the inquiry by showing its inability to accommodate the employee. In contrast, the Eighth Circuit requires the employee to address the element of unreasonableness in making a facial showing that a reasonable accommodation is possible in the initial burden. Thus, the Eighth Circuit’s standard clearly makes it harder than that of the Tenth Circuit for employees to win reasonable accommodation claims under the ADA.

To further a more equitable allocation of the burdens, courts should recognize that employees generally do not have access to the employer’s records or knowledge of the employer’s ability to finance a proposed accommodation. Without this information, an employee may not know the reasonableness of a proposed accommodation, therefore, it would be unduly burdensome to expect the employee to prove it at trial. For this reason, the Tenth Circuit’s proof structure gives employees a more equitable opportunity to bring reasonable accommodation claims, whereas other proof structures create more obstacles for employees.

2. Shifting Burdens of Persuasion

In an alternative interpretation of the ADA’s allocation of burdens of proof pre-Barnett, the Second and Third Circuits were unique in holding that the proof structure in reasonable accommodation cases involves a shifting burden of persuasion. In Borkowski v. Valley Central
School District, the Second Circuit employed a shifting burden of persuasion for the first time in a case involving the Rehabilitation Act. The employee's burden involved showing the existence of an effective accommodation that would qualify her for the position, and then "identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits." At this point, the burden of persuasion shifted to the employer to attack the "reasonableness of the proposed accommodation... in making out an affirmative defense of undue hardship" by way of a "common-sense balancing of the costs and benefits in light of the factors listed in the regulations....".

Subsequently, the Second Circuit expressly applied this standard to reasonable accommodation cases under the ADA in Jackan v. New York State Department of Labor. The court also clarified its earlier ruling in Borkowski, stating that the employee bears both the burden of production and of persuasion in proving the existence of an accommodation, and bears a burden of production in proving that the accommodation is reasonable. If the employee succeeds, the burden of persuasion shifts to the employer to prove the accommodation is unreasonable. Thus, like the Eighth Circuit's decision in Fjellestad, the Second Circuit also forced the employee to make a showing of the unreasonableness of the proposed accommodation.

78. 63 F.3d 131 (2d Cir. 1995). A motor vehicle accident left Ms. Borkowski, a school teacher, with memory loss, an inability to concentrate, reduced balance, coordination and mobility. Id. at 134. She was ultimately terminated as the result of alleged poor performance. Id. The Second Circuit held she presented a valid case because she had known disabilities and the school terminated her without considering whether those disabilities could be accommodated. Id. at 135, 144.


80. Borkowski, 63 F.3d at 139.

81. Id. at 140.

82. 205 F.3d 562, 566 (2d Cir. 2000), cert. denied, 531 U.S. 931 (2000). Mr. Jackan proposed, but was denied, reassignment to his old desk job as an accommodation for his back pain, which stemmed from spinal cord surgery to correct injuries he sustained in a motorcycle accident. Id. at 564.

83. 63 F.3d 131.

84. Jackan, 205 F.3d at 567.

85. Id. Using this standard, the court affirmed judgment in favor of the employer on the basis that the employee failed to establish the existence of an appropriate vacancy. Id.

86. 188 F.3d 944.

87. Arguably, this requirement fails to consider employees who, through no fault of their own, are genuinely unaware of other positions or accommodations that are available to them elsewhere in the company. In fact, it is the employers that were given the burden of initiating the interactive process in order to address the challenges of determining a reasonable accommodation. 29 C.F.R. § 1630.2(o)(3) (2002). The interactive process was designed to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Id. Thus, it would clearly be inconsistent with the spirit of the
Unfortunately for Mr. Jackan and similarly situated employees, many circuit courts (and now the Supreme Court) agree with this restriction on employees’ ability to recover. Another among them is the Third Circuit. In *Walton v. Mental Health Association*, the Third Circuit expressly followed the Second Circuit’s decision in *Borkowski*, stating that an employee bears a burden of persuasion to show an effective accommodation exists that will enable the employee to perform the job’s essential functions. The employee also bears a burden of production in identifying a reasonable accommodation whose costs do not exceed its benefits. Satisfaction of these burdens by the employee shifts the burden of persuasion to the employer to prove that the proposed accommodation is unreasonable or that it would create an undue hardship.

**B. Traditional Burdens of Proof**

The second general approach to burden allocation in reasonable accommodation cases pre-*Barnett* is a more traditional approach in civil litigation. Instead of shifting burdens between the parties, the employee must simply plead the elements of a prima facie case of disability discrimination to the satisfaction of the trier of fact. The employer then has the opportunity to rebut any element(s) of the employee’s prima facie case, or to plead an affirmative defense. In the event the employer pleads an affirmative defense, the employer bears the burden of proving an undue hardship.
satisfying the defense’s own unique set of elements or factors to be considered. If the employer does not meet this burden, the defense is lost. The foregoing describes what this note refers to as traditional burdens of proof.

Several courts adopted the traditional burden of proof method Pre-Barnett, including the First, Fifth, Seventh, Ninth, Eleventh and District of Columbia circuits. Most of the courts follow the same method with slight variation in the quantum of proof required to carry a party’s burden.

In Reed v. LePage Bakeries, Inc., the First Circuit rejected the burden-shifting method for reasonable accommodation cases, opting for traditional burdens of proof instead. The court required the employee to show “not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances.” If the employee carries this burden, it is then up to the employer to show that “the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details.”

The significance of the First Circuit’s proof structure is that it explicitly requires the employee to prove the feasibility of a proposed accommodation. This is more than the Tenth Circuit requires, and is thus more difficult for an employee to meet. When contrasted with the

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93. Reed v. LePage Bakeries, Inc., 244 F.3d 254 (1st Cir. 2001).
95. Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538 (7th Cir. 1995).
96. Brauning v. Countrywide Home Loans, Inc., 220 F.3d 1154 (9th Cir. 2000).
99. 244 F.3d 254 (1st Cir. 2001). Ms. Reed had great difficulty addressing conflict situations with coworkers as a result of bipolar disorder. Id. at 255. To prevent problems, Ms. Reed’s supervisors allowed her (and all their employees) to walk away from conflict situations with coworkers so that a supervisor could resolve the problem. Id. However, Ms. Reed never notified her supervisors of her disability and was eventually terminated after becoming enraged during a non-conflict situation; she cursed and threatened a human resources director although she had an opportunity to walk away. Id. at 256. The First Circuit affirmed summary judgment for the employer on the grounds that Ms. Reed had never even notified her employer of the need for an accommodation, and even if she had, she nevertheless failed to walk away from the situation as her supervisors directed. Id. at 261-62.
100. Reed, 244 F.3d at 259.
101. Id.
102. Id.
burden-shifting models already discussed, it also clearly indicates that all approaches to burden allocation are not functionally the same.\textsuperscript{104}

In \textit{Barth v. Gelb},\textsuperscript{105} the District of Columbia Circuit rejected the application of the burden-shifting framework for reasonable accommodation cases brought under the Rehabilitation Act.\textsuperscript{106} The court required the employee to establish that: "(a) he is handicapped but, (b) with reasonable accommodation (which he must describe), he is (c) able to perform the essential functions of the position he holds or seeks."\textsuperscript{107} If the employee satisfies this burden, the employer then has the opportunity to rebut the evidence.\textsuperscript{108} The employer may plead the affirmative defense of undue hardship, but it must bear the burden of proof.\textsuperscript{109} The District of Columbia Circuit later applied \textit{Barth}'s traditional burdens of proof method to reasonable accommodation cases under the ADA in \textit{Aka v. Washington Hospital Center}.\textsuperscript{110}

\textsuperscript{104} \textit{Contra} Barnett, 122 S. Ct. at 1522-23; Reed, 244 F.3d at 259. The First Circuit and the Supreme Court are both of the opinion that all methods of burden allocation are functionally the same, yet the \textit{Barnett} and \textit{Reed} decisions fail to consider the Tenth Circuit's decision in \textit{White} and other decisions that are analytically separate from the same few cases cited by both courts. \textit{Barnett}, 122 S. Ct. at 1522-23; \textit{Reed}, 244 F.3d at 259; \textit{White}, 45 F.3d at 361.

\textsuperscript{105} 2 F.3d 1180 (D.C. Cir. 1993). The court ultimately concluded that the employee, Mr. Barth, was validly denied an overseas assignment because the employer satisfied its undue hardship defense with evidence proving the proposed accommodation would have resulted in loss of essential operational flexibility. \textit{Id.} at 1188-89.

\textsuperscript{106} \textit{Id.} at 1187-89. Notably, the court perceived three distinct types of disability discrimination claims and assigned special standards for analyzing each: (1) where the employer claims non-discriminatory reasons for its adverse employment action; (2) where the employer maintains that the employee is not an otherwise qualified individual with a disability, or that no reasonable accommodation is available, so that the employee falls outside the scope of ADA protection; and (3) where the employer offers the affirmative undue hardship defense for its actions. \textit{Id.} at 1186-87.

\textsuperscript{107} \textit{Id.} at 1186.

\textsuperscript{108} \textit{Barth}, 2 F.3d at 1186-87.

\textsuperscript{109} \textit{Id.} The employer's success or failure in meeting its burden should be analyzed in light of the factors enumerated in the statute. \textit{Id.} For the ADA's list of factors to be considered when analyzing the viability of an employer's undue hardship defense, see 42 U.S.C. § 12111(10)(B) (2000).

\textsuperscript{110} 156 F.3d 1284 (D.C. Cir. 1998). Mr. Aka was an operating room orderly who requested reassignment to a different position because it was no longer prudent for him to exert physical force after a bypass surgery, but he was continually rejected for other open positions at the hospital although he was qualified and had seniority. \textit{Id.} at 1286-88. The District of Columbia Circuit reversed the district court's grant of summary judgment for the employer citing to triable issues of fact as to whether the hospital was required to reassign Mr. Aka under the circumstances. \textit{Id.} at 1305-06. It seems peculiar that the Supreme Court failed to consider this case in \textit{Barnett} and instead elected to consider only \textit{Barth} despite the similar implications regarding reassignment under the ADA instead of the Rehabilitation Act where the scope of permissible reassignment provided for by a collective bargaining agreement was at issue.
In *Riel v. Electronic Data Systems Corp.*, the Fifth Circuit assigned traditional burdens of proof to parties litigating reasonable accommodation claims under the ADA, stating “[t]he employee must show that the employer failed to implement a reasonable accommodation, and the employer may defend by showing business necessity or undue burden.” The court followed the *Barth* opinion in requiring that the proposed accommodation be reasonable “in the run of cases,” and that the undue hardship analysis is focused on the burden imposed by the employee’s preferred accommodation in light of the employer’s particular business.

The Ninth Circuit also opted for traditional burdens of proof pre-*Barnett* as seen in *Braunling v. Countrywide Home Loans, Inc.* The court required employees to make a prima facie showing that a reasonable accommodation was possible. The employer then had to show that the proposed accommodation would impose an undue hardship on the running of the business. The court ultimately affirmed summary judgment for the employer, reasoning that evidence of poor

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111. 99 F.3d 678 (5th Cir. 1996). In this particular case, Mr. Riel was a computer systems engineer whose job performance suffered from fatigue he attributed to kidney problems and diabetes, which often prevented him from meeting deadlines. *Id.* at 680-81. Although Mr. Riel missed several deadlines designed to be checkpoints during the course of completing a project, he never missed the final deadline. *Id.* at 680. After the employer’s attempts to remedy the situation and Mr. Riel’s emergency appendectomy that discovered kidney failure, Mr. Riel proposed either changing the deadline schedule or transferring to a job that didn’t require deadlines, but was denied on the basis of below-average performance reports and was fired. *Id.* at 681, 683. The Fifth Circuit reversed the district court’s grant of summary judgment for the employer, finding triable issues of fact regarding whether Mr. Riel’s medical condition was a disability and whether meeting the deadlines constituted an essential job function. *Id.* at 683-84. The court remanded for consideration whether Mr. Riel’s proposed accommodations were reasonable. *Riel*, 99 F.3d at 683-84. Notably, the court also distinguished disability discrimination from other forms of employment discrimination, observing, for example, that while race discrimination statutes mandate equality of treatment, disability discrimination statutes would punish such behavior in efforts to obtain accommodating treatment for the disabled. *Id.* at 681.

112. *Id.* at 682.

113. *Id.* at 683 (citing *Barth*, 2 F.3d at 1187).

114. 220 F.3d 1154 (9th Cir. 2000). Ms. Braunling was an underwriting supervisor who suffered from multiple sclerosis, which caused her extreme fatigue and dizziness as well as sensitivity to light, heat, humidity and stress. *Id.* at 1155. Ms. Braunling was terminated after she failed to perform at the required level following a transfer she requested to a higher position within the company that resulted in more stress, difficulties with her new supervisor, and reduced performance. *Id.* at 1155-56.

115. *Id.* at 1157.

116. *Id.* (citing *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (utilizing traditional burdens of proof in reasonable accommodation cases under the Rehabilitation Act)). The court also noted an unresolved dispute within the Ninth Circuit as to whether the employee has the burden of showing a specific reasonable accommodation exists that is available to the employer as part of the employee’s prima facie case. *Braunling*, 220 F.3d at 1157 n. 2.
performance unrelated to the employee’s disability were adequate grounds for her termination.\textsuperscript{117}

In \textit{Willis v. Conopco, Inc.},\textsuperscript{118} the Eleventh Circuit also adopted Barth's traditional burdens of proof approach for reasonable accommodation cases.\textsuperscript{119} The court iterated a proof structure in which the employee must describe the particular accommodation that would enable him to perform the essential functions of the job.\textsuperscript{120} Once the employee has done this, "it would then be up to the employer... to refute that evidence."\textsuperscript{121} As seen in the other models, the employee retains the ultimate burden of persuasion.\textsuperscript{122}

The foregoing cases discussing the allocation of traditional burdens of proof illustrate the split amongst the federal circuit courts over burden allocation pre-\textit{Barnett}. Some courts utilized a burden-shifting method while others employed traditional burdens of proof. Although they utilized differing proof structures, the First, Second, Third, Fifth, Eighth, Ninth, Eleventh and District of Columbia circuits required the employee to make a showing of the unreasonableness of the proposed accommodation. On the other hand, the Tenth Circuit did not impose this obligation.

\textsuperscript{117} \textit{Braunling}, 220 F.3d at 1157-58.
\textsuperscript{118} \textit{Id.} at 284-85. When blood tests confirmed Ms. Willis' exposure to certain enzymes in the laundry detergent her employer packages and sells caused allergic reactions in her lungs and on her skin, she was reassigned to another area of the plant her employer's air quality testing determined to be safe for her. \textit{Id.} at 283-84. In addition to air quality testing, other efforts the employer made to accommodate Ms. Willis included directing her to wear a mask when she was in enzyme-enriched areas of the plant, providing her with a parking pass which allowed her to avoid unsafe areas, and excusing her from performing her normal duties and attending meetings in unsafe areas. \textit{Id.} at 283. However, after an unrelated medical leave nearly two years later, Ms. Willis refused to return to work unless she was reassigned to a safer work area or her employer install air conditioning in the area of the plant where she worked. \textit{Id.} at 283-84. Ms. Willis was eventually terminated when her employer's pulmonologist determined she could work and she again refused. \textit{Willis}, 108 F.3d at 284. The court affirmed summary judgment in favor of the employer, concluding the employee failed to offer competent evidence regarding the availability of a reassignment within the company, and that her only other proposed accommodation (installing air conditioning to alleviate exposure to allergenic enzymes) would not be effective. \textit{Id.} at 286-87. The court further noted that "[w]hen an employee refuses to show up for work after being informed that her failure to do so will result in the loss of her job, the employer has presented a valid, nonretaliatory reason for terminating that employee." \textit{Id.} at 287 (citation omitted).
\textsuperscript{120} \textit{Id.} at 284
\textsuperscript{121} \textit{Id.} (quoting \textit{Barth}, 2 F.3d at 1186).
\textsuperscript{122} \textit{Willis}, 108 F.3d at 284.
In *Vande Zande v. Wisconsin Department of Administration,* the Seventh Circuit interpreted the ADA to assign traditional burdens of proof as well. The court held that:

[t]he employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.

Thus, the Seventh Circuit imposed upon employees the burden of showing not only the effectiveness of the proposed accommodation, but also the proportionality of its cost to the employer.

Expecting an employee to know the employer’s ability to finance either the proposed accommodation or other available alternatives is too demanding an imposition. Employees should not be expected to weigh any proposed accommodation against alternatives an employee may not be aware of. While employees are in a better position to assess which among the possible accommodations would be most effective, it is the employer who knows best its ability to finance the “range of possible positions and can more easily perform analyses regarding the ‘essential functions’ of each . . . .” Therefore, from a practical view, the burden of showing unreasonableness rests more equitably with the employer.

123. 44 F.3d 538 (7th Cir. 1995). A spinal cord tumor that paralyzed Ms. Vande Zande from the waist down left her in a wheelchair and suffering from pressure ulcers, which often required her to stay at home for several weeks at a time. *Id.* at 542-43. While her employer made numerous accommodations for her disability, she nevertheless complained about having to use sixteen and one half hours of sick leave while working nearly full time from home during an eight-week period, and her employer’s refusal to install sinks in the office’s kitchenette at a height of thirty-four inches instead of thirty-six. *Id.* at 544-46. Among the accommodations Ms. Vande Zande’s employer made for her disability were having bathrooms modified, steps turned into a ramp, buying special adjustable furniture, paying half the cost for a cot she needed for personal care, adjusting her schedule to accommodate medical appointments and making plan changes to a new locker room. *Id.* at 544. The Seventh Circuit affirmed the district court’s grant of summary judgment for the employer, finding that an employer is not required allow a disabled employee to work alone without supervision at home, and that Ms. Vande Zande’s employer did not have a duty to modify the sink’s height since another one was conveniently located and easily accessible to her. *Id.* at 546.

124. *Vande Zande*, 44 F.3d at 543.

125. *Id.* The court also concluded that an employer satisfies the duty of reasonably accommodating disabled employees when it does what is necessary to enable the disabled employee to work in reasonable comfort. *Id.* at 546.


127. Contrast this approach with the Tenth Circuit’s pre-*Barnett*, which only required the employee to facially show that a proposed accommodation is possible. *White*, 45 F.3d at 361.
C. Burden-shifting and Traditional Burdens, Depending Upon the Type of Evidence Available

Uniquely, the Sixth Circuit adopted both methods of burden allocation; the method applied depends on whether the employee has either direct or circumstantial evidence of the employer’s discrimination. In *Monette v. Electronic Data Systems Corp.*, the Sixth Circuit clearly laid out distinct standards for both scenarios.

Traditional burdens of proof were assigned where the employee had direct evidence and the employer admitted discrimination:

1) The plaintiff bears the burden of establishing that he or she is “disabled.”
2) The plaintiff bears the burden of establishing that he or she is “otherwise qualified” for the position despite his or her disability: a) without accommodation from the employer; b) with an alleged “essential” job requirement eliminated; or c) with a proposed reasonable accommodation.
3) The employer will bear the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer.

In contrast, the court assigned the burden-shifting method to cases in which the employee has only circumstantial proof of the employer’s discrimination:

[T]he plaintiff may establish a *prima facie* case of discrimination by showing that: 1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) suffered an

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128. 90 F.3d 1173 (6th Cir. 1996). Mr. Monette was Electronic Data System's only customer service representative at the store where he worked, but was injured one day when a television and videocassette recorder he was delivering fell on him. *Id.* at 1176. Upon his return from eight months medical leave, he learned his position had been filled and was unwilling to transfer to other stores. *Id.* at 1176-77. The Sixth Circuit affirmed summary judgment in favor of the employer, holding that it is unreasonable for an employer to have to offer unpaid leave of absence until another position becomes available. *Id.* at 1187-89.

129. For Sixth Circuit cases following the traditional method of burden allocation which requires direct proof of discrimination, see Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001); Hoskins v. Oakland County Sheriff’s Dep't, 227 F.3d 719 (6th Cir. 2000). For Sixth Circuit cases following the burden-shifting method which requires only circumstantial proof, see Doren v. Battle Creek Health Sys., 187 F.3d 595 (6th Cir. 1999); Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998).

130. *Monette*, 90 F.3d at 1186.
adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced. The defendant must then offer a legitimate explanation for its action. If the defendant satisfies this burden of production, the plaintiff must introduce evidence showing that the proffered explanation is pretextual. Under this scheme, the plaintiff retains the ultimate burden of persuasion at all times.\textsuperscript{131}

Thus, the Sixth Circuit uniquely utilizes both traditional and shifting burdens of proof in reasonable accommodation cases. The factor determining which model should be used depends upon the strength of the employee's evidence of discrimination.\textsuperscript{132}

\textbf{D. Pre-Barnett Circuit Court Summary and Argument}

The foregoing illustrates the different approaches taken by the Circuit Courts of Appeals with regard to allocating burdens of proof in reasonable accommodation cases under the ADA pre-Barnett. The Second, Third, Eighth and Tenth Circuits utilized shifting burdens, whereas the First, Fifth, Seventh, Ninth, Eleventh and District of Columbia Circuits utilized traditional burdens of proof. The Sixth Circuit actually used both, depending upon whether the employee has direct or circumstantial evidence of discrimination.

The Tenth Circuit's standard is the most favorable to employees, since it does not require an employee to show the unreasonableness of a proposed accommodation. Conversely, the Seventh Circuit's standard is the most burdensome, since it requires employees to show not only the proposed accommodation's effectiveness, but also its proportionality to cost. The remaining circuits also force employees to make a showing of the unreasonableness of the proposed accommodation, but require less proof of employees than the Seventh Circuit. Notably, the EEOC's position has not been adopted in any circuit although administrative guidance should be regarded as carrying the force of law, or should at

\textsuperscript{131} Id. at 1186-87 (footnote omitted).

\textsuperscript{132} Id. It is notable that the Fourth Circuit has also opted for a shifting burden of production approach founded upon the \textit{McDonnell Douglas} opinion and its progeny. Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196-97 (4th Cir. 1997). The Fourth Circuit's approach is similar to that of the Sixth Circuit in that the strength of the employee's evidence of discrimination is critical to the analysis of whether the employer must provide a reasonable accommodation. See id.; \textit{Monette}, 90 F.3d at 1186-87. However, the Fourth Circuit's approach will not be discussed further because it squarely follows the \textit{McDonnell Douglas} framework without implementing a unique proof structure that applies solely in reasonable accommodation claims. See Halprin, 128 F.3d at 196-97.
least merit some deference. The next section illustrates how judicial deference to the EEOC's views would create a uniform proof structure. However, it will also illustrate an inherent flaw in the EEOC's interpretation of what constitutes a reasonable accommodation.

IV. THE AUTHORITY OF THE EEOC AND IT'S INTERPRETATIONS OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

When Congress enacted the ADA, it delegated varying degrees of authority to administrative agencies in regard to the different titles of the statute. The EEOC, established by the Civil Rights Act of 1964, was given the authority to issue regulations and to administer, interpret and enforce Title I of the ADA. Following Congress' mandate, on July 26, 1991, the EEOC published final rules ("regulations") to enforce the ADA, which contained an appendix entitled, Interpretive Guidance on Title I of the Americans with Disabilities Act ("Interpretative Guidance"). The EEOC further discussed its interpretation of Title I in an amicus curiae brief on behalf of the plaintiff-employee in Reed v. LePage Bakeries, Inc.

Under administrative law, the EEOC's

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133. The Supreme Court recognized the various agencies that are delegated authority in regard to the ADA:

- the EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, §§ 12111-12117, pursuant to § 12116. The Attorney General is granted authority to issue regulations with respect to Title II, subtitle A, §§ 12131-12134, which relates to public services. Finally, the Secretary of Transportation has authority to issue regulations pertaining to the transportation provisions of Titles II and III. See § 12149(a). See also § 12204 (granting authority to the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design). Moreover, each of these agencies is authorized to offer technical assistance regarding the provisions they administer. See § 12206 (c)(1)...


134. U.S. Equal Employment Opportunity Commission, EEOC Enforcement Activities, at http://www.eeoc.gov/enforce.html (last visited Oct. 25, 2002) ("the EEOC coordinates all federal equal employment opportunity regulations, practices, and policies. The Commission interprets employment discrimination laws, monitors the federal sector employment discrimination program, provides funding and support to state and local Fair Employment Practices Agencies (FEPAs), and sponsors outreach and technical assistance programs.")


137. 29 C.F.R § 1630 (2002).

138. 29 C.F.R § app. 1630.1-16.

139. EEOC's Amicus Brief, supra note 13.
regulations regarding Title I of the Act should carry the force of law.\textsuperscript{140} At a minimum, the Interpretive Guidance merits some deference.\textsuperscript{141}

Courts have not deferred to the EEOC regulations and guidance for various reasons: (1) the agency’s perceived pro-employee bias;\textsuperscript{142} (2) the EEOC regulations regarding reasonable accommodations and undue hardship are beyond the scope of the agency’s authority,\textsuperscript{143} and (3) the EEOC’s regulations are impermissible constructions of the ADA.\textsuperscript{144} The lack of deference to the EEOC’s interpretations of the ADA weakens the agency’s power and authoritative force. Deference to the EEOC regulations and guidance would create a uniform application of the ADA. In addition, parties to litigation and practitioners would be able to rely confidently upon the EEOC’s well informed views. However, the EEOC’s views, at least as advocated in Reed and Barnett, were inherently flawed. This section will attempt to establish the extent of the EEOC’s authority in relation to Title I of the ADA.

A. The Pre-Barnett Era and Reed v. LePage Bakeries, Inc.: The EEOC Voices its Interpretation of Burden Allocation Under the ADA

As the ADA conveys, an employer’s legal obligation to provide reasonable accommodations is limited to the extent to which an accommodation would cause an employer undue hardship.\textsuperscript{145} According to the EEOC’s regulations and Interpretive Guidance, methods of reasonable accommodation that a qualified individual is afforded under the ADA can be categorized into three groups: (1) changes to the job application process; (2) changes to the work environment, or to the way a job is usually performed; and (3) changes that enable an employee with a disability to enjoy equal benefits and privileges of employment (such as access to training).\textsuperscript{146}

\begin{footnotesize}
\begin{enumerate}
\item See infra Part IV.B. The lack of deference to EEOC guidance exhibits the agency’s second-class status. Locke, supra note 5, at 108.
\item See infra Part IV.B.
\item There seems to be a conflict when the EEOC sues an employer on behalf of an employee and cites its own regulations and views as the authority the court is required to follow.\textsuperscript{143}
\item 29 C.F.R. § 1630.2(o) (2002); 29 C.F.R. app. § 1630.2(o).
\end{enumerate}
\end{footnotesize}
Regrettably, reasonable accommodation is not specifically defined under the ADA; rather, the statute only offers examples of what a reasonable accommodation may include. The ADA states that a 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 modifications 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.

As a result, the interpretation of reasonable accommodation is left to agency or judicial interpretations.

The EEOC regulations used the same language in its interpretation of what a reasonable accommodation may include. But according to the EEOC, reasonable accommodation also means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

The foregoing provisions essentially illustrate methods of accommodations that are deemed reasonable by the EEOC. The EEOC’s Interpretative Guidance further clarified the agency’s view of what is reasonable by stating that:

147. 42 U.S.C. § 12111(9).
148. Id. § 12111(9)(A)-(B).
149. 29 C.F.R. § 1630.2 (o)(2)(i).
150. Id. § 1630.2 (o)(1)(i)-(iii).
151. Congress only indicated what reasonable accommodation may include. 42 U.S.C. §12111(9) (2000). The EEOC tried to fill this gap by listing methods of accommodation that it considers reasonable.
if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.  

Read together, the EEOC's regulations and Interpretive Guidance define a reasonable accommodation as one that is both job-related and effective. However, this approach was not advocated in Reed. In Reed, the EEOC advocated that reasonable accommodation in the employment context only refers to whether a proposed accommodation enables an employee to effectively perform the job. In Barnett, the Supreme Court only considered the EEOC's regulations, and failed to consider the effect that reading the regulations together with the Interpretive Guidance would have on formulating a proof structure. Reading the regulations and the Interpretive Guidance together would arguably foster an equitable and logical proof structure.  

The EEOC regulations also expanded upon the ADA's definition of undue hardship. Notably, the history of the EEOC's regulations points out that the agency purposefully "deleted the reference to undue hardship from the definition of reasonable accommodation" which is "a technical change reflecting that undue hardship is a defense to, rather than an aspect of, reasonable accommodation." The EEOC regulations state that undue hardship with respect to providing accommodations means "significant difficulty or expense incurred by a covered entity" in light of several factors, which include:

152. 29 C.F.R. app. § 1630.9.
153. EEOC's Amicus Brief, supra note 13.
154. Id.
156. In Barnett, the Supreme Court rejected the EEOC's view embodied in the Reed Amicus Brief and the regulations because they would only require that a reasonable accommodation be effective. Id. The Court may be more likely to accept a proof structure in which the Interpretive Guidance's job-relatedness requirement is added to the effectiveness requirement to make a two-pronged burden for the employee to satisfy. Regrettably, the EEOC did not argue for such a two-pronged requirement in Reed because the employee in that case probably would not have been able to meet the job-relatedness prong. EEOC's Amicus Brief, supra note 13 at 3-16.
159. 29 C.F.R. § 1630.2(p)(1).
A Call for Clarification

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.160

Thus, the EEOC advocates the term undue hardship as referring to the influence a proposed accommodation can have on the employer in light of factors such as a business’ size, financial resources and the nature and structure of its operation.161

In the EEOC’s amicus brief in Reed,162 the agency contended that the district court imposed an unduly heavy burden on the plaintiff and urged the court to clarify the ADA’s standards by finding that “an ADA plaintiff bears the burden of establishing that a proposed accommodation would be effective; to avoid liability, the employer must then show that it

160. Id. § 1630.2(p)(2)(i)-(v).
161. Id. § 1630.2(p)(2).
162. EEOC’s Amicus Brief, supra note 13. In essence, the proof structure endorsed by the EEOC can be broken down as follows: the employee should bear the initial burden of establishing that an accommodation exists that would be effective and would allow the employee to perform the essential job functions. Id. To rebut the employee’s claim, the defense can either offer evidence showing the accommodation would be ineffective or raise the affirmative defense of undue hardship. Id. The plaintiff’s only burden in proving a reasonable accommodation is to show that the accommodation would effectively enable the employee to perform the job. Id. Whether the accommodation would cause an undue hardship (is too costly or difficult) is entirely for the defendant to prove. Id. See generally White v. York Int’l Corp., 45 F.3d 357 (10th Cir. 1995) (offering a proof structure similar to the one advocated by the EEOC).
has offered an effective accommodation or that such accommodation would cause an undue hardship."

Ultimately, the EEOC views the burden of proving the unreasonableness of proposed accommodations as falling upon the employer. The reasoning for the EEOC's conclusion is that employees can better determine what accommodation will work best for them, so they should have the burden of proving an effective accommodation exists. In addition, since an employer has greater access to information about whether a particular accommodation will cause an undue hardship, the employer should have the burden of proving it in litigation, as opposed to the employee proving its absence.

The First Circuit rejected the EEOC's position, and the Supreme Court impliedly rejected it in Barnett. As the Supreme Court pointed out, the EEOC's proof structure is flawed in two respects. First, "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Second, "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees...." Significantly, there is no indication in the Barnett opinion that the Court considered reading the EEOC's regulations together with its Interpretive Guidance to formulate that a reasonable accommodation is one that is both job-related and effective. Such a reading would negate the Court's analysis that the EEOC's views are impermissible constructions of the ADA.

**B. Giving Deference to the EEOC's Guidance**

It is settled law that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance....'" However, the courts' failure to defer to the EEOC on

\[\text{163. } \text{EEOC's Amicus Brief, supra note 13 (emphasis added).}\\
\text{164. } \text{See id.}\\
\text{165. } \text{Barnett, 122 S. Ct. 1522-23; EEOC's Amicus Brief, supra note 13.}\\
\text{166. } \text{Barnett, 122 S. Ct. 1522-23; EEOC's Amicus Brief, supra note 13.}\\
\text{167. } \text{Reed, 244 F.3d at 258.}\\
\text{168. } \text{122 S. Ct. 1516, 1522-23 (rejecting the plaintiff's practical reading of the statute, which was consistent with the EEOC's view in Reed).}\\
\text{169. } \text{id. at 1522.}\\
\text{170. } \text{Id.}\\
numerous occasions has put the agency’s authority in doubt. The following discussion will illustrate when the courts are bound to an agency’s interpretation of a statute by analyzing Skidmore v. Swift & Co., Chevron U.S.A. Inc. v. Natural Resources Defense Council and United States v. Mead Corp. A review of these cases will show that the EEOC’s views should be afforded more weight in reasonable accommodation cases as a matter of law.

In Mead, the Supreme Court affirmed Skidmore in holding that “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency . . . .” Thus, under Mead and Skidmore, the EEOC’s Interpretive Guidance and amicus curiae brief in Reed should be persuasive to a court trying to settle the terms reasonable accommodation and undue hardship. Conversely, “administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” In Chevron, the Supreme Court established a two-pronged test for judicial interpretation of an agency’s statutory regulations. First, a court must determine if “Congress has directly spoken to the precise

court rulings and the ever-evolving interpretation of the ADA make it critical for practitioners to rely upon the most recent decisions in disability discrimination law. Churchill, supra note 20, at 13 (noting that disability discrimination “is not an area of the law that tolerates well a reliance on any but the most recent cases” and that attorneys must pay close attention to constantly evolving law).

172. As the Supreme Court has expressed:

‘[j]udicial deference to an agency’s interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches . . . . When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency’s policy determinations is limited.


176. Id. at 234 (quoting Skidmore, 323 U.S. at 139) (emphasis added). The degree of deference the courts will afford an agency’s interpretation of a statute varies with circumstances. Id. at 228. In determining the amount of deference, courts have considered the extent of the agency’s care, the validity of its reasoning and the consistency of the agency’s interpretations, amongst other factors. Id.

177. Skidmore, 323 U.S. at 139.
178. Mead, 533 U.S. at 236.
179. Chevron, 467 U.S. at 842.
question at issue." If so, an administrative agency’s guidance will not be given Chevron deference. When Congress has not addressed the precise question at issue and an administrative agency has the authority to regulate the statute, courts must defer to an agency’s interpretation of the statute if it is “based on a permissible construction of the statute.” Therefore, unless the EEOC’s regulations in regard to reasonable accommodation or undue hardship are “arbitrary, capricious, or manifestly contrary to the statute[,]” a reviewing court must defer to the EEOC’s interpretation.

In Barnett, the Supreme Court impliedly found the EEOC’s regulations to be an impermissible construction of the ADA without performing formal Chevron or Skidmore analyses. However, if the Court read the EEOC’s regulations together with what should have been considered persuasive Interpretive Guidance, the Court may have concluded that both the job-relatedness and effectiveness requirements in one proof structure would constitute a permissible construction of the ADA.

C. Support for the EEOC’s Interpretation of the ADA

The ADA’s express language and the notion that employees should not be forced to prove the unreasonableableness of proposed accommodations support the conclusion that the EEOC’s view of what constitutes a reasonable accommodation and an undue hardship are permissible constructions of the ADA.

First, the burden of proving undue hardship is essentially a burden of proving the unreasonableableness of a proposed accommodation, which the ADA has squarely placed on the employer. The ADA clearly states that a punishable form of disability discrimination is “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 . . . .” This language plainly requires the employer (covered entity) to carry its burden of proof (demonstrate)

180. Id.
181. Id. at 842-43.
182. Id.
183. Chevron, 467 U.S. at 844.
that the employee's proposed accommodation would be unreasonable in terms of expense or impact (impose an undue hardship) on the operation of its business. Thus, proving the existence of a job-related, effective accommodation is a burden analytically distinct from arguing that it is unreasonable under the circumstances. Since undue hardship and reasonable accommodation are not mirror images, the reasonableness prong of the employee's case must mean something other than proving economic hardship caused by a proposed accommodation. As the EEOC's Interpretive Guidance suggests, reasonableness is thus satisfied by an employee showing that the accommodation sought is job-related in the context of employment situations under Title I. In other words, the accommodation sought cannot be "primarily for the personal benefit of the individual with a disability."^{186} It is not the employer's duty to fully reconcile the employee's disability. "Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related . . . ."^{187}

Next, the EEOC's regulations require the interactive process to be initiated and pursued by the employer.^{188} It is clear from the EEOC's regulations that it is the employer who must oversee this informal process aimed at "identify[ing] the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."^{189} The employee must identify his disability and the employer must determine how to reasonably accommodate it. "Almost all of the circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process and that this obligation is triggered either by the employee's request for accommodation or by the employer's recognition of the need for accommodation."^{190} Therefore, employees should not be forced to prove the unreasonableness of the accommodation if litigation becomes

186. 29 C.F.R. app. § 1630.9 (2002).
187. Id.
188. 29 C.F.R. § 1630.2(o)(3).
189. Id.
necessary, because the employer should have realized the financial effects of the proposed accommodation during the interactive process.

Finally, common sense also dictates that employees should not be required to prove the unreasonableness of proposed accommodations. It is employers who know what they can afford, not employees. An employee should not be expected to take its employer's ability to finance a proposed accommodation into account. Furthermore, employers know the range of positions available to a disabled employee or applicant and know what job functions are essential. Armed with this information, financial and other related business records, it is the employer who knows best the unreasonableness of proposed or alternative accommodations. Consequently, employees claiming discrimination for the failure to reasonably accommodate their disability should not be required to make a showing of its unreasonableness.

The significance of this issue of statutory interpretation is that an employer's obligation to provide reasonable accommodations to qualified individuals is integrally affected by the ADA's attempt to define the terms reasonable accommodation and undue hardship. It is the EEOC's place to reconcile these ambiguities in the ADA. If courts are unwilling to afford Chevron deference, the EEOC's regulations and Interpretative Guidance should at least be regarded as persuasive authority. If the EEOC's interpretations of the ADA were given deference, a uniform approach to burden allocation would result, and practitioners and parties to litigation would have a clear and consistent source of guidance.

V. CLARIFYING THE ADA THROUGH ANALOGY TO TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits employment practices that discriminate on the basis of race, color, religion, sex or national origin. As a respected predecessor, Title VII's caveat to employers has been significant and influential enough to help form the foundation of the ADA's prohibition of disability discrimination, as well as court interpretations of the ADA's proof structure. 

191. In Meritor, a regulation that was deemed not controlling was still considered to "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) (citations omitted); see also Petitioner's Brief, Sutton v. United Airlines, 1997 U.S. Briefs 1943 (1999).
193. Id. § 2000e-2.
194. Colker, supra note 40 (pointing out that the ADA's roots stem from Title VII and the Rehabilitation Act). Several courts have employed the McDonnell Douglas burden-shifting proof
Much like the ADA, Title VII’s ambiguity produced uncertainty regarding the proper allocation of burdens of proof in discrimination claims. In Title VII’s case, this was due to the statute’s failure to identify proof structures that distinguish between direct and circumstantial evidence.\(^{195}\) Attempting to resolve this dilemma, the Supreme Court rendered landmark decisions in *McDonnell Douglas Corp. v. Green*\(^{196}\) and *Price Waterhouse v. Hopkins*,\(^{197}\) which set forth proof structures in disparate treatment cases depending upon the strength of the employee’s evidence of discrimination.\(^{198}\)

However, several of the Supreme Court’s employment law decisions would soon come under scrutiny and be altered by Congress with the passage of the Civil Rights Act of 1991 ("1991 Act").\(^{199}\) In particular, the 1991 Act made several important modifications to both Title VII and the *Price Waterhouse* proof structure.

- First, section 703(m) of the 1991 Act clearly specified that a complaining party need only demonstrate that race, color, religion, sex or national origin was a motivating factor in the employment practice.\(^{200}\) This language adopts the plurality’s view in *Price Waterhouse* but...
changed the ultimate holding in that it was no longer required that the immutable characteristic be a *substantial* motivating factor.  

Second, section 706(g)(2)(B) of the 1991 Act clearly specified the available remedies when a claimant proves a violation of section 703(m) and the defendant demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor." With this language, Congress illustrated the correct framework in direct evidence cases.

Finally, section 701(m) of the 1991 Act specifically defined the word demonstrate to mean "meets the burdens of production and persuasion." The purpose of this addition to Title VII was clearly to dispel any confusion regarding the weight of the parties' respective burdens of proof. Read together with the foregoing two provisions, it is evident that the proof structure Congress sought to promulgate for direct evidence cases involves a shifting burden of persuasion. Congress implemented these provisions to clarify an ambiguity in Title VII that the Supreme Court misinterpreted.

The current predicament involving the proof structure in reasonable accommodation cases under the ADA is similar to that which Title VII endured. Like it did with Title VII, Congress should intervene and


202. 42 U.S.C. § 2000e-5(g)(2)(B). If both parties meet their burden, relief is limited to declaratory judgment, injunction and attorney's fees and costs "demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m)." *Id.* § 2000e-5(g)(2)(B)(i). The statute goes on to expressly prohibit courts from awarding damages or from ordering any admission, reinstatement, hiring, promotion or otherwise ordering that any payment be made. *Id.* § 2000e-5(g)(2)(B)(ii).

203. *Id.* § 2000e(m) (emphasis added).

204. The employee bears the burdens of production and persuasion in demonstrating that the protected characteristic was a motivating factor in the employment practice. Then the employer bears the burdens of production and persuasion in demonstrating that it would have taken the same action absent the impermissible motivating factor.

205. Compare 42 U.S.C. §§ 2000e(m), 2000e-2(m), 2000e-5(g)(2)(B) with *Price Waterhouse*, 490 U.S. 228. See also Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 250-51 (1994) (noting the 1991 Act's modifications of several Supreme Court employment law decisions); Belton, *supra* note 202 at 651-63 (discussing the effects on Title VII jurisprudence in light of the Supreme Court's decisions in *McDonnell Douglas* and *Price Waterhouse*, and the legislative response to the confusing proof standards they created). That Congress took such swift action to alter the face of employment law indicates it plainly disagreed with the way the Court was interpreting antidiscrimination statutes. Note the significance of Justice O'Connor's opinions in the *Price Waterhouse* and *Barnett* decisions. Justice O'Connor concurred in the plurality opinion in *Price Waterhouse*, and was the only one to address the significance of direct evidence. *Price Waterhouse*, 490 U.S. at 261-79. Justice O'Connor concurred in the majority opinion to arrive at a compromise between the various opinions of the Court "despite her concerns" in another extremely close decision. *Barnett*, 122 S. Ct. at 1526-28.
amend the ADA to specify precisely what proof structure should govern disability discrimination, and expressly define the weight of the parties' respective burdens. Several factors support such action.

First, the very purposes of the ADA are:

1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
4. to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Naturally, a court-made rule that fills a gap in an ambiguous statute should be afforded deference if it is consistent with the statute’s plain meaning and legislative intent. Yet courts have done little to clarify the ambiguity even though the ADA specifically calls for clear, comprehensive, strong, consistent, enforceable standards encompassing the sweep of congressional authority. Therefore, Congress should clarify the ADA.

Second, Congress expressly delegated authority to regulate Title I of the ADA to the EEOC. This grant of power should enable the EEOC to interpret ambiguous terminology in Title I as it applies to Title I. Furthermore, even if the agency does not have this power, the Supreme Court should expressly analyze the agency’s authority to wield it.

Third, the Supreme Court’s opinion in Barnett did not clarify the ADA’s ambiguous proof structure in reasonable accommodation cases; rather, it perpetuated the uncertainty. The various approaches to burden allocation taken by the circuit courts pre-Barnett were not as “functionally similar” as the Supreme Court may think. A shifting
burden of production\textsuperscript{210} clearly is not the same as a shifting burden of persuasion,\textsuperscript{211} and neither are the same as traditional burdens of proof.\textsuperscript{212} Additionally, requiring employees to merely prove that an accommodation is possible\textsuperscript{213} is not the same as requiring employees to show that a proposed accommodation would enable them to perform the essential functions of the job and that the proposed accommodation is at least facially feasible for the employer.\textsuperscript{214} If the circuit court interpretations of the ADA were this varied before the Supreme Court decided \textit{Barnett}, the \textit{Barnett} holding itself will probably be subjected to as diverse an array of interpretations unless the Court shortly gives substance to the "ordinarily or in the run of the cases" language.\textsuperscript{215}

Finally, a congressional resolution of this issue resembling that of the 1991 Act would facilitate the pursuit and defense of disability discrimination claims from the perspective of all parties involved: (1) practitioners, who will be better positioned to advance their clients’ interests when dealing with a straightforward proof structure; (2) judges, who will be able to rely upon clear, authoritative precedent in deciding disputes; (3) federal agencies delegated authority to administer the statute, which will be able to expend their resources on enforcement instead of explaining statutory ambiguities; and (4) employers and disabled employees who will realize enhanced representation, and whose rights will thus be better protected.\textsuperscript{216} Accordingly, Congress should

\textsuperscript{210} Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 950-51 (8th Cir. 1999).
\textsuperscript{211} Jackan v. N.Y. State Dep’t of Labor, 205 F.3d 562, 566 (2d Cir. 2000).
\textsuperscript{212} Willis v. Conopco, Inc., 108 F.3d 282, 284 (11th Cir. 1997).
\textsuperscript{213} White v. York Int’l Corp., 45 F.3d 357, 361 (10th Cir. 1995).
\textsuperscript{214} Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001).
\textsuperscript{215} \textit{Barnett}, 122 S. Ct. at 1523. For example, the majority in \textit{Barnett} only expressly cites to the First, Second and District of Columbia Circuits’ approaches as proper interpretations of the ADA’s vague proof structure. \textit{Id.} Thus, it is unclear whether the Court has effectively limited lower courts to relying upon these approaches. See, e.g., Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 783-84 (7th Cir. 2002) (citing \textit{Barnett}, but continuing to rely upon pre-\textit{Barnett} decisions); Dilley v. SuperValu, Inc., 296 F.3d 958, 963-64 (10th Cir. 2002) (relying upon pre-\textit{Barnett} precedent for the reasonable accommodation proof structure); EEOC v. Yellow Freight Sys., Inc., No. 98 Civ. 2270, 2002 U.S. Dist. LEXIS 16826, at *58-60 (S.D.N.Y. Sept. 4, 2002) (failing to cite \textit{Barnett} in its analysis of the appropriate allocation of burdens of proof while relying on the pre-\textit{Barnett} precedent).
\textsuperscript{216} Note that this section does not advance the view that the ADA should employ the same proof structure as Title VII, as the two statutes’ protections may not be analogous. Knynch, supra note 63 (arguing that courts should not rely upon the \textit{McDonnell Douglas} burden-shifting proof structure in Title VII claims for guidance under the ADA because the statutes involve distinct types of discrimination). For example, the ADA offers employers a cost justification defense, whereas Title VII does not. Undue hardship to the operation of the employer’s business is the very factor that excuses discrimination against the disabled, but costs will not excuse discrimination against individuals upon the basis of race, color, religion, sex or national origin. City of L.A. Dep’t of
modify the ADA to specify a clear proof structure for reasonable accommodation cases and indicate the weight of the respective burdens of proof just as it did to Title VII via the Civil Rights Act of 1991.

VI. CONCLUSION

Despite being touted at its passage as the most significant civil rights legislation since the Civil Rights Act of 1964, the ADA has since been criticized for its ambiguous standards. Regrettably, the criticism is not unfounded. The ADA’s lack of a clear proof structure has resulted in a significant reduction in its ability to provide adequate remedies for employees bringing reasonable accommodation claims. The fact that the circuit courts have implemented different proof structures alone shows the ADA is not being properly applied. The Supreme Court’s decision in Barnett, although fair to the parties, did little to clarify the statute’s vague standards. As a result, disabled employees bringing discrimination claims have not enjoyed the ADA’s promise of accommodation, and all parties involved are left without the clear, strong, consistent standards the ADA sought to achieve.

Although the EEOC was given a broad grant of power to regulate and fill any gaps in Title I of the ADA, its interpretations of reasonable accommodation and undue hardship generally have not been afforded deference. Yet the agency’s interpretation of the ADA’s proof structure is logical and consistent with congressional intent. The two-pronged reasonable accommodation definition gathered from reading the EEOC’s regulations and Interpretive Guidance together is a permissible construction of the ADA. Therefore, it should be accorded the force of law or should at least merit some deference. At the very least, the Supreme Court should determine the extent of the agency’s authority as well as the validity of its regulations and Interpretative Guidance in relation to the ADA’s vague reasonable accommodation standard.

Furthermore, the circuit split, the lack of deference to the EEOC and the development of disparate treatment law under Title VII reveal

Water & Power v. Manhart, 435 U.S. 702 (1978) (refusing to permit the heightened cost of insurance premiums for male employees as opposed to female employees due to longevity calculations to justify a 14.84% disparity in pension fund contributions based solely upon sex); Int’l Union v. Johnson Controls, 499 U.S. 187, 210 (1991) ("The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender.") (citation omitted). Rather, this section merely considers the history and development of employment law under Title VII as a respected predecessor of the ADA, and proposes that Congress resolve a similar issue of statutory interpretation in like manner.

217. Locke, supra note 5, at 108.
that the ADA’s vague standards are ripe for legislative clarification. Congress should modify the ADA just as the Civil Rights Act of 1991 modified Title VII’s proof structure so that judges, practitioners, parties, and administrative agencies alike will better comprehend the extent of the statute’s reach and the exact process for litigating reasonable accommodation claims. Doing so would create the clear, comprehensive, strong, consistent, enforceable standard originally sought by Congress.

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