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Must We Talk about That Reasonable Accommodation--The Eighth Circuit Says Yes, But Is the Answer Reasonable

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"Must We Talk About that Reasonable Accommodation?": The Eighth Circuit Says Yes, But is the Answer Reasonable?

Fjellestad v. Pizza Hut of America, Inc.[1]

I. INTRODUCTION

In 1990, when Congress enacted the Americans with Disabilities Act ("ADA"),[2] an estimated forty-three million Americans had one or more physical or mental disabilities.[3] Unfortunately, many Americans with disabilities experience various forms of discrimination including outright intentional exclusion.[4] Title I of the ADA is designed to address employment discrimination and requires covered employers to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability who is either an applicant or an employee.[5]

The ADA has been hailed by advocates for persons with disabilities as the most important civil rights act passed since 1964,[6] and as the "Emancipation Proclamation" for Americans with disabilities.[7] Critics of the ADA "cast the law as overly broad, difficult to interpret, inefficient, and as a preferential treatment initiative."[8] Others question whether the law's economic benefits outweigh its administrative costs.[9] Empirical data also suggests that "the ADA's track record in improving employment opportunities for individuals with disabilities appears dismal."[10] Aggravating the problem, and contrary to the media's portrayal of the

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1. 188 F.3d 944 (8th Cir. 1999).

2. The official name of the Americans with Disabilities Act is the Equal Opportunity for Individuals with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1992) (codified at 42 U.S.C. §§ 12101-12113 (1994)).

3. *See* 42 U.S.C. § 12101(a)(1) (1994).

4. *See* 42 U.S.C. § 12101(a)(5) (1994).

5. *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

6. *See* 135 CONG. REC. S10708-01 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) (stating that the ADA "has the potential to become one of the great civil rights laws of our generation").

7. 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Sen. Harkin, chief sponsor of the ADA) (describing the ADA as "the 20th century Emancipation Proclamation for all persons with disabilities").

8. Peter David Blanck, *The Economics of the Employment Provisions of the Americans With Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 877 (1997).

9. *Id.*

10. Susan Schwochau & Peter David Blanck, *The Economics of the Americans With Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000). A recent report of the National Institute on Disability and Rehabilitation Research indicates that the ADA has not led to an improvement of

ADA as a windfall statute for plaintiffs,[11] studies show that individuals with disabilities are finding it nearly impossible to win in court.[12] Nonetheless, by providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," the ADA is an innovative attempt by Congress to address the pervasive problem of discrimination against persons with disabilities.[13]

More than eight years after the effective date of Title I,[14] fundamental questions remain. This Note examines one aspect of the ongoing evaluation and debate: What responsibilities do employers and employees have in the reasonable accommodation process? The federal regulations implementing the ADA provide guidance by suggesting that employers participate in an "interactive process" to help their employees find reasonable accommodations.[15] However, courts remain divided on the question whether employers must

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employment conditions of individuals with disabilities generally. *Id.* at 271 (citing H. Stephen Kaye, *Is the Status of People with Disabilities Improving?* 1 (Disability Stat. Ctr., Disability Stat. Abstract No. 21, 1998)). Findings from the 1998 National Organization on Disability/Harris Survey of Americans with Disabilities indicate that twenty-nine percent of individuals with disabilities surveyed in 1998 were employed compared to thirty-one percent in 1994 and thirty-four percent in 1986. For a summary of the findings of the most recent survey, see National Organization on Disability/Harris Survey of Americans with Disabilities, *available at* http://www.nod.org/presssurvey.html (visited Sept. 5, 2000).

11. *See* Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 nn.2-3 (1999) (citing Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Apr. 25, 1997, at 16 (stating that ADA has created a "lifelong buffet of perks, special breaks and procedural protections" for individuals with questionable disabilities); Trevor Armbrister, *A Good Law Gone Bad*, READER'S DIG., May 1998, at 145, 149 (asserting that plaintiffs "have used the ADA to trigger an avalanche of frivolous suits clogging federal courts"); John Leo, *Let's Lower the Bar*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19 (arguing that the ADA has the potential "'to force the rethinking and watering down of every imaginable standard of competence, whether of mind, body or character'" (quoting WALTER OLSON, THE EXCUSE FACTORY (1997)))).

12. *See* Colker, *supra* note 11, at 103-08 (finding that from 1992 through July 1998 defendants prevailed in employment discrimination cases under the ADA in 448 of 475 cases (94%) at the trial court level and in 376 of 448 cases (84%) in which plaintiffs appealed adverse judgments); John W. Parry, *ABA Survey of Employment Discrimination Cases Brought Under the Americans With Disabilities Act*, Daily Lab. Rep. (BNA) No. 121, at E1 (June 22, 2000) (reporting that of 434 Title I cases decided in 1999, 95.7% resulted in employer wins, and noting that in some circuits, no employee wins occurred).

13. 42 U.S.C. § 12101(b)(1) (1994).

14. The effective date of Title I of the ADA was July 26, 1992. Section 108 provided that: "This title [sub-chapter] shall become effective 24 months after the date of enactment [July 26, 1990]." Americans with Disabilities Act, Pub. L. No. 101-336, § 108, 104 Stat. 327 (1992).

15. *See* 29 C.F.R. § 1630.2(o)(3) (1999); *see also* discussion *infra* Part III.B.

participate in an interactive process and whether they can be held liable for failure to do so. The United States Court of Appeals for the Eighth Circuit recently had the opportunity to consider this issue in *Fjellestad v. Pizza Hut of America, Inc.*

II. FACTS AND HOLDING

On December 14, 1994, Ellen Fjellestad was seriously injured in an automobile accident that required her to be hospitalized for nearly one month.[16] Fjellestad's injuries included a lacerated liver, severe chest injuries, blunt trauma to her right shoulder, and multiple broken ribs.[17] Prior to her accident, Fjellestad had been a successful unit manager of the Yankton, South Dakota, Pizza Hut restaurant for more than sixteen years.[18]

During Fjellestad's hospitalization and recovery, Linda Folkers, a senior shift manager at the Pizza Hut restaurant, performed Fjellestad's unit manager duties, which included: general administration of the restaurant, ensuring customer satisfaction and restaurant cleanliness, maintaining restaurant safety and financial control measures, managing bank deposits, and supervising, training, and hiring employees.[19] Pizza Hut expects unit managers to work fifty hours a week, with the possibility of working fewer hours if they are able to accomplish their duties in less time.[20]

On April 28, 1995, Fjellestad's doctors released her to work two hours every other day.[21] However, in early May 1995, Fjellestad suffered another accident and was again prohibited from working.[22] Fjellestad returned to work in June 1995 when her doctors released her to work four hours every other day for a total of twelve hours per week.[23] When Fjellestad returned to work in June, she and Folkers served as "co-managers."[24]

On August 24, 1995, Fjellestad received the first of several memos she was to eventually receive from Rick Swanson, her area Pizza Hut supervisor, criticizing her for poor performance.[25] By this time, Fjellestad's doctors had released her to work twenty hours per week.[26] As Fjellestad's work hours

16. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 947 (8th Cir. 1999).
17. *Id.*
18. *Id.* Fjellestad had received district and national recognition for her managerial skills. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 948.
25. *Id.*
26. *Id.*

continued to increase, Swanson continued to cite her for poor performance.[27] Additionally, on October 23, 1995, Swanson met with Fjellestad and told her that once she had exhausted her available leave time under the Family Medical Leave Act, she would be welcomed back to the full-time unit manager position.[28] Swanson also advised Fjellestad that if she was unable to work the required fifty hours per week, she would be demoted to shift manager.[29]

In response to Swanson's conduct, Fjellestad filed a grievance letter with Pizza Hut on November 15, 1995. In the letter she wrote, "'I request that I be reasonably accommodated.'"[30] In her grievance, Fjellestad also stated, "'[d]emotion or termination would not be consistent with employer reasonable accommodation duties.'"[31] On December 12, 1995, Fjellestad received a call from a representative of Pizza Hut's human resources department regarding her grievance.[32] Pizza Hut informed Fjellestad that she would be allowed to retain her position as unit manager because she had been released by her doctor to work a sufficient number of hours to perform her required duties.[33] However, Swanson placed her on a sixty-day performance plan that included bi-weekly evaluations.[34]

On January 16, 1996, Fjellestad's doctors concluded that she had reached her maximum recovery and determined that she had a thirty percent permanent impairment to her upper right extremity and would have "prominent weakness in her arms long term with probably some residual deficits for the rest of her life."[35] Additionally, Fjellestad's doctors limited her to working thirty-five to forty hours per week with no more than three consecutive days of work.[36]

In a letter to Fjellestad dated January 4, 1996, Pizza Hut mentioned assigning her to the shift manager position.[37] Pizza Hut's internal correspondence also mentioned this possibility.[38] However, Pizza Hut never offered the shift manager position to Fjellestad.[39] Instead, on February 8, 1996, day forty-seven or forty-eight of the sixty-day performance plan, Fjellestad was terminated by Swanson for allegedly failing to make adequate progress in meeting the targets set forth in the performance plan.[40] Linda Folkers was then

27. *Id.*
28. *Id.* at 948 n.1.
29. *Id.*
30. *Id.* at 948, 952.
31. *Id.* at 951.
32. *Id.* at 948.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 949.
37. *Id.* at 951.
38. *Id.*
39. *Id.* at 953.
40. *Id.* at 948.

promoted to unit manager.[41] Following her termination, Fjellestad filed two additional grievances with Pizza Hut requesting reasonable accommodation.[42] After Pizza Hut failed to take action, Fjellestad filed suit under Title I of the ADA.[43]

In granting summary judgment for Pizza Hut, the United States District Court for the District of South Dakota held that Fjellestad failed to establish a claim because she was not disabled within the meaning of the ADA.[44] Furthermore, the district court held that even if Fjellestad were disabled, she was not qualified to perform the essential functions of her job with or without reasonable accommodation.[45]

Fjellestad appealed the district court's decision to the Eighth Circuit.[46] The Eighth Circuit reversed, holding that genuine issues of material fact existed as to whether Fjellestad was disabled within the meaning of the ADA.[47] Specifically, the court determined that Fjellestad had created a factual dispute about whether her overall employment opportunities were limited and whether her medical restrictions significantly restricted the condition, manner, or duration in which she could work as compared to an average person in the general population.[48]

The Eighth Circuit also held that employers who have received notice that a reasonable accommodation is requested have a duty to engage in an interactive process with the requesting employee, and summary judgment is precluded when a genuine dispute exists as to whether the employer acted in good faith and engaged in the interactive process.[49] The court also held that no independent liability exists under the ADA if an employer fails to engage in the interactive process.[50] In viewing the evidence in the light most favorable to Fjellestad, the court concluded that a genuine dispute existed about whether Pizza Hut made a good faith effort to engage in the interactive process, and therefore, summary judgment was inappropriate.[51]

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41. *Id.*
42. *Id.*
43. *Id.* at 947-48.
44. *Id.* at 948.
45. *Id.*
46. *Id.*
47. *Id.* at 957.
48. *Id.* at 949-50.
49. *Id.* at 953. Nevertheless, the court held that the burden of persuasion remains at all times on the employee. *Id.* at 957.
50. *Id.* at 952.
51. *Id.*

III. LEGAL BACKGROUND

During the second half of the twentieth century, Congress took significant steps to eliminate various forms of employment discrimination.[52] Most notably, Congress enacted the Civil Rights Act of 1964 to provide for equal treatment of individuals based on their membership in specific protected classes, including race, color, sex, religion, and national origin.[53] Title VII of the Civil Rights Act prohibits employers from considering an individual's membership in one of the five protected classes when deciding "terms, conditions, or privileges of employment," such as hiring, firing, and job classification.[54]

Under the plain meaning of Title VII, the class of individuals with disabilities is not protected by the Civil Rights Act. In enacting the Rehabilitation Act of 1973[55]—prohibiting disability-based discrimination by the federal government, federal contractors, and recipients of federal funds in matters of hiring, placement, or advancement[56]—Congress sought "'to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted.'"[57] As originally enacted, the Rehabilitation Act did not define what constituted discrimination against individuals with disabilities. However, the regulations for that portion of the Rehabilitation Act applying to employers provide guidance

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52. *See, e.g.*, The Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. III 1997); The Equal Pay Act, 29 U.S.C. § 206 (1994); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).

53. *See* 42 U.S.C. §§ 1971, 1975, 2000e (1994).

54. 42 U.S.C. § 2000e-2(a) (1994). Under Title VII:

> It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or (2) to limit, segregate, or classify his employees or applicants for employment . . . because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994). It is also unlawful for employers to "fail or refuse to refer for employment" or "to classify or refer for employment" an individual based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(b) (1994).

55. 29 U.S.C. §§ 701-797(b) (1994).

56. *See* 29 U.S.C. §§ 793, 794 (1994). Section 504(a) of the Act provides that:

> [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a) (1994).

57. Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 277 (1987) (quoting 123 CONG. REC. 13515 (1977) (statement of Sen. Humphrey)).

by requiring covered employers to provide "reasonable accommodations" to qualified individuals with disabilities.[58]

In 1990, Congress enacted the ADA and extended protection from discrimination to individuals with disabilities in the private sector.[59] In 1992, Congress amended the Rehabilitation Act to apply the same standards from the newly enacted ADA, including the reasonable accommodation requirement.[60]

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58. The regulations state:

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

45 C.F.R. § 84.12 (1996). An employee can establish a prima facie case of discrimination under the Rehabilitation Act by demonstrating that: (1) he is an individual who has a disability within the meaning of the statute; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he was nonetheless terminated or otherwise prevented from performing the job. *See* Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997). An employer can defeat an employee's claim by showing that: (1) making a reasonable accommodation would cause it hardship, and (2) the hardship would be undue. *See* Stone v. City of Mount Vernon, 118 F.3d 92, 97 (2d Cir. 1997).

59. *See* 42 U.S.C. §§ 12101-12213 (1994). The ADA is divided into five titles, each prohibiting discrimination against Americans with disabilities, but in different contexts. Title I prohibits discrimination by private employers. *See* 42 U.S.C. §§ 12111-12117 (1994). Title II prohibits discrimination in the provision of programs, services, and activities by state and local governments. *See* 42 U.S.C. §§ 12131-12150 (1994). Title III prohibits discrimination by public accommodations, such as hotels, restaurants, retail stores, museums, parks, and health clubs, in the provision of goods and services. *See* 42 U.S.C. §§ 12181-12189 (1994). Title IV provides for telecommunications for individuals with hearing and speech disabilities and for close-captioning of public service announcements. *See* 47 U.S.C. §§ 201-229 (1994). Title V contains several miscellaneous provisions. *See* 42 U.S.C. §§ 12201-12213 (1994).

60. While more comprehensive in its application, the ADA was modeled after the Rehabilitation Act and the regulations promulgated thereunder. *See* H.R. REP. NO. 101-485, pt. 2, at 54-55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (stating that the range of employment decisions covered by Title I of the ADA is intended to be consistent with regulations implementing the Rehabilitation Act); H.R. REP. NO. 101-485, pt. 2, at 62 (directing that interpretation of the concept of a "reasonable accommodation" is to be generally consistent with interpretations of that term under the Rehabilitation Act); H.R. REP. NO. 101-485, pt. 2, at 67 (noting that the concept of "undue hardship" is derived from and should be interpreted consistently with regulations implementing the Rehabilitation Act). *See also* 29 U.S.C. § 794(d) (1994) (stating that Rehabilitation Act is to be interpreted in accordance with the standards applied under the ADA); 42 U.S.C. § 12117(b) (1994) (stating that federal agencies administering federal disability statutes are to avoid subjecting employment discrimination claims to "inconsistent or conflicting

A. The ADA

Unlike the Rehabilitation Act, which covers only the federal government, federal contractors, and recipients of federal funds, the ADA was the first attempt by Congress to provide comprehensive protection to the class of individuals with disabilities from discrimination based on their disabilities, real or perceived.[61] The ADA reaches private, and state and local government employers, and it provides protection from discrimination in the areas of state and local government services, public accommodations, and the provision of telecommunications services.[62] Title I of the ADA, the focus of this Note, covers employment discrimination and prohibits covered employers[63] from discriminating against qualified individuals with disabilities.[64] An employer commits unlawful discrimination under the ADA if the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[65]

Unlike other statutes prohibiting discrimination in employment, the reasonable accommodation requirement of the ADA forces employers to recognize that workplaces were traditionally designed for "the average, normal, able-bodied majority."[66] Particularly, by defining discrimination as the failure to make reasonable accommodations to the known physical or mental limitations

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standards"); *Mengine*, 114 F.3d at 420 (citing 29 U.S.C. § 794(d) (1994)); *City of Mount Vernon*, 118 F.3d at 96 (stating that terms common to both the Rehabilitation Act and the ADA are to be interpreted in the same manner); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996) (stating that cases decided under the Rehabilitation Act are instructive and looked to for guidance in interpreting the ADA).

61. *See* 42 U.S.C. §§ 12101-12213 (1994). When the ADA was enacted in 1990, approximately 43 million Americans had one or more physical or mental disabilities. *See* 42 U.S.C. § 12101(a)(1) (1994).

62. *See supra* note 59.

63. Since July 5, 1994, employer means "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." 42 U.S.C. § 12111(5)(A) (1994).

64. *See* 42 U.S.C. § 12112(a) (1994). The ADA provides that: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994).

65. 42 U.S.C. § 12112(b)(5)(A) (1994).

66. FRANK G. BOWE, HANDICAPPING AMERICA, at viii (1978) ("For two hundred years, we have designed a nation for the average, normal, able-bodied majority, little realizing that millions cannot enter many of our buildings, ride our subways and buses, enjoy our educational and recreational programs and facilities, and use our communications systems.").

of an individual with a disability, the ADA requires employers to make adjustments in the workplace that afford individuals with disabilities the opportunity to perform the essential functions of their jobs. Thus, the reasonable accommodation requirement is not a means of giving individuals with disabilities a competitive advantage, but rather a means of leveling the playing field.[67]

To establish a prima facie case under the ADA, a plaintiff must show that (1) she is disabled within the meaning of the Act,[68] (2) she is qualified[69] to

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67. *See* Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996) (noting that the reasonable accommodation process does not require an employer to create a new position for an employee with a disability); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996) (stating that the statute does not require "affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled"); Emrick v. Libby-Owens-Ford Co., 875 F. Supp. 393, 398 (E.D. Tex. 1995) (holding that "the ADA does not require that an employer substantially modify its operations in order to ensure every disabled individual the benefits of employment. . . . To hold otherwise would entitle employees with disabilities to more opportunities for employment than are offered to employees without disabilities, and such is not the intent of the ADA."); 136 CONG. REC. 10856 (daily ed. May 17, 1990) (statement of Rep. Hoyer) ("[The ADA] does not guarantee a job—or anything else. It guarantees a level playing field."); 29 C.F.R. pt. 1630 app. § 1630.1(a), at 350 (2000) (ADA "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given"). However, critics of the ADA have characterized an employer's obligation to provide accommodations as a form of market distortion leading to economic inefficiencies. *See* John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2608-09 (1994). Critics claim that the duty to provide a reasonable accommodation to individuals with disabilities creates an employment privilege or subsidy, in that it attempts to provide covered workers the wages they would receive in a nondiscriminatory free market. *Id.* at 2609. *See also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").

68. A "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1994). Hence, to fall within this definition an individual must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having a disability (subsection (C)). *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999). The Supreme Court in *Sutton* explained the definition of "disability" by reference to the EEOC regulations:

> After restating the definition of disability given in the statute, . . . the EEOC regulations define the three elements of disability: (1) "physical or mental impairment," (2) "substantially limits," and (3) "major life activities." See [29 CFR] §§ 1630.2(h)-(j). Under the regulations a "physical impairment"

perform the essential functions of the job either with or without reasonable accommodation,[70] and (3) she has suffered adverse employment action because of the disability.[71] While the ADA does not clearly state what a plaintiff must prove to prevail on a claim of discrimination under Title I, courts that have considered such claims have typically applied Title VII's burden-shifting framework first enunciated in *McDonnell Douglas Corp. v. Green*[72] and elaborated in subsequent cases.[73] Given the obvious difficulty of gathering direct

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includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." § 1630.2(h)(1). The term "substantially limits" means, among other things, "[u]nable to perform a major life activity that the average person in the general population can perform;" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." § 1630.2(j). Finally, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 1630.2(i).

Id. at 479-80.

69. The determination of whether an individual is "qualified" in the Eighth Circuit involves a two-fold inquiry: "(1) whether the individual meets the necessary prerequisites for the job, such as education, experience, training, and the like; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation." Cravens v. Blue Cross & Blue Shield of Kan. City, 214 F.3d 1011, 1016 (8th Cir. 2000) (citing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1111-12 (8th Cir. 1995)).

70. *See* 42 U.S.C. § 12111(9)(A)-(B) (1994). The ADA does not define "reasonable accommodation" but merely gives examples of what one might be. The term "reasonable accommodation" may include:

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

42 U.S.C. § 12111(9) (1994). While the definition of reasonable accommodation might elude precise definition, the Eighth Circuit has noted that an employer need not provide an accommodation that completely removes from the disabled employee's job the essential functions that a person in that job must perform. *See Benson*, 62 F.3d at 1112-13.

71. *See Benson*, 62 F.3d at 1112.

72. 411 U.S. 792 (1973).

73. The burden-shifting method of proof in Title VII cases was developed in a

evidence of discrimination, the Title VII burden-shifting framework allows plaintiffs to prove discrimination even absent direct evidence of discrimination.[74] Under the burden-shifting framework, the plaintiff's prima facie case of discrimination serves to create a rebuttable presumption that, in the absence of direct evidence of discrimination, the employer's decision was based on an impermissible factor.[75]

If the plaintiff is able to establish a prima facie case of discrimination, the burden of production then shifts to the employer, who must come forward with a "legitimate, nondiscriminatory reason" for its action.[76] If the employer is able

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trilogy of United States Supreme Court cases. *See McDonnell Douglas*, 411 U.S. at 792; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). *See, e.g.*, Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1184 (6th Cir. 1996) (noting that *McDonnell Douglas* burden-shifting framework will be appropriate in disability discrimination cases where the "plaintiff has no direct evidence of discrimination and the employer disclaims reliance on the plaintiff's disability"); DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995) (approving the use of the *McDonnell Douglas* burden-shifting method of proof in ADA claim for disparate treatment).

74. *See, e.g.*, *McDonnell Douglas*, 411 U.S. at 802; *see also infra* note 75.

75. *See McDonnell Douglas*, 411 U.S. at 802. To prove a prima facie case of employment discrimination under Title VII of the Civil Rights Act, the plaintiff must show: (1) the plaintiff is a member of the protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the employer rejected the plaintiff; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons possessing the plaintiff's qualifications. *Id.*; *see also Monette*, 90 F.3d at 1179 (discussing *McDonnell Douglas/Burdine* formula under Title VII cases).

76. *McDonnell Douglas*, 411 U.S. at 802; *see also Hicks*, 509 U.S. at 506-07 ("the *McDonnell Douglas* presumption places upon the [employer] the burden of producing an explanation to rebut the prima facie case"); *Burdine*, 450 U.S. at 255-56 ("Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."). Under Title I of the ADA, a legitimate reason an employer may offer for its action is that the employee's proposed reasonable accommodation would impose an undue hardship on the operation of the employer's business. *See* 42 U.S.C. § 12112(b)(5)(A) (1994) (employer commits unlawful discrimination if the employer does not provide reasonable accommodation, "unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]"). The ADA defines undue hardship as an action that causes an employer great difficulty or expense when considered with regard to the employer's overall business needs. *See* 42 U.S.C. § 12111(10) (1994). Factors to be considered in determining whether an action imposes an undue hardship include:

> (i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such

to offer a legitimate reason, the burden shifts back to the plaintiff to show that the proffered reason was only a pretext for the employer's decision.[77] The trier of fact must then decide the ultimate question of the case: "whether [the employee] has proven 'that the defendant intentionally discriminated against [the employee].'"[78] Thus, the ultimate burden of persuading the trier of fact of employment discrimination under Title VII (and arguably under Title I of the ADA) remains at all times on the employee.[79] The Eighth Circuit's decision in *Benson v. Northwest Airlines, Inc.*[80] is illustrative of how the court has incorporated Title VII's burden-shifting framework into of a reasonable accommodation employment discrimination case under the ADA.

In *Benson*, the plaintiff worked as a mechanic for Northwest and, after suffering severe chest pains on the job, was diagnosed with a rare neurological disorder that causes pain and weakness or numbness in the individual's arm and shoulder.[81] Initially, Northwest transferred Benson to a position where employees with work-related injuries were allowed to work until they were able to return to their former positions or find alternative positions.[82] One month later, Benson's doctor advised Northwest of Benson's medical condition and recommended that he no longer work in any job requiring extensive use of his left arm or repetitive motion of his left shoulder and that his previous job as a mechanic would be totally inappropriate given his condition.[83] After being

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accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B) (1994).

77. *See McDonnell Douglas*, 411 U.S. at 804.

78. *Hicks*, 509 U.S. at 511 (quoting *Burdine*, 450 U.S. at 253).

79. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 511 (1993). However, some scholars criticize the courts' reflexive and often blind reliance on Title VII precedent by noting many fundamental differences that exist between employment discrimination under Title VII and employment discrimination on the basis of disability as defined in Title I of the ADA. *See, e.g.*, Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98 (1997).

80. 62 F.3d 1108 (8th Cir. 1995).

81. *Id.* at 1110.

82. *Id.*

83. *Id.*

bumped by a senior employer from one job, disqualified from another job, and placed on ninety-days unpaid leave, Northwest terminated Benson.[84]

Benson filed an ADA claim alleging that Northwest discriminated against him because of his disability and failed to reasonably accommodate his disability.[85] Northwest did not dispute that Benson was disabled or that his disability precipitated his termination.[86] Hence, the issue before the Eighth Circuit was whether the employee made a facial showing that a reasonable accommodation was possible.[87] In answering this question, the *Benson* court also established the appropriate burden-shifting framework to be used in discrimination cases brought under Title I of the ADA in the Eighth Circuit.

The *Benson* court held that once the employee "makes 'a facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee."[88] Furthermore, the court explained that "[i]f the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut the showing with evidence of his individual capabilities."[89] The court explained that at this point, the "employee's burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination."[90] However, the *Benson* court also held that when the employer disputes the evidence that an employee can perform the essential functions of the job in question, the employer must come forward with some evidence of what those "essential functions" are.[91]

Applying this framework, the *Benson* court determined that summary judgment was inappropriate because "[m]aterial issues of fact remain[ed] as to what the essential functions of the positions [were], whether Benson [could] perform them, and, if not, whether a reasonable accommodation by Northwest would enable him to do so."[92] The court concluded that Benson had made a

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84. *Id.* at 1110-11.

85. *Id.* at 1111.

86. *Id.* at 1112.

87. *Id.*

88. *Id.* (quoting Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir. 1989)).

89. *Id. But see* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1186 n.12 (6th Cir. 1996) (The Sixth Circuit disagreed with the Eighth Circuit's holding in *Benson* that the employer bears the burden of showing that the employee cannot perform the essential functions of the job even with the proposed reasonable accommodation. Rather, the Sixth Circuit concluded that the employer bears the burden of establishing that a proposed reasonable accommodation imposes an undue hardship, but no reason exists for also requiring the employer to show that the employee is unqualified for the position even with the proposed accommodation.).

90. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

91. *Id.* at 1113.

92. *Id.* at 1112.

facial showing that reasonable accommodation was possible.[93] At this point, because Northwest disputed Benson's evidence that he could perform the essential functions of the mechanic's job, the Eighth Circuit concluded that the burden shifted to Northwest to "put on some evidence of those essential functions."[94]

The court once again reiterated that Benson retained the ultimate burden of persuading the trier of fact that he could perform the essential functions of the job, with or without accommodation.[95] However, the court pointed out that "much of the information which determines those essential functions lies uniquely with the employer."[96] Consequently, because the court determined that Benson made a facial showing that reasonable accommodation was possible, the failure of Northwest to present "some evidence" that accommodation was impossible precluded summary judgment.[97] While the bilateral obligations of the employer and an employee with a disability in reaching an accommodation were not at issue in *Benson*, the Eighth Circuit's recognition that the employer may possess information unavailable to the employee begs the question of what those obligations might be.

The ADA's statutory language does not specifically articulate the parties' obligation in the accommodation process or provide a method for assigning responsibility when the process fails. However, Congress did delegate rulemaking authority under the ADA to several different federal agencies, depending on the particular subject matter involved.[98] The Equal Employment Opportunity Commission ("EEOC") is authorized to issue regulations governing private employment discrimination.[99]

B. EEOC Regulations and the Interactive Process

With regard to reasonable accommodations, the EEOC regulations provide some guidance concerning employer participation in the process of finding a reasonable accommodation, suggesting that "it may be necessary for [an

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93. *Id.*

94. *Id.* at 1113.

95. *Id.*

96. *Id.*

97. *Id.* at 1115.

98. With the exception of transportation services, the Department of Justice is designated as the agency with authority to issue regulations with respect to the provision of programs and services, by state and local governments, *see* 42 U.S.C. § 12134(a) (1994), and by public accommodations and commercial facilities, *see* 42 U.S.C. § 12186(b) (1994). The Department of Transportation has rulemaking authority with respect to provisions governing transportation services. *See* 42 U.S.C. §§ 12149(a), 12186(a) (1994).

99. *See* 42 U.S.C. § 12116 (1994); *see also* 29 C.F.R. pt. 1630 app., at 350 (2000) ("The [EEOC] is responsible for enforcement of title I of the [ADA] . . . .").

employer] to initiate an informal, interactive process with the qualified individual with a disability" to determine whether a reasonable accommodation exists or to select a specific reasonable accommodation.[100] The Interpretive Guidance Appendix ("Appendix") to the ADA regulations makes it clear that the ADA envisions a "flexible, interactive process that involves both the employer and the [employee] with a disability."[101]

According to the Appendix, once an employee has requested an accommodation, an employer has a duty to make reasonable efforts to determine an appropriate accommodation.[102] Because of inherent information asymmetries between employers and employees, the Appendix stresses the importance of communication between the parties in order to determine a reasonable accommodation:

> [I]n some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation.[103]

The Appendix offers a four step interactive process that employers should follow when an employee with a disability requests a reasonable accommodation. The four step process that employers should follow includes: (1) analyzing the particular job and determining its purpose and essential

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100. 29 C.F.R. § 1630.2(o)(3) (1999). The regulations, in full, provide:

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

29 C.F.R. § 1630.2(o)(3) (1999).

101. 29 C.F.R. pt. 1630 app. § 1630.9, at 364 (2000) (Process of Determining the Appropriate Reasonable Accommodation).

102. Section 1630.9 of the ADA Interpretive Guidance reads in pertinent part:

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

29 C.F.R. pt. 1630 app. § 1630.9, at 364 (2000).

103. 29 C.F.R. pt. 1630 app. § 1630.9, at 365 (2000).

functions, (2) consulting with the individual with a disability to ascertain the precise job-related limitations and how those limitations could be overcome with a reasonable accommodation, (3) consulting with the individual with a disability to identify and assess the effectiveness of potential accommodations, and (4) considering the preferences of the individual to be accommodated and selecting and implementing the accommodation most appropriate for both the employee and the employer.[104]

Because this interactive process is strongly recommended by the EEOC,[105] the question arises whether an employer's failure to participate in the interactive process creates automatic liability independent from a failure to accommodate an employee's disability. Consequently, a split among the federal circuit courts of appeals has resulted concerning whether employers have a duty to engage in the interactive process and if independent liability exists if an employer fails to engage in the interactive process. While all courts agree that employers *should* engage in an interactive process with their employees, the Ninth, Tenth, and Eleventh Circuits have held that they would not permit a cause of action against an employer who fails to engage in an interactive process.[106] The Third, Fifth,

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104. *See* 29 C.F.R. pt. 1630 app. § 1630.9, at 364 (2000) (Process of Determining the Appropriate Reasonable Accommodation). Courts have also interpreted the plain language of the ADA regulations to require an interactive process that requires participation by both employees and employers. *See, e.g.*, Cravens v. Blue Cross & Blue Shield of Kan. City, 214 F.3d 1011, 1022 (8th Cir. 2000) (stating that "the employee does not have the burden of identifying open positions without the employer's assistance" (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 (3d Cir. 1999)) and noting that employer has a "corresponding obligation to help [an employee] identify appropriate job vacancies (since [employees] can hardly be expected to hire detectives to look for vacancies)" (quoting Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 n.27, (D.C. Cir. 1998))); Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999) ("[Employee] cannot 'expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.'" (quoting Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995))); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1501 (N.D. Iowa 1997) ("Because [the employee] has first-hand knowledge of both his disability and his job, an employee has substantial responsibility for identifying the nature of a reasonable accommodation.").

105. *See* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986) (stating that "while not controlling upon the courts by reason of their authority, [the EEOC Guidelines] do constitute a body of evidence and informed judgment to which courts and litigants may properly resort for guidance").

106. *See, e.g.*, Barnett v. U.S. Air, Inc., 196 F.3d 979, 992-93 (9th Cir. 1999) (holding that the ADA does not impose independent and automatic liability on an employer for failing to engage in an interactive process with an employee with a disability to investigate whether a reasonable accommodation exists); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the employee has the burden of showing available accommodations and that the employer cannot be found liable "merely for failing to engage in the [interactive] process itself"); White v. York Int'l Corp., 45

and Seventh Circuits have taken the position that once an employee requests a reasonable accommodation, the employer has a duty to engage in an interactive process.[107] However, of those circuits requiring employer participation in the interactive process, only the Seventh Circuit appears willing to assign independent liability for failure to engage in the interactive process.[108] Rather than impose independent liability, those circuits recognizing a duty to engage in the interactive process have held that the employee still has the burden of proving that a reasonable accommodation could have been made, and evidence that a employer acted in bad faith in the interactive process only precludes summary judgment for the employer.[109]

C. Circuits Not Requiring Employer Participation in the Interactive Process

The Ninth, Tenth, and Eleventh Circuits have not deferred to the EEOC's regulations suggesting employer participation in the interactive process. The Ninth Circuit's decision in *Barnett v. U.S. Air, Inc.*[110] is illustrative. In *Barnett*, a ten-year employee of U.S. Air injured his back while handling cargo at work.[111] When Barnett could no longer perform the physical requirements of his

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F.3d 357, 363 (10th Cir. 1995) (noting that the regulations only recommend that an interactive process occur, and only after the employee shows that reasonable accommodation is possible). The First Circuit also appears to take the position that the EEOC regulations are permissive rather than mandatory. *See* Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 513 (1st Cir. 1996) ("The regulations' use of 'may' clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to."). However, the First Circuit in *Jacques* also stated, "[t]here may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA." *Jacques*, 96 F.3d at 515.

107. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312-13 (3d Cir. 1999) (holding that an employer's knowledge of an employee's disability triggers an obligation to participate in an interactive process to provide a reasonable accommodation); Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (finding that an employee's request for accommodation obligates the employer to participate in the interactive process of determining a reasonable accommodation); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135-37 (7th Cir. 1996) (holding that both parties have a responsibility to participate in an interactive process). The Eighth Circuit addressed this issue in *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999).

108. *See, e.g.*, Gile v. United Airlines, Inc., 213 F.3d 365, 373 (7th Cir. 2000) (upholding jury verdict for employee because "[employer] flunked its obligations under the ADA [to engage in an interactive process]").

109. *See* discussion *infra* Part III.D.

110. 196 F.3d 979 (9th Cir. 1999).

111. *Id.* at 985. Barnett's restrictions included prohibitions from excessive

job because of his back injury, he used his seniority to obtain a position in the mailroom. However, two years later, U.S. Air decided to open all of its mailroom positions to bidding, with positions to be awarded based on seniority. Fearing that he would lose his mailroom position, Barnett asked for an ADA accommodation, seeking an exception to the company's seniority system that would allow him to remain in the mailroom. U.S. Air declined to supersede its seniority system, but for the next five months placed Barnett on "limited duty," allowing him to work in a temporary swing-shift mailroom position. Subsequently, Barnett was placed on job injury leave, which continued his salary for one month. Barnett then requested two other forms of accommodation that U.S. Air denied.[112]

Barnett filed suit against U.S. Air for discrimination under the ADA.[113] While the district court acknowledged that Barnett had proven that he was disabled within the meaning of the ADA, the court concluded that "Barnett's proposed accommodations of his disability were not reasonable" and granted U.S. Air's motion for summary judgment.[114] The district court also held that an employer can be independently liable for failing to engage in an interactive process.[115] The Ninth Circuit affirmed summary judgment but disagreed with the district court's reasoning and held that "[t]he ADA and its regulations do not . . . create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation."[116]

The *Barnett* court interpreted the language used in the EEOC regulations as permissive, but nonetheless issued a warning to employers that a failure to engage in the interactive process may expose them to liability for failing to make reasonable accommodations.[117] The court noted that holding employers automatically liable for failing to participate in the interactive process could create liability for an employer that had reasonably accommodated its

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bending, twisting, turning, prolonged standing or sitting, and from lifting twenty-five pounds or more. *Id.* at 986.

112. *Id.*

113. *Id.* Barnett also sued U.S. Air under the ADA for retaliation. *Id.*

114. *Id.*

115. *Id.* at 986-87. However, the district court found that U.S. Air was not liable because it had responded to Barnett's requests and was not at fault for the parties' failure to identify a reasonable accommodation. *Id.* at 987.

116. *Id.* at 993. The Ninth Circuit held that the employee in an ADA discrimination case "must be able to point to at least one specific reasonable accommodation that was available to the employer (but which the employer presumably did not pursue)." *Id.* at 989. Once the employee makes out a prima facie case, the burden then shifts to the employer to show that the accommodation would constitute an undue hardship. *Id.*

117. *Id.* at 993-94.

employee's disability, but had nevertheless failed to engage in the interactive process. This, in the court's opinion, was an irrational result.[118]

The Ninth Circuit also expressed concern about how a rule imposing independent employer liability would work, noting that the point at which an employer incurs process liability is unclear.[119] The court did, however, recognize that an employer should engage in an interactive process with its employees with disabilities because such a process will ensure an "optimal" accommodation to the employee's limitation.[120] Nevertheless, the court held that the appropriate inquiry is whether the employer failed to make required reasonable accommodations for the employee.[121] While failure to engage in an interactive process may be relevant to that inquiry, in the Ninth Circuit's opinion, it is not a separate inquiry.[122]

Similar to the *Barnett* majority, in *Willis v. Conopco, Inc.*,[123] the Eleventh Circuit held that employers cannot be held independently liable for failing to engage in the interactive process.[124] The court held that "where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant."[125] The court expressed fear of potential employer liability for failing to engage in the interactive process in

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118. *Id.* at 994.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* The dissent disagreed with the majority's view of the EEOC language as permissive concerning the interactive process. *Id.* at 996. According to the dissent, if the employer has no obligation to participate in determining if a reasonable accommodation exists, "the effectiveness of the ADA as a tool to use constructively the skills of disabled persons is seriously diminished." *Id.* at 995. Furthermore, the dissent argued that the burden imposed by requiring the interactive process would not be overly burdensome and may be as minor as communicating with the employee about the problem. *Id.* at 997.

123. 108 F.3d 282 (11th Cir. 1997).

124. *Id.* at 285. Willis was an employee at Lever Brothers (Conopco) who had a sensitivity to enzymes in the laundry detergent she packaged. Conopco attempted to accommodate Willis by minimizing her exposure to the enzymes, which included transferring her to a new position and directing her to wear a mask when crossing the packing area floor. Following unrelated foot surgery, Willis provided Conopco with a doctor's letter stating that she had an immune system abnormality and should stop working at the plant. At this point, Willis refused to return to work and requested that Conopco either reassign her to a new building or enclose the area in which she worked. *Id.* at 283. Conopco then arranged for Willis to be examined by a pulmonologist who determined that she was capable to return to work. When Willis failed to return to work, Conopco terminated her employment. *Id.* at 284. The Eleventh Circuit affirmed the district court's granting of summary judgment in favor of Conopco. *Id.* at 287.

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

instances where an investigation into reasonable accommodations "would [be] fruitless."[126] The court also stated that the punitive approach of automatic employer liability for failure to participate in an interactive process is inconsistent with the basic remedial goals of the ADA, which work to ensure that individuals with disabilities "can fully participate in all aspects of society, including the workplace."[127]

Likewise, in *White v. York International Corp.*,[128] the Tenth Circuit rejected the EEOC's recommendations that employers are required to engage in an interactive process.[129] The court stated that EEOC recommendations are not statutory requirements, and they only suggest employer participation once an employee has proven himself to be "qualified" within the meaning of the ADA.[130]

D. Circuits Requiring Employer Participation in the Interactive Process

Courts requiring employer participation in the interactive process defer to the EEOC's regulations. These courts differ regarding whether the employer or employee bears the initial burden of commencing the interactive process, but all agree that courts should require employers and employees to participate in the process. The Seventh Circuit was one of the first circuit courts to take this position.

In *Beck v. University of Wisconsin Board of Regents*,[131] Lorraine Beck, a secretarial employee, suffered from osteoarthritis and depression.[132] After a

126. *Id.* (quoting *Moses*, 97 F.3d at 448).

127. *Id.*

128. 45 F.3d 357 (10th Cir. 1995).

129. *Id.* at 361-63. White's position required lifting and continuous standing, for York, a manufacturer of commercial air conditioners. *Id.* at 358-59. White injured his ankle in a non-work related accident and after undergoing surgery presented York with a doctor's note restricting his physical activities. After a York appointed doctor determined that White was unable to return to work, York terminated White. York argued that it terminated White because of his excessive absenteeism and because they were unaware of possible reasonable accommodations for White's disability. *Id.* at 359. The Tenth Circuit affirmed the district court's granting of summary judgment in favor of York. *Id.* at 363. The court noted that White did not meet his required burden of proof by making "bald conclusions" that he could have performed his job with reasonable accommodations. *Id.* at 362. Instead, White needed to demonstrate "a genuine issue of fact regarding his ability to perform the essential functions [of his position] with reasonable accommodation." *Id.* The Tenth Circuit held that as with discrimination cases generally, the plaintiff bears the burden of persuasion at all times. *Id.* at 361.

130. *Id.* at 363.

131. 75 F.3d 1130 (7th Cir. 1996).

132. *Id.* at 1132.

three month medical leave, Beck was assigned to a new position where she was given a month to learn and practice a word processing program. Thereafter, Beck suffered from osteoarthritis aggravated by repetitive keyboarding. Beck's doctors recommended that she avoid repetitive keyboarding. A few months later, Beck was hospitalized with severe depression and anxiety. When she returned to work, Beck had a note from her doctor indicating that she may require some reasonable accommodation so that she would not have a recurrence.[133]

The University then requested that Beck sign a release allowing them to obtain further medical information from her doctor, which she refused to do.[134] Beck then took a second medical leave, and on her return to work had another letter from her doctor indicating that she may require assistance with her work load and an adjustable keyboard. The Assistant Dean then forwarded a memo to Beck indicating that the University needed more information in order to understand what accommodations she needed. Beck was also temporarily moved to a new room, given a wrist pad, and given a reduced work load. Beck was not satisfied with the new assignment and complained that the new room was not properly ventilated. Beck then took a third medical leave and was granted a six-month unpaid medical leave of absence. During her medical leave of absence, Beck filed a charge with the EEOC and subsequently filed suit in the district court under the ADA. After filing suit, Beck requested that she be reinstated at the University in a different department. The University denied her request and told her to report to work in the same department. When she did not report to work, she was terminated by the University.[135]

The *Beck* court observed that "the crux of this dispute is one not clearly answered by the ADA: does the employer or the employee bear ultimate responsibility for determining exactly what accommodations are needed?"[136] The court noted that before a failure to provide a reasonable accommodation triggers ADA liability, the employee bears the initial burden of informing the employer of the disability.[137] The court explained that this approach is merely a "common sense" extension of the ADA, which requires reasonable accommodations for "known physical or mental limitations" of an employee.[138]

Furthermore, the *Beck* court stated that while "[i]t is plain enough what 'accommodation' means,"[139] the employer has some responsibility in

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133. *Id.* at 1132-33.

134. *Id.* at 1133.

135. *Id.* at 1134.

136. *Id.*

137. *Id.*

138. *Id.* at 1134; *see* 42 U.S.C. § 12112(b)(5)(A) (1994).

139. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (quoting Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995)).

determining the necessary accommodation.[140] The court acknowledged that the EEOC regulations envisioned an interactive process that requires participation by both parties.[141] The Seventh Circuit concluded:

> [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.[142]

Finally, the court held that once an employer knows of an employee's disability, and the employee has requested reasonable accommodations, the parties are required to engage in an interactive process to determine what accommodations are necessary, and liability for failure to provide reasonable accommodations ensues only when the employer is responsible for a breakdown in the process.[143]

In upholding summary judgment in favor of the University, the *Beck* court concluded that the University had properly engaged in the interactive process and Beck had caused the breakdown by failing to provide requested medical information and refusing to sign a medical release.[144] However, in *Gile v. United Airlines, Inc.*,[145] the Seventh Circuit upheld a jury award for the employee because the employer "flunked its obligations under the ADA" to engage with the employee in the interactive process to determine alternative accommodations that might have permitted the employee to continue working.[146]

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1137. In *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285-86 (7th Cir. 1996), the Seventh Circuit acknowledged that an employer's duty to participate in the interactive process in cases involving employees with mental disabilities may be heightened. The court held that an employer must both initiate and participate in the interactive process if the employer has reason to assume the employee with a mental disability may need an accommodation. *Id.* at 1286. *See generally* John F. Birmingham, Jr., *The Interactive Accommodation Process—Cooperate or Pay the Price*, 77 MICH. B.J. 1044, 1046 (1998); Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 294 (1998).

144. *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1132, 1136-37 (7th Cir. 1996).

145. 213 F.3d 365 (7th Cir. 2000).

146. *Id.* at 373; *see* also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700 (7th Cir. 1998) ("[T]he record does not permit the conclusion that the ADA requirement of a flexible, interactive process . . . has been fulfilled as a matter of law."). It appears

In *Taylor v. Principal Financial Group, Inc.*,[147] Mark Taylor, the manager of Principal Mutuals' El Paso, Texas office, suffered from bipolar and anxiety disorders and accused his employer of discrimination under the ADA for failure to provide reasonable accommodations.[148] Analogous to the Seventh Circuit in *Beck*, the Fifth Circuit stated that, had a request for accommodation been made, "the responsibility for fashioning a reasonable accommodation is shared between the employee and employer."[149] However, the court held that if the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one.[150]

The court in *Principal Financial* also noted the importance of distinguishing between an employer's knowledge of a disability and an employer's knowledge of limitations caused by the disability. The court held that an employer only has a duty to reasonably accommodate an employee when the employer knows of limitations resulting from the employee's disability because the ADA "requires employers to reasonably accommodate limitations, not disabilities."[151] The court explained that the ADA does not require an employer to assume that an employee with a disability suffers from a limitation, but rather public policy should dictate the opposite presumption; namely, employees with disabilities are not limited in their abilities to perform their jobs.[152]

In *Taylor v. Phoenixville School District*,[153] the Third Circuit also held that employers have a duty to engage in an interactive process with an employee in order to determine an appropriate reasonable accommodation.[154] The *Taylor*

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that the Seventh Circuit is the only court that has held that failure to interact in the process is sufficient for independent employer liability under Title I of the ADA.

147. 93 F.3d 155 (5th Cir. 1996).

148. *Id.* at 160-61.

149. *Id.* at 165.

150. *Id.* The Fifth Circuit's decision in *Principal Financial* is not as broad as the Seventh Circuit's rulings. The Fifth Circuit requires employer participation in the interactive process only after the employee has initially requested an accommodation. *Id.*

151. *Id.* at 164.

152. *Id.* The court affirmed the district court's granting of summary judgment for the employer because the court held that Taylor had failed to make known his limitations and had failed to request accommodations, thus the need for reasonable accommodation and the interactive process did not arise. *Id.* at 165-66. The Fifth Circuit has held that demonstration of a breakdown in the interactive process alone is not sufficient to establish an ADA claim. *See* Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 622 (5th Cir. 2000) (upholding summary judgment for employer even though employee demonstrated a breakdown in the interactive process).

153. 184 F.3d 296 (3d Cir. 1999).

154. *Id.* at 319. Prior to her termination, Katherine Taylor worked for twenty years as a principal's secretary in the Phoenixville School District. In late August 1993, Taylor began to suffer from the onset of bipolar disorder. During Taylor's leave of absence,

court stated that "the interactive process, as its name implies, requires the employer to take some initiative."[155] Elaborating on the interactive process, the court explained:

> The interactive process would have little meaning if it [were] interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow.[156]

While extolling the virtues of the interactive process, the *Taylor* court nevertheless concluded that the "interactive process does not dictate that any particular concession be made by the employer; nor does the process remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions."[157] In short, the court found that all the interactive process required was that employers make a good-faith effort to seek accommodations.[158]

The Third Circuit then explained that because employers have a duty to help employees with disabilities devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury could reasonably conclude that the employee would have been able to perform the job with accommodations.[159] Consequently, the court held that the jury is entitled to bear in mind that, had the employer participated in good faith, there may have been other, unmentioned possible accommodations, and when an employee has evidence that the employer did not act in good faith in the interactive process, summary judgment is inappropriate.[160]

Taylor's son stated that he had numerous phone conversations with the school district's administrative assistant for personnel, including one conversation in which he stated that his mother would require accommodations when she returned to work. *Id.* at 301. Upon Taylor's return to work in October 1993, her principal immediately began to document her errors. *Id.* at 304. In September 1994, Taylor was placed on thirty days probation and eventually terminated in October 1994. *Id.* Taylor then brought suit under the ADA alleging that the school district failed to provide her reasonable accommodations for her mental illness. *Id.* at 301.

155. *Id.* at 315.

156. *Id.* at 315-16.

157. *Id.* at 317.

158. *Id.*

159. *Id.* at 317-18.

160. *Id.* at 318.

The *Taylor* court also listed four factors that an employee with a disability must demonstrate to show that an employer failed to participate in the interactive process:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.[161]

In *Donahue v. Consolidated Rail Corp.*,[162] the Third Circuit clarified its decision in *Taylor* regarding whether an employer's failure to engage in good faith in the interactive process was itself sufficient to defeat summary judgment and establish an ADA claim. Relying on *Taylor*, the employee in *Donahue* argued that his employer's failure to engage in the interactive process was sufficient to create an independent cause of action. The court stated that this reasoning was a misinterpretation of *Taylor* and held that:

> [T]he plaintiff in a disability discrimination case who claims that the defendant engaged in discrimination by failing to make a reasonable accommodation cannot recover without showing that a reasonable accommodation was possible. . . . [and] 'because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations.'[163]

Finally, the court in *Donahue* concluded that when "the summary judgment record is insufficient to establish the existence of [a reasonable accommodation], summary judgment must be granted in favor of the [employer]—even if it also appears that the [employer] failed to engage in good faith in the interactive process."[164]

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161. *Id.* at 319-20. The court concluded that a reasonable jury could have concluded that Taylor had requested accommodations and that the school district made no effort to help her find accommodations, and it reversed the district court's grant of summary judgment for the school district and remanded for trial. *Id.* at 320.

162. 2000 WL 1160947 (3d Cir. Aug. 17, 2000).

163. *Id.* at *7 (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999)).

164. *Id.* at *6.

IV. INSTANT DECISION

The Eighth Circuit first filed an opinion in *Fjellestad* on June 16, 1999.[165] This opinion was later withdrawn, and the instant decision was substituted in its place.[166] Two United States Supreme Court decisions issued subsequent to the filing of the Eighth Circuit's first opinion necessitated this amendment.[167]

In *Fjellestad*, the Eighth Circuit considered Fjellestad's challenge to the grant of summary judgment in favor of her former employer, Pizza Hut, in her suit brought under Title I of the ADA.[168] On appeal Fjellestad argued that the district court erred in holding: "(1) that she was not disabled within the meaning of the ADA, and (2) that even if she was disabled, she was not a qualified individual because she failed to articulate a reasonable accommodation that would make her qualified for the job."[169] The Eighth Circuit reversed the district court's opinion and remanded for trial.[170]

A. Disability

In order to qualify as being disabled under the ADA, an individual must satisfy one of the three prongs under the ADA's definition of disability: (1) actual disability, (2) record of disability, or (3) regarded as having a disability.[171] The Eighth Circuit held that a triable issue of material fact existed as to whether Fjellestad was actually disabled under the first prong of the ADA's definition of disability.[172]

The court stated that an impairment is substantially limiting if it "renders an individual unable to perform a major life activity that the average person in the general population can perform, or if it significantly restricts the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the average person in the general population."[173] The court noted three factors that are determinative as to whether an individual is substantially limited in a major life activity: "(1) the nature and severity of the

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165. *See* Fjellestad v. Pizza Hut of Am., Inc., 182 F.3d 609 (8th Cir. 1999).

166. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 947, 954 (8th Cir. 1999).

167. *Id.* at 954; *see* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that an individual's disability must be considered with reference to any mitigating measure); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (holding same).

168. *Fjellestad*, 188 F.3d at 947.

169. *Id.*

170. *Id.*

171. *Id.* at 948; *see also supra* note 68 and accompanying text.

172. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 950 n.3 (8th Cir. 1999). The court did not address Fjellestad's "regarded as" claim. For a discussion of disability under the first prong of the ADA definition of disability, see *supra* note 68.

173. *Fjellestad*, 188 F.3d at 948-49 (citing 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1997)).

impairment; (2) its duration or anticipated duration; and (3) its long-term impact."[174] Additionally, the court stated that determinations as to whether an individual is substantially limited in a major life activity must be made on a case-by-case basis.[175]

The district court rejected Fjellestad's claim that she was substantially limited in the major life activities of sleeping, bathing, sitting, and working.[176] However, the Eighth Circuit disagreed and held that a triable issue of fact existed as to whether Fjellestad was substantially limited in the major life activity of working.[177] The court explained that to be substantially limited in working, a person must be "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.'"[178] The court listed several factors that are to be considered: "the number and type of jobs from which the impaired individual is disqualified; the geographical area to which the individual has reasonable access; and the individual's job training, experience, and expectations."[179] Finally, the court concluded that to find that an individual is substantially limited in her ability to work "requires a showing that [her] overall employment opportunities are limited."[180] The individual's expertise, background, and job expectations are all relevant in defining the class of jobs used to make this determination.[181]

The court found four pieces of evidence raised by Fjellestad significant to create a factual dispute regarding whether her overall employment opportunities were limited as a result of her medical restrictions.[182] First, the court noted that Fjellestad's entire work training, experience, and expectations lie in restaurant management, including nearly twenty years of restaurant management experience working for Pizza Hut.[183] Second, Fjellestad's accident and recovery had made it impossible for her to work the hours or perform her duties to the level of success she had previously achieved.[184] Third, an occupational specialist had calculated that because of Fjellestad's functional limitations she had experienced a ninety-one percent reduction in employability and a ninety-five percent reduction in labor market access based on actual positions available in

174. *Id.* at 949 (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii)(1997)).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (quoting Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998)).

179. *Id.* (citing Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 617 (8th Cir. 1997); 29 C.F.R. § 1630.2(j)(3)(ii) (1997)).

180. *Id.* (citing Miller v. City of Springfield, 146 F.3d 612, 614 (8th Cir. 1998)).

181. *Id.*

182. *Id.* at 949-50.

183. *Id.* at 949.

184. *Id.*

her vocational profile.[185] Finally, the court noted that Fjellestad had been unable to obtain employment following her termination.[186] Given these facts, the Eighth Circuit held that a triable issue was created as to whether Fjellestad's impairments had "significantly restricted the condition, manner, or duration in which she [could] work as compared to an average person in the general population."[187]

B. Reasonable Accommodation and the Interactive Process

In answering the question whether Fjellestad was qualified to perform the essential functions of her job with or without reasonable accommodations, the Eighth Circuit concluded that Fjellestad was required to make a facial showing that a reasonable accommodation was possible.[188] Fjellestad argued that two reasonable accommodations were possible. First, Fjellestad argued that Pizza Hut could have accommodated her by creating a permanent co-manager position.[189] The district court rejected this suggestion, and the Eighth Circuit agreed concluding that while job restructuring is a possible accommodation under the ADA, an employer need not reallocate or eliminate the essential functions of a job to accommodate an employee with a disability, nor is an employer required to create a new position or a permanent position out of a temporary one as an accommodation.[190]

However, Fjellestad also contended that Pizza Hut could have accommodated her by assigning her to the shift manager position that became

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185. *Id.*

186. *Id.*

187. *Id.* at 949-50; *see also* 29 C.F.R. § 1630.2(j)(1)(i)-(iii) (1997). In light of the Supreme Court's decisions in *Sutton* and *Murphy*, Pizza Hut argued in its supplemental briefing that Fjellestad was not substantially limited in her ability to work. To support its position, Pizza Hut relied on the following language in *Sutton* to contend that Fjellestad could not be substantially limited in her ability to work unless she was completely unable to perform any job:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Id. at 954 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999)). The court quickly dismissed this argument stating that "Pizza Hut's interpretation of *Sutton* would create an unintended and an absurd result." *Id.*

188. *Id.* at 950 (citing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995)).

189. *Id.*

190. *Id.*

vacant when Linda Folkers was promoted to unit manager.[191] While the district court also rejected this suggested accommodation, the Eighth Circuit concluded that because Fjellestad had competently performed her duties as a unit manager for close to twenty years, she met her burden of making a facial showing that a reasonable accommodation was possible.[192] Therefore, the court determined that a genuine issue of material fact was created as to whether Fjellestad was qualified for the shift manager position and whether moving her to this position would be a reasonable accommodation.[193]

At this point, the Eighth Circuit held that the burden of production should have shifted to Pizza Hut to produce evidence that it was unable to accommodate Fjellestad through reassignment to the shift manager position.[194] However, rather than shifting the burden, the district court summarily dismissed this suggested accommodation because Fjellestad had previously rejected this accommodation in her November 15, 1995 grievance letter.[195] The court stated that "the district court's analysis ignored Pizza Hut's obligation under the ADA to help determine the appropriate reasonable accommodation."[196]

The Eighth Circuit stated that the ADA interpretative guidelines set forth when it is necessary for an employer to initiate an informal interactive process with an employee in need of an accommodation.[197] Specifically, an employer becomes obligated to participate in an interactive process when an individual with a disability requests an accommodation.[198] Furthermore, the court held that while "an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible," for purposes of summary judgment, "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are

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191. *Id.*

192. *Id.* at 950-51.

193. *Id.* Under the ADA, reassignment to a vacant position is a possible accommodation. *Id.* at 950; *see also* 42 U.S.C. § 12111(9)(B) (1994); *Benson*, 62 F.3d at 1114; 29 C.F.R. § 1630.2(o)(2)(ii) (1997).

194. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999) (citing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1115 (8th Cir. 1995)).

195. *Id.* The court later determined that even though Fjellestad's grievance letter generally rejected demotion as a possible reasonable accommodation, because Pizza Hut had never discussed accommodation options with her or explained that assignment to a shift manager position might be the only possible accommodation, and never actually offered her the shift manager position, Pizza Hut was not relieved of its obligation of discussing with her the possible accommodations that were appropriate and available. *Id.* at 953.

196. *Id.* at 951.

197. *Id.* at 952. For a discussion of the interpretative guidelines, see *supra* Part III.B. and accompanying notes.

198. *Fjellestad*, 188 F.3d at 952.

possible is prima facie evidence that the employer may be acting in bad faith."[199] The court concluded that under these circumstances, a factual question existed as to whether Pizza Hut had attempted to provide Fjellestad reasonable accommodation as required by the ADA.[200]

The court then determined that a dispute existed as to whether Pizza Hut had made a good faith effort to engage in the interactive process, and that a reasonable jury could conclude that Pizza Hut had not met its burden to engage in the interactive process to determine whether an appropriate reasonable accommodation existed. Therefore, the court held that summary judgment was inappropriate.[201] The court reached this decision by applying the four-factor test developed by the Third Circuit in *Taylor*.[202]

The court quickly addressed the first two elements of the *Taylor* test stating that "Pizza Hut had more than enough information to put it on notice that Fjellestad might have a disability,"[203] and Fjellestad had specifically requested a reasonable accommodation in her November 15, 1995 grievance letter to Pizza Hut.[204] Viewing the evidence in the light most favorable to Fjellestad, the court concluded that element three of the *Taylor* test was also satisfied because "a dispute exists whether Pizza Hut made a good faith effort to engage in the interactive process, and that a reasonable jury could conclude that Pizza Hut ha[d] not met its burden to engage in an interactive process to determine whether an appropriate reasonable accommodation existed."[205] The court based its conclusion on evidence that after Fjellestad had requested a reasonable accommodation, Pizza Hut placed her on a sixty-day performance plan, terminated her before the sixty days had expired, and never offered her

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199. *Id.*

200. *Id.*

201. *Id.* at 952-54.

202. *Id.* The *Taylor* four-factor test is as follows:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Id. (quoting Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 165 (3d Cir. 1999)). For a discussion of the Third Circuit's decision in *Taylor*, see *supra* Part III.D.

203. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999). Specifically, the court found that Pizza Hut (1) knew that Fjellestad was involved in a car accident which required her to be hospitalized for nearly one month, (2) had letters from Fjellestad's doctors containing her various work restrictions and diagnosis, and (3) knew that Fjellestad had not been performing her job to the level she had for nearly twenty years prior to her accident. *Id.*

204. *Id.*

205. *Id.*

reassignment or discussed with her whether other accommodations were available.[206]

Finally, assuming that Pizza Hut failed to act in good faith by engaging in the interactive process, the court concluded that Pizza Hut had not presented any evidence that it would have been unable to accommodate Fjellestad by assigning her to the vacant shift manager position.[207] The Eighth Circuit further emphasized that the requirement that employers engage in an interactive process does not require that any particular accommodation be made by the employer, but that employers merely "'make a good faith effort to seek accommodations.'"[208] Furthermore, the court concluded: "The employee still carries the burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the essential functions of the job."[209] Hence, in finding that genuine issues of material fact existed as to whether Fjellestad was disabled within the meaning of the ADA, and whether she was qualified to perform the essential functions of the position with reasonable accommodation, the court reversed the district court's decision and remanded for trial.[210]

V. COMMENT

In *Fjellestad*, for the first time, the Eighth Circuit addressed the question whether employers are required to participate in an interactive process with employees with disabilities in order to determine if a reasonable accommodation exists. While the court's decision sides with those circuit courts that require employer participation in the interactive process, the court's unwillingness to recognize independent liability for an employer's refusal to engage in the interactive process is inefficient, unfair, and unreasonable.[211] While at first blush the court's decision appears sound (i.e., recognizing an affirmative duty to engage in the interactive process), upon further analysis, the decision may have unintentionally created the incentive the court was trying to avoid—employers sitting passively back and knocking down every specific accommodation in post-termination litigation as too burdensome.[212]

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206. *Id.* at 956.

207. *Id.* at 953.

208. *Id.* at 954 (quoting Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 162 (3d Cir. 1999)).

209. *Id.* (citing *Taylor*, 174 F.3d at 162).

210. *Id.* at 957.

211. While explicitly stating that "there is no per se liability under the ADA if an employer fails to engage in an interactive process," the court's decision does avoid the uncertainty experienced by other circuits on this issue. *Id.* at 952. However, the Eighth Circuit offered no reason as to why it was adopting this position.

212. *Id.* at 953.

A. Information Asymmetries, Incentives, and Inefficiencies

Both the EEOC regulations and court decisions appropriately recognize that information asymmetries exist between the employer and employee. Particularly, employers are likely to have an information advantage in at least two important areas necessary for employees to establish a prima facie claim: the essential requirements of the particular job the employee desires, and what accommodations are likely to impose an undue hardship on the employer.[213] Likewise, employees possess information about their particular medical conditions and inherent limitations which are possibly unknown to employers. Therefore, through the requirement that employees and employers engage in a flexible interactive process, both parties are able to break through these information barriers and determine if an accommodation exists in an efficient manner. Therefore, the Eighth Circuit was prudent to follow the lead of the circuit courts that have held that employers have a duty to engage in an interactive process with their employees with disabilities. However, the incentive the Eighth Circuit created for employers to fulfill this "duty," namely, the preclusion of summary judgment, is both unfair and inefficient.

Only the Seventh Circuit has acknowledged that circumstances may exist when an employer is obligated to both initiate and participate in the interactive process.[214] Consequently, it is the employee's responsibility to initiate the process by notifying his employer that he has a disability and requesting that he be accommodated. Therefore, regardless of whether an employee's disability could have been reasonably accommodated, absent notification of a disability and a request for accommodation, the employer's duty to engage in the interactive process never arises, and an employee will always lose on summary judgment. Likewise, if the employee does provide notification and requests accommodation, but nevertheless fails to interact in good faith with the employer, the employee once again will automatically lose on summary judgment. Thus, the employee is given a sufficient incentive to disclose information he uniquely possesses, because his failure to do so results in the dismissal of his claim.

However, if an employer fails to fulfill its "duty," once triggered by an employee's notification of disability and request for accommodation, under the Eighth Circuit's analysis, the employer does not automatically lose, but rather is only precluded from winning on summary judgment.[215] This result, unequal

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213. In the Seventh Circuit, the employee bears the burden of proving that he is an "otherwise qualified individual." This proof involves a two-step inquiry: (1) the employee must demonstrate that he satisfied the prerequisites for the position, and (2) the employee must show that he could perform the essential functions of the job with or without reasonable accommodation. *See* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1284 (7th Cir. 1996).

214. *See supra* note 143.

215. While the actual employer costs associated with communicating with an

consequences for each party's "breach of duty," is unfair. More importantly however, this result creates a perverse incentive for an employer to withhold information that it uniquely possesses, because even if an employer does not participate in the interactive process, it can still prevail if the employee is unable to show that a particular accommodation was possible. Thus, with no liability for failure to participate in the interactive process, the employer has an incentive to withhold information the employee needs to meet his burden. Particularly, this situation will arise in those circumstances where the employer possesses information that is both unknown to the employee and necessary to prove the possibility of a reasonable accommodation.

Under the facts of *Fjellestad*, the Eighth Circuit concluded that Fjellestad had created a factual question as to whether she was qualified to perform the essential functions of the shift manager position vacated by Folkers. In this case, Fjellestad had knowledge of the opening because Folkers was promoted to fill Fjellestad's unit manager position. However, if Fjellestad did not have this information, Pizza Hut could have withheld the information that Fjellestad needed to satisfy her burden and would have been able to "passively sit back," confident that it would not be found liable for failure to interact. Consequently, when information asymmetries exist between two parties to a transaction, absent strict liability for failure to disclose, the parties will always have an incentive to withhold information. In one sense, the Eighth Circuit's decision imposes strict liability on employees for breach of their duty, but it imposes no reciprocal liability on employers. Hence, while employees have the proper incentive to disclose information and engage in the interactive process in good faith, the Eighth Circuit's decision does not create the same incentive for employers.

In *Jackan v. New York State Department of Labor*,[216] the Second Circuit stated that the concern over an employer's greater access to information combined with the employee's burden of proof requirements is over-stated. In making this conclusion the Second Circuit stated: "Once the litigation has begun, the plaintiff can utilize the liberal discovery procedures of the Federal Rules of Civil Procedure, including interrogatories, depositions, and document demands . . . ."[217] However, this reasoning is flawed because it fails to take into consideration the inefficiencies created by such a framework. Relying on the litigation alternative (the most expensive and resource intensive form of dispute

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employee with a disability are probably marginal, employers may have other incentives for not engaging in an interactive process with employees with disabilities. Employers may fear that preferential treatment given to employees with disabilities (often disabilities that are unknown to co-workers) will have an adverse affect on co-worker morale. *See* Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003 (1997). Employers also may fear that communications with employees with disabilities will create a precedent whereby other workers will demand accommodations such as, flexible working hours or on-sight day care.

216. 205 F.3d 562 (2d Cir. 2000).

217. *Id.* at 568 n.4.

resolution), as the method whereby employees are able to discover information possessed by their employers, rather than employing the simple interactive process envisioned by the EEOC guidelines is terribly inefficient. Not only does this framework waste society's scarce resources, but because employees with disabilities are likely to be at a significant financial disadvantage as compared to their employers, the decision is also likely to deter plaintiffs from pursuing valid claims of discrimination.

B. Alternative Frameworks

One possible solution to the incentive and efficiency problems created by the Eighth Circuit's framework would be to create a mandatory inference of discrimination when an employee prevails on proof of failure to engage in good faith in the interactive process. Such a framework would not only be fair in that it would carry the same consequences for failure to interact for both the employer and employee, but it would provide employers with the proper incentive to communicate with their employees to determine whether a reasonable accommodation exists in the most efficient manner possible. This solution is somewhat analogous to the position Congress took in evaluating a "mixed-motive" case under Title VII of the Civil Rights Act.

In a "mixed-motive" case, the employer's decision for its adverse action is based on a mixture of legitimate and illegitimate considerations. In *Price Waterhouse v. Hopkins*,[218] the Supreme Court held that Title VII requires employees to prove that the employer relied on an impermissible factor in reaching its employment decision and that an employer shall not be liable if it can prove that, even if it had not taken the impermissible factor into account, it would have reached the same employment decision regarding the employee.[219] The Civil Rights Act of 1991 modified the Supreme Court's holding in *Price Waterhouse* as to when a plaintiff is entitled to relief in a "mixed-motive" case.

As amended, Title VII now provides that a plaintiff establishes an unlawful employment practice "when [she] demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[220] However, if an employer

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218. 490 U.S. 228 (1989). In *Price Waterhouse*, Ann Hopkins's proposed partnership was held up for consideration for one year and subsequently refused to be re-proposed. *Id.* at 231-32. Hopkins filed suit under Title VII alleging sex discrimination. *Id.* at 232. Hopkins had direct evidence of discrimination which included being told that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. In addition to evidence of showing direct discrimination, there was also evidence that the employer had a nondiscriminatory reason for denying Hopkins's promotion. *Id.* at 234-35.

219. *Id.* at 241-43.

220. 42 U.S.C. § 2000e-2(m) (1994). This provision was added by the Civil Rights

is able to establish that the same action would have been taken in the absence of the illegitimate motive, the court is limited in the types of relief that it may order.[221] Thus, in the context of the interactive process, when an employer has an affirmative duty to participate in the process, failure to do so—regardless of whether the employer would have taken the same action if it had engaged in the process—is illegitimate behavior, and therefore should entitle the employee to at least minimum relief.

An alternative solution to independent liability for failure to engage in the interactive process would be to shift the burden of persuasion to the employer upon a showing of failure to engage in good faith in the interactive process. Under the court's current framework, the ultimate burden of persuasion remains at all times on the employee.[222] Specifically, the employee has the burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the essential functions of the job. This framework is unfair when employers possess information that the employee requires to satisfy her burden of proof. Thus, in those instances where an employer is found to have failed to satisfy its duty regarding the interactive process, it is logical to shift the burden and require the employer to persuade the jury that the employee's proposed accommodation would not have made the employee qualified. Shifting the burden in this manner creates an alternative framework that provides employers with an incentive to fulfill their duty to participate in good faith in the interactive process.

VI. CONCLUSION

The ADA was a historic piece of legislation intending to "mandate" the elimination of discrimination experienced by Americans with disabilities. Unfortunately, implementing the statute has not been easy. Establishing the bilateral obligations of employees and employers in the search for a reasonable accommodation and assigning liability when the process breaks down has left the Federal Circuit Courts of Appeals perplexed. The Eighth Circuit's decision in *Fjellestad* provides clear guidance to both employers and employees. For employers, there is a duty to engage in an interactive process with your employees with disabilities in order to determine if a reasonable accommodation exists. For employees, a failure of your employer to engage in the interactive process is not sufficient to establish an ADA claim. While generally in line with the EEOC guidelines, when information asymmetries exist between the employer and employee, the court's decision leaves employees with an unfair burden of proof, employers with an incentive to derail employees' claims, and

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Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991).

221. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075-76 (1991) (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)).

222. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 957 (8th Cir. 1999).

society footing the bill. The Supreme Court will eventually be called on to sort out the confusion. The Court must be careful and not inadvertently create a disincentive for employers to interact with their employees with disabilities to find a reasonable accommodation. To do so would clearly undermine the purpose of the ADA. Unfortunately, that is what the Eighth Circuit's decision in *Fjellestad* may just have done.

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