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# A New Look at the ADA's Undue Hardship Defense

Nicole Buonocore Porter\*

## I. INTRODUCTION

Under Title I of the Americans with Disabilities Act (“ADA”),<sup>1</sup> employers are required to provide reasonable accommodations to qualified employees with disabilities unless those accommodations would cause an undue hardship.<sup>2</sup> Several issues arise from that one sentence. First, who has a disability? Second, who is qualified? Third, what are reasonable accommodations and when do they have to be provided? And finally, what is an undue hardship and how is it defined? All but the last of these questions have received considerable attention in the courts<sup>3</sup> and in scholarly literature.<sup>4</sup> The undue hardship issue is the exception. Specifically, most of the scholarly work aimed at analyzing the undue hardship provision was written around the time that the ADA was first passed in 1990. In fact, the last article<sup>5</sup> that explored the meaning of the

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1. 42 U.S.C. § 12111–17 (2018).

2. *Id.* § 12112(b)(5)(A).

3. *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325 (2009); Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009); Murphy v. United Parcel Serv., 527 U.S. 516 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009); Bragdon v. Abbott, 524 U.S. 624 (1998), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009).

4. It would be impossible to cite to all of the literature written on these issues. Instead, this is a list of disability scholars whose work on these (and many other) issues has influenced me (in alphabetical order): Bradley A. Areheart, Samuel Bagenstos, Carlos A. Ball, Kevin M. Barry, Stephen Befort, Robert L. Burgdorf Jr., Ruth Colker, Jeanette Cox, Mary Crossley, Chai Feldblum, Harlan Hahn, Ann Hubbard, Christine Jolls, Alex B. Long, Elizabeth Pendo, Jessica L. Roberts, Laura Rothstein, Ani B. Satz, Anita Silvers, Michael Ashley Stein, Michelle Travis, Michael Waterstone, and Mark C. Weber. I apologize in advance if I forgot anyone.

5. This refers to a more in-depth analysis given in a full article written by a legal academic. Most of the writing on the undue hardship provision was student-authored notes and comments. Without denigrating those valuable pieces of scholarship, many of which I cite to in other work, see generally Nicole Buonocore Porter, *Cumulative*

undue hardship provision was written twenty-two years ago in 1995.<sup>6</sup> This Article attempts to fill that lengthy void.

This comprehensive investigation into the undue hardship provision is especially important at this point in the history of the ADA. The ADA was passed in 1990 with overwhelming bipartisan support in Congress.<sup>7</sup> Despite this promising beginning, it was not long before federal courts began dramatically narrowing the class of individuals protected by the statute.<sup>8</sup> For many years, most ADA cases were dismissed at the summary judgment stage with courts holding that the plaintiffs did not have a disability and therefore could not proceed with the merits of their cases.<sup>9</sup> As a result, there was not much litigation involving the most important provision of Title I of the ADA—the reasonable accommodation provision and its accompanying defense—the undue hardship defense. Congress was unhappy with the narrowed interpretation of the ADA and consequently passed the ADA Amendments Act (“ADAAA”) in 2008.<sup>10</sup>

The ADAAA dramatically expanded the definition of disability, and, as I discuss in other work,<sup>11</sup> courts have (for the most part) followed Congress’ mandate for an expanded protected class.<sup>12</sup> This means that more cases have proceeded and will continue to proceed past the issue of coverage (which focuses on whether the employee has a disability protected by the statute) and on to the merits of the case, which often involve issues of reasonable accommodations.<sup>13</sup> As more cases reach the issue of reasonable accommodation, there are likely to be more cases reaching the issue of the defense to an employer’s obligation to provide a reasonable accommodation—the undue hardship defense. To be clear, this Article is not limited to an analysis of undue hardship

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*Hardship*, GEORGE MASON L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3036619> [hereinafter Porter, *Cumulative Hardship*], articles written by legal academics have the ability to explore issues in more depth and detail.

6. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes Undue*, 48 VAND. L. REV. 391, 422–27 (1995).

7. See, e.g., RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 5–6* (2005); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008) (“[E]xpectations for the [original] ADA [had been very] high.”).

8. E.g., Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 8–11 (2014) [hereinafter Porter, *Backlash*]; see also Long, *supra* note 7, at 218.

9. See Long, *supra* note 7, at 228.

10. Porter, *Backlash*, *supra* note 8, at 4; see Long, *supra* note 7, at 217–18.

11. Porter, *Backlash*, *supra* note 8, at 3, 46–47.

12. *Id.*; see also Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013).

13. See Porter, *Backlash*, *supra* note 8, at 4; Befort, *supra* note 12, at 2029; Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L. J. 187, 204 (2010).

cases that have been decided since the ADAAA went into effect. Instead, because we are in an era where more reasonable accommodation issues are being litigated, I believe this is an especially important time to take a new look at the undue hardship provision since the ADA's enactment. This Article is mostly a descriptive piece. I did not begin the project with any specific normative goal, and this Article does not propose any reform in this area. Instead, my goal was to simply take a closer look at how courts have been deciding issues of undue hardship and to see if any trends or themes emerged.

For all of the years I have been teaching employment discrimination and disability law (every year since 2004), I have frequently told my students that the undue hardship provision is relatively irrelevant—that very few cases turn on the undue hardship defense.<sup>14</sup> When I began reviewing undue hardship cases for other work,<sup>15</sup> I was somewhat surprised that there were so many cases.<sup>16</sup> But upon further review of these cases, most of them are simply citing the statutory provision and do not involve a discussion of the undue hardship provision.<sup>17</sup> Nevertheless, the cases that *do* discuss undue hardship provide some interesting insights. This Article will not only summarize and attempt to categorize the undue hardship cases but will also identify three trends that become apparent when engaging in a thorough analysis of this body of cases.

This Article will proceed in four additional parts. Part II will provide the background of the undue hardship provision, including the statutory language and its regulations, the legislative history, and the undue hardship cases decided under the precursor to the ADA—the Rehabilitation Act of 1973. Part III will delve into the undue hardship cases under the ADA. Even though most people think about undue hardship as mostly involving financial cost, this Part will reveal that relatively few cases turn on the actual costs of the accommodation. Part IV will identify three trends in the courts' decisions that only became apparent when I engaged in a deep dive of these cases: (1) courts often confuse or conflate the reasonable accommodation inquiry and the undue hardship defense; (2) whether an accommodation places burdens on other employees (what I call “special treatment stigma”) is frequently relevant to the undue hardship defense; and (3) the phenomenon of “withdrawn accommodations” often influences courts' analyses of the undue hardship defense. These themes not only provide a deeper insight into the undue hardship defense but also help to more broadly illuminate the scope of an employer's obligation to provide reasonable accommodations. Finally, Part V will conclude.

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14. STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, *DISABILITY LAW: CASES AND MATERIALS* 186 (West Academic 2016).

15. See generally Porter, *Cumulative Hardship*, *supra* note 5.

16. A Westlaw search (as of June 18, 2017) of “ADA /s ‘undue hardship’” resulted in 1,997 results.

17. I identified only about 120 cases that actually engaged in an undue hardship discussion rather than simply citing the statutory language.

## II. THE UNDUE HARDSHIP PROVISION

A. *The Statute and Regulations*

The ADA is considered an anti-discrimination statute, but it has two provisions<sup>18</sup> that set it apart from other anti-discrimination statutes—primarily Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>19</sup> The first difference is unlike Title VII, which protects all employees from discrimination based on race, sex, color, religion, and national origin, the ADA has a much smaller protected class.<sup>20</sup> Plaintiffs have to prove that they have a disability, which is defined as a physical or mental impairment that substantially limits one or more major life activities.<sup>21</sup> The other primary difference is the ADA’s reasonable accommodation provision.<sup>22</sup>

The ADA defines “discriminate” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity . . . .”<sup>23</sup> The “undue hardship” defense provides the outer limit of an employer’s obligation to provide reasonable accommodations under the ADA. It is defined in the statute as “an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).”<sup>24</sup>

Subparagraph (B), in turn, provides the factors to be considered:

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

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

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18. Porter, *Backlash*, *supra* note 8, at 7–8.

19. 42 U.S.C. § 2000e (2018).

20. Porter, *Backlash*, *supra* note 8, at 7.

21. 42 U.S.C. § 12102(2).

22. Porter, *Backlash*, *supra* note 8, at 8.

23. 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

24. *Id.* § 12111(10)(A).

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

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>25</sup>

The Equal Employment Opportunity Commission (“EEOC”) has provided some additional direction on the undue hardship provision.<sup>26</sup> First, the EEOC regulations suggest that an additional factor that should be considered is “the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.”<sup>27</sup> The EEOC also issued guidance, which states that an accommodation could impose an undue hardship if it would “fundamentally alter the nature of the operation or business.”<sup>28</sup> The EEOC guidance also notes that an employer will not have an undue hardship defense based on employees’ or customers’ fears or prejudices toward the individual with a disability. Similarly, undue hardship cannot be based on the fact that providing a reasonable accommodation will have a “negative impact on the morale of other employees.”<sup>29</sup> However, employers might be able to establish an undue hardship defense if an accommodation would be “unduly disruptive to other employees’ ability to work.”<sup>30</sup>

### B. Legislative History

Because there is relatively little case law under the undue hardship provision,<sup>31</sup> it is helpful to examine the legislative history of the ADA to determine what Congress thought the provision meant. As stated by one commentator, “The undue hardship standard was one of the most controversial elements of the ADA during its consideration in Congress.”<sup>32</sup> Originally, the ADA called for a higher standard than we currently have—an accommodation would have

25. *Id.* § 12111(10)(B).

26. *See generally* EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), [http://www.eeoc.gov/policy/docs/accommodation.html#N\\_114](http://www.eeoc.gov/policy/docs/accommodation.html#N_114) [hereinafter EEOC Guidance].

27. 29 C.F.R. § 1630.2(p)(2)(v) (2018).

28. EEOC Guidance, *supra* note 26.

29. *Id.*

30. *Id.*

31. *See infra* Section III.C.

32. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448 (1991).

to threaten the continued existence of the employer's business.<sup>33</sup> Proponents called it the "bankruptcy provision," but it was subsequently altered to the standard we have now in "the spirit of compromise."<sup>34</sup> Still, the legislative history indicated that the undue hardship provision has a high bar. For instance, Senator Lowell Weicker stated that the "costs associated with this bill are a small price to pay for opening up our society to persons with disabilities."<sup>35</sup>

We know that Congress intended the undue hardship standard to be greater than the undue hardship defense under the religious accommodation provision of Title VII, where anything more than a de minimis cost is considered an undue hardship.<sup>36</sup> But we do not know too much more about defining the specific standard that Congress intended.<sup>37</sup> "One Congressman urged his colleagues to develop a 'concrete formula,'" and another insisted that businesses need some way of being able to predict what they are responsible for when it comes to accommodating individuals with disabilities.<sup>38</sup> Two attempts to provide a more concrete formula failed. The first was to "limit [an employer's] expenditures to five percent of annual net profit for businesses with gross annual receipts of \$500,000 or less."<sup>39</sup> This amendment failed by a large margin.<sup>40</sup> The other amendment proposed would have capped the cost of an accommodation at ten percent of the disabled employee's annual salary.<sup>41</sup> This amendment was rejected by a vote of 25-11 in the Senate and 213-187 in the House.<sup>42</sup>

Here is what we *do* know from the legislative history. First, courts should consider the net cost, not the gross cost when deciding if an accommodation causes an undue hardship.<sup>43</sup> So if an employer receives tax credits or other benefits for the accommodation, these would offset the accommodation's cost.<sup>44</sup> Second, "the court must take into account the number of employees, presently and in the future, who will benefit from the proposed accommodation."<sup>45</sup> Thus, an accommodation that might cause an undue hardship if it will

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33. Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927.

34. *Id.*

35. Epstein, *supra* note 6, at 422-23.

36. *See, e.g.*, H.R. REP. NO. 101-485(II) (1990) (stating that the undue hardship standard is a significantly higher standard than the one used in *Hardison* and that this is "necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.").

37. In fact, one scholar described it as a "standard so vague as to amount to no standard at all." Cooper, *supra* note 32, at 1450.

38. Epstein, *supra* note 6, at 426.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 426-27.

43. Cooper, *supra* note 32, at 1450; *see also* H.R. REP. NO. 101-485(II).

44. *See* Cooper, *supra* note 32, at 1450.

45. *Id.* at 1451.

only be used for one employee might not cause an undue hardship if it could be shared by five employees with disabilities or if other employees might also benefit from the accommodation.<sup>46</sup> Third, courts need to distinguish costs to a particular facility versus costs to the entity as a whole.<sup>47</sup> As discussed above, an accommodation can pose an undue hardship without threatening the existence of the employer's business as a whole.<sup>48</sup> But with respect to the undue hardship in relationship to the particular facility, although Congress did not want an entity to shut down a marginal facility rather than absorb the cost of the proposed accommodation at that particular facility, Congress was apparently willing to place fairly high costs on an entity as long as a particular facility is not threatened with closure or job loss.<sup>49</sup>

We also know that Congress expected that the reasonable accommodation provision would be a significant obligation. Some evidence of this includes the fact that the legislative history referenced readers and interpreters several times, both of which are very costly accommodations.<sup>50</sup> The legislative history also mentioned another expensive accommodation, personal attendants, stating that whether or not a personal attendant hired to help a disabled employee when traveling for work or with other job-related functions would constitute an undue hardship should be decided on a case-by-case basis.<sup>51</sup>

### C. Undue Hardship Cases Under the Rehabilitation Act

Much of the early scholarship about the ADA was very critical of the amorphousness of the undue hardship provision. The concern was that the vagueness of the standard would lead to an abundance of litigation over the meaning of the undue hardship provision. There was also significant concern about the costs of complying with the reasonable accommodation provision, given that the undue hardship definition—significant difficulty or expense—seemed to create a fairly high bar.

For instance, one commentator stated that he believed the ADA was going to be very costly for employers—costing as much as several billion dollars annually.<sup>52</sup> Another commentator thought it was naïve for Congress to assume that the accommodation mandate in the ADA would not be expensive; he was responding to a Senate Report that noted the costs to do business were “expected to be less than \$100 per worker for 30% of workers needing accommodations, with 51% of those needing an accommodation requiring no expense at

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46. *See id.* at 1451.

47. *Id.*

48. *Id.*

49. *Id.* at 1451–52.

50. *See, e.g.*, S. REP. NO. 101-116 (1989).

51. *Id.*

52. Gregory S. Crespi, *Efficiency Rejected: Evaluating “Undue Hardship” Claims Under the Americans with Disabilities Act*, 26 TULSA L. J. 1, 4 (1990).



all.”<sup>53</sup> His response was that it was unrealistic to believe that the population of unemployed individuals with disabilities would not need significant accommodations; thus, “although accommodation costs prior to the ADA may have been ‘no big deal,’ accommodation costs under the ADA—particularly for those disabled citizens pulled into the employment sector for the first time—may be a very big deal indeed.”<sup>54</sup>

Steven Epstein also complained about the vagueness of the standard.<sup>55</sup> His central thesis was that Congress should not have adopted such a vague standard because it fails to inform covered entities and their employees with disabilities of the nature of the employer’s obligations and the employees’ rights.<sup>56</sup> He also argued that a vague standard will cause employers to feel coerced into giving accommodations to avoid being wrong in litigation and that it will create tense, if not hostile, relations between employers and employees.<sup>57</sup> His argument was that it is unfair to impose liability on an employer for failure to comply with an obligation that Congress consciously decided not to define clearly.<sup>58</sup> It was also unfair to require employers to spend money to obtain clarity through the litigation process.<sup>59</sup> Finally, it also put “job applicants and employees in the awkward position of not knowing what accommodations they can rightfully demand” from their employers.<sup>60</sup>

In response to arguments that the undue hardship provision is too vague and undefinable, Congress pointed to cases that had been decided under the predecessor to the ADA—Section 504 of the Rehabilitation Act.<sup>61</sup> However, several scholars complained that those cases did not provide a consistent standard.<sup>62</sup> Others pointed out that there were not that many cases compared to the number of cases that would get filed under the ADA.<sup>63</sup> It seems to me that

53. See Epstein, *supra* note 6, at 428–30.

54. *Id.* at 429–30.

55. See generally *id.*

56. *Id.* at 397.

57. *Id.*

58. *Id.* at 440–41.

59. *Id.*

60. *Id.* at 442.

61. See, e.g., Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 114 (1990) (“ADA’s legislative history states that federal agencies applying the reasonable accommodation and undue hardship language should do so consistently with interpretations under the Rehabilitation Act.”); Crespi, *supra* note 52, at 13 (discussing the intentions of the Senate Committee regarding the applicability of the Rehabilitation Act to ADA coverage).

62. See, e.g., Steven F. Stuhlbarg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311, 1334–36 (1991); Brandfield, *supra* note 61, at 114.

63. Epstein, *supra* note 6, at 433–34. There were “only 265 lawsuits filed under the Rehabilitation Act from 1973–1990.” *Id.* After the ADA went into effect, approximately 30,000 charges were filed in the first two years, and approximately one-quarter of those involved reasonable accommodation issues. *Id.* at 434. Epstein argues that

some of the confusion derives from the fact that some of the Section 504 Rehabilitation Act cases are not employment cases,<sup>64</sup> so the application of the undue hardship factors does not translate as well to employment cases.<sup>65</sup> The other problem is that these cases involve large public, or quasi-public, employers whose budgets were comprised in large part of revenue collected from taxpayers. Gleaning anything from these cases when applied to private employers is difficult.<sup>66</sup> Thus, the question remains whether these cases actually helped clarify the standard. The answer, I am afraid, is “not much.”

In one of the most frequently cited cases under the Rehabilitation Act, *Nelson v. Thornburgh*,<sup>67</sup> three blind income maintenance workers with Pennsylvania’s Department of Public Welfare (“DPW”) requested their employer to provide them readers to allow them to perform their jobs.<sup>68</sup> Because their jobs entailed extensive paperwork, they had to use readers on a part-time basis.<sup>69</sup> The plaintiffs had originally hired and paid for the readers themselves.<sup>70</sup> But in their lawsuit, they claimed that the defendant’s refusal to accommodate them by providing readers or some other mechanical device to allow them to read was discrimination within the meaning of Section 504 of the Rehabilitation Act.<sup>71</sup> The defendant argued that the cost of the readers or mechanical devices would be an undue hardship.<sup>72</sup> In exploring the cost of the readers, the court noted that the provision of a *full-time* reader is not necessary because the workers could conduct the determination and redetermination interviews without the reader and then use the reader to prepare the forms required.<sup>73</sup> Thus, a reader was only necessary for four hours per day or less.<sup>74</sup> During the rest of the day, a person capable of serving as a reader could be on call.<sup>75</sup> At the time, the type

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those 265 cases “could not possibly have provided a large enough database to sufficiently clarify an issue” that is litigated much more under the ADA, especially considering that only a handful of the cases addressed whether an accommodation would impose an undue hardship and only two focused on financial costs. *Id.*

64. Section 504 of the Rehabilitation Act applies to *all programs or activities* receiving federal financial assistance. 29 U.S.C. § 794 (2018).

65. *See, e.g.,* *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982) (addressing undue hardship in a case regarding public transit); *Am. Pub. Transit Ass’n v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (dealing with the issue of whether the Department of Transportation regulations implementing Section 504 in the public transit context were valid); *R.I. Handicapped Action Comm. v. R.I. Pub. Transit Auth.*, 549 F. Supp. 592 (D.R.I. 1982) (addressing undue hardship in a case regarding public transit), *rev’d in part, vacated in part* 718 F.2d 490 (1st Cir. 1983).

66. *See* Epstein, *supra* note 6, at 437–39.

67. 567 F. Supp. 369 (E.D. Pa. 1983), *aff’d*, 732 F.2d 146 (3d Cir. 1984).

68. *Id.* at 370.

69. *Id.*

70. *Id.*

71. *Id.* at 370–71.

72. *Id.* at 371.

73. *Id.* at 376.

74. *Id.*

75. *Id.*

of clerk that performed the job as a reader earned \$13,276 per year.<sup>76</sup> The court reasoned that because the plaintiffs could perform the essential functions of their job if they were each supplied with a half-time reader, the cost of accommodation would be approximately half of the salary of the clerk, or \$6,638 per year, for each plaintiff.<sup>77</sup>

In determining whether this accommodation constituted an undue hardship for the defendant, the court reviewed the factors promulgated in the implementing regulations for the Rehabilitation Act. Those factors are very similar to the factors we currently have under the ADA: “(1) the overall size of the recipient’s program with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient’s operation, including the composition and structure of the recipient’s workforce; and (3) the nature and cost of the accommodation needed.”<sup>78</sup> The court also cited to the illustrations in the Appendix to the regulations:

The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher’s aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.<sup>79</sup>

Applying these regulations, the court held, in light of the defendant’s \$300 million administrative budget, the “modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW’s services, [makes] it . . . apparent that DPW has not met its burden of showing undue hardship.”<sup>80</sup> This case is frequently cited as one where the relatively significant costs of accommodation did not cause an undue hardship.<sup>81</sup>

In *Arneson v. Sullivan*,<sup>82</sup> the plaintiff was an employee at a social security administration (“SSA”) office. He had a neurological disorder called apraxia that caused him difficulty bringing ideas together and writing; he was easily distracted, and he had difficulty with some motor skills.<sup>83</sup> He especially had

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76. *Id.*

77. *Id.*

78. *Id.* at 379–80 (quoting 45 C.F.R. § 84.12(c)(1-3)).

79. *Id.* at 380 (quoting 45 C.F.R. app. § 84).

80. *Id.*

81. See e.g., William S. Colwell, *Accommodating the Handicapped Federal Employee*, 35 A.F. L. REV. 69, 77–78 (1991).

82. 946 F.2d 90 (8th Cir. 1991).

83. *Id.* at 91.

trouble concentrating in noisy, stressful environments.<sup>84</sup> He performed satisfactorily in one location, where he had a semi-private office space, but once he was transferred to a different location, he began to have trouble performing.<sup>85</sup> The employer terminated him for alleged performance difficulties.<sup>86</sup> Arneson sued, and in his lawsuit he argued that he could have performed his job adequately with the following accommodations: “(1) a telephone headset to free his hands; (2) a quiet workspace to minimize his distractibility; and (3) clerical assistance to check his work.”<sup>87</sup> Although the employer agreed to the first request, it claimed it could not find him a quiet workspace and that providing clerical assistance would mean it would have to hire another employee capable of doing his job, which would be the equivalent of hiring two people to perform one job.<sup>88</sup> The employer argued that these accommodations were not reasonable and would cause an undue hardship, and the district court agreed.<sup>89</sup>

In the first opinion by the U.S. Court of Appeals for the Eighth Circuit, the court disagreed with the district court’s conclusion that the employer had offered the plaintiff reasonable accommodations and that the plaintiff was not qualified.<sup>90</sup> The court stated that the district court had not given enough attention to the possibility of transferring plaintiff back to his original location where he had a semi-private workspace or providing him some clerical assistance.<sup>91</sup> The court stated that it did not appear that these options were adequately examined in an effort to determine the cost of such accommodations and the impact they would have on the employer’s operation.<sup>92</sup> As the court stated:

[F]urther development is necessary to ascertain what duties this assistant would have to perform in order to have some impact on Arneson’s job performance, what the cost of such an assistant would be and whether additional funding may be available to offset the cost to the SSA. Obviously, it is beyond the expectations of the Rehabilitation Act that the SSA be required to hire another person capable of actually performing Arneson’s job. On the other hand, Arneson claims that he would only need someone to proofread his work and that this person would only need to know how to read. And, presumably, the necessary

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84. *Id.*

85. *Id.*

86. *Arneson v. Heckler*, 879 F.2d 393, 395 (8th Cir. 1989), *remanded* No. 84–2552–C(3), 1990 WL 116658 (E.D. Mo. 1990), *aff’d in part, rev’d in part sub nom. Arneson v. Sullivan*, 946 F.2d 90 (8th Cir. 1991).

87. *Id.* at 397.

88. *Id.*

89. *Id.*

90. *Id.* at 397–98.

91. *Id.*

92. *Id.* at 397.

proofreading could be accomplished by a part-time worker, such as a college student.<sup>93</sup>

The court also stated: “We strongly feel that the federal government should be a model employer of the handicapped and should be required to make whatever reasonable accommodations are available.”<sup>94</sup> The court remanded the case back to the district court, and the district court again rendered judgment for the defendant.<sup>95</sup>

In the Eighth Circuit’s second opinion, the court again reversed the district court, concluding that Arneson was qualified and that the SSA refused to make reasonable accommodations as required by law.<sup>96</sup> Specifically, the court noted that “very little was done to attempt to accommodate Arneson and to, thus, preserve him as a contributing employee of the SSA.”<sup>97</sup> The court further noted that Arneson was “on disability, receiving a government pension when he c[ould] very likely adequately perform services as a social security claims representative.”<sup>98</sup> The court also noted that the duties of the claim representative had by then been automated, thus negating the need for a clerical assistant.<sup>99</sup> With regard to the distraction-reduced workspace, the court noted that the SSA never looked into providing a private work space at the new location and that no one had demonstrated how much it would cost.<sup>100</sup> Thus, the court reversed the district court and remanded, directing the district court to enter an order reinstating Arneson, giving him computer training on the new system, and requiring the department to spend a reasonable amount to provide him a distraction-free environment.<sup>101</sup> The court also awarded back pay.<sup>102</sup> Perhaps surprisingly, the court also directed that, if necessary, Arneson be given a “reader.”<sup>103</sup> The court noted that this did not need to be someone “who [wa]s an alternate claims representative, only an individual who, upon reading the paper printed by the computer at the work station, c[ould] assist Arneson in his efforts to satisfactorily complete his assigned tasks.”<sup>104</sup>

The above cases are ones where the court set a fairly high bar for the employer to prove undue hardship. But there were other Rehabilitation Act

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93. *Id.* at 397–98.

94. *Id.* at 398.

95. *Id.*; *Arneson v. Heckler*, No. 84–2552–C(3), 1990 WL 116658, at \*6 (E.D. Mo. 1990), *aff’d in part, rev’d in part sub nom.* *Arneson v. Sullivan*, 946 F.2d 90 (8th Cir. 1991).

96. *Id.* at 91.

97. *Id.*

98. *Id.* at 92.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 92–93.

103. *Id.* at 93.

104. *Id.*

cases where the courts did not require expensive, burdensome accommodations. For instance, in *Gardner v. Morris*,<sup>105</sup> the plaintiff was a civil engineer with the United States Army Corps of Engineers ( “Corps”) and was diagnosed as a manic depressive.<sup>106</sup> His application for promotion and transfer to Saudi Arabia was rejected because the “medical facilities in Saudi Arabia were not capable of accommodating the plaintiff’s condition” and the “nearest competent physician was a one-hour flight, or a thirteen-hour drive[,] away.”<sup>107</sup> The court concluded that the only accommodation would have been for the Corps to set up a medical facility in Saudi Arabia sufficient to treat the plaintiff’s condition and that this accommodation would impose an undue hardship.<sup>108</sup>

Similarly, in *Treadwell v. Alexander*, the plaintiff, a retired Air Force colonel, applied with the Corps as a seasonal park technician.<sup>109</sup> He had been previously rated by the Veteran’s Administration as 100% disabled due to a nervous condition and a heart condition and was denied the position because the Corps believed he was not qualified due to his disabilities.<sup>110</sup> The district court concluded that it would have been necessary for the Corps to require other park technicians to perform many of the plaintiff’s duties if he had been hired.<sup>111</sup> The appellate court stated that because “only two to four other workers [were] available at any given time to patrol the 150,000 acres [of the park,] and in light of the agency’s limited resources,” requiring other workers to perform some of plaintiff’s duties would impose an “undue hardship” on the Corps.<sup>112</sup> The appellate court agreed with the district court that the defendant had established its undue hardship defense.<sup>113</sup>

### III. UNDUE HARDSHIP CASES UNDER THE ADA

Despite the concern expressed in early scholarship that the vagueness of the undue hardship provision would lead to a great deal of litigation, the reality is that the undue hardship defense is very rarely outcome determinative. This Part does not try to discuss or even cite to every undue hardship case under the ADA. Instead, its goal is to categorize the cases based on the facts that are alleged to create an undue hardship.

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105. 752 F.2d 1271 (8th Cir. 1985).

106. Epstein, *supra* note 6, at 419.

107. *Id.*

108. *Id.*

109. 707 F.2d 473, 474 (11th Cir. 1983).

110. *Id.*

111. *Id.* at 478.

112. *Id.*

113. *Id.*

### A. The Early Cases

There were three cases decided in the early days of the ADA that provided *some* guidance on the undue hardship provision but mostly discussed the burdens of proof and the relationship between the undue hardship defense and the reasonable accommodation provision. Even though none of these cases specifically discussed the issue of “how much is too much,” they do provide some guidance on what early courts were thinking with respect to the undue hardship defense.

The first and one of the most-cited ADA cases is *Vande Zande v. Wisconsin Department of Administration*.<sup>114</sup> This case is most known for its statement regarding how to determine whether an accommodation is “reasonable”—by using a cost-benefit approach.<sup>115</sup> The court stated:

It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But at the very least, the cost could not be disproportionate to the benefit.<sup>116</sup>

The court’s reasoning for so defining the reasonable accommodation provision was its concern that the undue hardship provision would make it difficult for an employer to raise a cost-based defense to an accommodation, especially if the employer is large or, like the employer in *Vande Zande*, a government employer.<sup>117</sup> The court stated:

Even if an employer is so large or wealthy—or, like the principal defendant in this case, is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees—that it may not be able to plead “undue *hardship*,” it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee. If the nation’s employers have potentially unlimited financial obligations to [forty-three] million disabled persons, the [ADA] will have imposed an indirect tax potentially greater

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114. 44 F.3d 538 (7th Cir. 1995). Westlaw reveals that, as of December 26, 2018, there are 2,594 citing references to this case. This opinion was authored by well-known Judge Posner, and Judge Easterbrook was also on the panel. I am certain that this contributed to the case’s popularity.

115. *Id.* at 542 (stating that the word “reasonable” weakens the word “accommodation” “in just the same way that if one requires a ‘reasonable effort’ of someone this means less than the maximum possible effort”).

116. *Id.*

117. *Id.* at 542–43.

than the national debt. We do not find an intention to bring about such a radical result in either the language of the A[DA] or its history.<sup>118</sup>

Then, in trying to determine how to define “undue hardship,” the court stated that undue hardship is a term of relation: “We must ask, ‘undue’ in relation to what? Presumably (given the statutory definition and the legislative history) in relation to the benefits of the accommodation to the disabled worker as well as to the employer’s resources.”<sup>119</sup> Thus, putting this all together, the court stated that costs should be considered at two points in the reasonable accommodation analysis.<sup>120</sup> According to the court, the “employee must show that the accommodation is reasonable in the sense” that it is both effective and proportional to costs.<sup>121</sup> Even if this showing is made, “the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.”<sup>122</sup>

Applying its cost-benefit approach to one of the accommodations requested, which was a lower sink in the kitchenette so that the plaintiff (who was a paraplegic) could reach it from her wheelchair, the court stated that even though it would have cost only \$150 to lower the sink, given the proximity of the bathroom sink,

we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.<sup>123</sup>

The second case (chronologically) is actually a case brought under the Rehabilitation Act, but it was decided in 1995, shortly after the ADA went into effect, and it is frequently cited in other ADA reasonable accommodation and undue hardship cases.<sup>124</sup> In *Borkowski v. Valley Central School District*,<sup>125</sup> the

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118. *Id.* (alteration in original).

119. *Id.* at 543.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.,* *Roberts v. Royal Atlantic Corp.*, 542 F. 3d 363, 370–71 (2d Cir. 2008); *Jackan v. N.Y. State Dep’t. of Labor*, 205 F. 3d 562, 566–67 (2d Cir. 2000).

125. 63 F.3d 131, 134 (2d Cir. 1995).



plaintiff was a library teacher who served at two elementary schools. In addition to her duties in the library, “she was responsible for teaching library skills to classes of elementary school students.”<sup>126</sup> She suffered major head trauma and serious neurological damage, which caused difficulties with memory and concentration, and she had trouble dealing with simultaneous stimuli.<sup>127</sup> An unannounced visit to one of her classes found her having difficulty controlling the class—“students had talked, yelled, and whistled without being corrected.”<sup>128</sup> The school district denied her tenure.<sup>129</sup>

The court was tasked with determining the appropriate burdens of proof when deciding reasonable accommodation and undue hardship issues. The court held that the plaintiff bears the burden of production and persuasion on the issue of whether she is qualified for the job in question, which includes whether there is an accommodation that would permit her to perform the job’s essential functions.<sup>130</sup> As for how costs come into play, the court held that “an accommodation is only reasonable if its costs are not clearly disproportionate to the benefits it will produce.”<sup>131</sup> Plaintiff’s burden with respect to reasonable accommodation is one of production—she must “suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.”<sup>132</sup> Then the defendant has the burden of showing that the accommodation is unreasonable and that burden merges with its ultimate burden of showing that the accommodation would cause an undue hardship.<sup>133</sup>

The court then undertook a more specific undue hardship analysis, attempting to analyze the undue hardship factors.<sup>134</sup> But the court stated that the factors do not tell us much because certainly “Congress could not have intended that the only limit on the employer’s duty to make reasonable accommodation to be the full extent of the tax base on which the government entity c[an] draw.”<sup>135</sup> Thus, the court stated that undue hardship is a relational term, where we have to look at not only the costs to the employer but also the benefits to others that will result.<sup>136</sup> However, the court also stated that there is no complex formula and instead courts should undertake a common-sense balancing of the costs and benefits.<sup>137</sup>

The way I read this language is that the court in *Borkowski* is intimating that the obligation to provide an accommodation is not very great or significant. But in deciding the issue of whether the plaintiff should be allowed a teacher’s

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 137–38.

131. *Id.* at 138.

132. *Id.*

133. *Id.*

134. *Id.* at 139.

135. *Id.*

136. *Id.* at 138.

137. *Id.* at 140.

aide to assist her in managing the classroom as a reasonable accommodation, the court stated there was not enough evidence of undue hardship to decide the issue on summary judgment.<sup>138</sup> Specifically, the court stated that the school district did not present evidence concerning the cost of providing a teacher's aide or the school district's budget, among other things.<sup>139</sup> The court also noted that the regulations to the Rehabilitation Act contemplate that employers might be required to assume the cost of providing an aide absent a showing that the cost is excessive in light of the factors.<sup>140</sup>

The third case is a district court case, which is included here because it was an early case that involved a significant discussion about the meaning of the undue hardship provision.<sup>141</sup> In *Bryant v. Better Business Bureau ["BBB"] of Greater Maryland, Inc.*, the plaintiff suffered from some (but not complete) hearing loss.<sup>142</sup> She requested and received a transfer to the membership coordinator position from the administrative position she had been serving in at BBB.<sup>143</sup> As part of that new job, she had to staff a hotline number and had difficulty hearing the addresses and telephone numbers of the callers with the amplification device she was accustomed to using.<sup>144</sup> She requested a text telephone ("TTY") device that would allow her to communicate by way of an operator typing the conversation of the caller and then Bryant simply speaking back to the caller (she had no difficulty with speech).<sup>145</sup> The cost of the TTY device was a one-time expense of \$279.<sup>146</sup> BBB denied her request, stating that it would cause an undue hardship.<sup>147</sup>

The court's analysis of the undue hardship defense was a bit different from other courts. The court first noted that several courts "have treated 'reasonable accommodations' and 'undue hardship' as flip sides of the same coin," meaning that an accommodation that is reasonable would not cause an undue hardship and an accommodation that is unreasonable would cause an undue hardship.<sup>148</sup> But as the court noted, "several courts have held . . . that an accommodation could be 'reasonable' and still cause an 'undue hardship.'"<sup>149</sup> The court agreed with these latter courts and argued that material differences exist between inquiries about whether an accommodation is reasonable and whether the accommodation would cause an excessive or undue hardship on

138. *Id.* at 142–43.

139. *Id.*

140. *Id.* at 142.

141. In full disclosure, I also chose this case for the disability law casebook that I co-authored with Steve Befort. See BEFORT & PORTER, *supra* note 14, at 187.

142. *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 727 (D. Md. 1996).

143. *Id.* at 730.

144. *Id.*

145. *Id.*

146. *Id.* at 730.

147. *Id.* at 731.

148. *Id.* at 733. See *infra* Section IV.A for a more thorough discussion of this issue.

149. *Id.* at 734.

the employer.<sup>150</sup> Thus, reasonable accommodation and undue hardship are not, according to the court in *Bryant*, flip sides of the same coin.<sup>151</sup>

Instead, the reasonable accommodation inquiry asks whether the accommodation would be effective and would allow the employee to attain an equal level of achievement, opportunity, and participation that a nondisabled individual would be able to achieve.<sup>152</sup> The undue hardship defense focuses on the impact that the accommodation would have on the specific employer at a particular time.<sup>153</sup> This is, according to the court, “a multi-faceted, fact-sensitive inquiry requiring consideration of: (1) financial cost; (2) additional administrative burdens; (3) complexity of implementation; and (4) any negative impact that the accommodation may have on the operation of the business, including the effect of the accommodation on the employer’s workforce.”<sup>154</sup>

BBB argued that it had denied the TTY device based on a determination that it “would slow down the operation of” the membership coordinator.<sup>155</sup> The employer argued it was worried about the volume of calls it would receive if it implemented a 900 number as planned.<sup>156</sup> But when pressed at his deposition, the supervisor said that cost was not a factor; instead, he testified that it was not the speed with which she could handle the calls; it was the accuracy.<sup>157</sup> The employer also provided the testimony of an expert witness who testified that “BBB’s members’ awkwardness and unfamiliarity with the system would cause the members who called BBB ‘an undue hardship.’”<sup>158</sup>

The court stated that these reasons did not comport with the statutory and regulatory scheme of the ADA. The argument that the TTY device would have slowed down the plaintiff focused on the reasonableness of the accommodation, not the burden on the employer.<sup>159</sup> The court also stated that the defendant’s argument of imagined awkwardness and unfamiliarity of BBB’s members with the system was “not only inappropriate and patronizing but offensive.”<sup>160</sup> Even assuming that the system was “awkward and unfamiliar,” the court noted that no suggestion had been made as to how that would have negatively affected the business.<sup>161</sup> The court held that the defendant’s assumption of an adverse impact on the business was based on “little more than preconceived

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150. *Id.* at 736.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 737.

155. *Id.* at 738.

156. *Id.*

157. *Id.* at 738.

158. *Id.* at 739.

159. *Id.*

160. *Id.* at 740.

161. *Id.*

discriminatory stereotypes, which are the targets of the ADA in the first place.”<sup>162</sup> Thus, the defendant’s undue hardship argument failed.<sup>163</sup>

Although these cases help us understand the burdens of proof in reasonable accommodation cases, they do little to give us a sense of predicting the cost question: How much is too much? Cases decided after these early cases do not shed *too much* light on the subject but are still worth analyzing.

### *B. Cases Where Financial Cost Was an Issue*

Of all the undue hardship cases I identified and read, only sixteen of them actually discussed costs.<sup>164</sup> And in one of these cases, the undue hardship analysis was dicta because the case could have been decided on other grounds. In *Balls v. AT&T Corp.*, the plaintiff had carpal tunnel syndrome, and her job required typing at least forty-five words per minute; but according to the plaintiff, often typing seventy to eighty words per minute was necessary.<sup>165</sup> The accommodation she requested was to use voice-activated technology instead of typing.<sup>166</sup> Because the evidence revealed that voice-activated technology would cost twelve million dollars, the court held that it would be an undue hardship.<sup>167</sup> Despite its undue hardship discussion, the court also held that the plaintiff did not have a disability, which justified dismissing the plaintiff’s case.<sup>168</sup>

Even when courts hold that the employer did not prove undue hardship, the procedural posture of these cases is such that the plaintiffs are not winning their claims—they are simply surviving to litigate another day, i.e., surviving the defendants’ motions for summary judgment. In most of the cases, the court simply stated that the defendant had not provided enough information to support the undue hardship defense.<sup>169</sup>

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162. *Id.* at 740.

163. *Id.* at 741.

164. As mentioned earlier, I identified 1,997 cases that mentioned “undue hardship” in the context of an ADA case. *See supra* note 16. However, of those, I identified only about 120 of them that actually engaged in an undue hardship discussion (rather than simply citing the statutory language). *See supra* note 17.

165. 28 F. Supp. 2d 970, 972 (E.D. Pa. 1998).

166. *Id.* at 973–74.

167. *Id.* at 974.

168. *Id.* at 974–75.

169. *See, e.g.,* *Rodal v. Anesthesia Grp. of Onondoga*, 369 F.3d 113, 122 (2d Cir. 2004) (holding that the employer had not proven that the costs of accommodating the plaintiff’s scheduling needs causes an undue burden because the defendant presented no evidence of the financial impact of the accommodation, including no evidence of their financial resources or the costs of the accommodation); *Reilly v. Upper Darby Twp.*, 809 F. Supp. 2d 368, 383–84 (E.D. Pa. 2011) (stating that the question of whether the cost the police department would incur from allowing the plaintiff to perform non-patrol duties would pose an undue hardship is a question for the jury).

For instance, in *Alabi v. Atlanta Public Schools*, the plaintiff was a school teacher with a hearing disability.<sup>170</sup> He requested a full-time interpreter to communicate in the classroom.<sup>171</sup> The employer argued that this would cost too much money because the teacher needed a very skilled sign language interpreter (presumably because of the subject matter).<sup>172</sup> The employer cited the cost of the interpreter as being \$62 per hour or \$85,000 for the school year, which it claimed would be an undue financial hardship, especially given that the cost was disproportionate to the plaintiff's yearly salary of \$53,000.<sup>173</sup> The court recognized that the cost seemed high but ultimately held that the defendant did not produce sufficient evidence to establish undue hardship.<sup>174</sup> The court reasoned that there was no evidence the school district had attempted to negotiate this rate or see if it could reassign another interpreter from within the school district.<sup>175</sup> The employer also lacked evidence of the impact of the potential translation fees on the school district's fiscal operation or resources.<sup>176</sup>

In another sign language interpreter case, *Searls v. Johns Hopkins Hospital*, the plaintiff was a deaf woman with a nursing degree.<sup>177</sup> When she was offered a nursing job, she requested an interpreter.<sup>178</sup> The evidence revealed that the cost of providing an interpreter proficient in medical terminology would be between \$40,000 and \$60,000 and that she would require two interpreters with her at all times for an annual cost of \$240,000.<sup>179</sup> The hospital ultimately determined that it was too expensive to accommodate her and rescinded her offer.<sup>180</sup> When the court discussed the employer's undue hardship defense, it noted that the defendant had only focused on the resources and operations of the specific unit for which she would be hired, ignoring the question of how providing an interpreter costing \$120,000, or 0.007% of the entire operational budget of \$1.7 billion, could impose an undue hardship.<sup>181</sup> The employer was basically arguing that it had no money in the budget allocated for reasonable accommodations. The court (sensibly in my opinion) held that the employer's budget for reasonable accommodations is an irrelevant factor in assessing undue hardship because allowing an employer to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede

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170. No. 1:12-CV-0191-AT, 2011 WL 11785485, \*1 (N.D. Ga. Sept. 26, 2011).

171. *Id.* at \*2.

172. *Id.* at \*3.

173. *Id.* at \*6-8.

174. *Id.* at \*10.

175. *Id.*

176. *Id.*

177. 158 F. Supp. 3d 427, 430 (D. Md. 2016).

178. *Id.* at 431.

179. *Id.* It is not clear why she would need two interpreters with her at all times, and even if she does, it is not clear how the defendant arrived at the \$240,000 figure. The court used the figure of \$120,000. *Id.* at 438.

180. *Id.* at 433.

181. *Id.* at 438.

the legal determination on this issue to the employer.<sup>182</sup> Finally, the court stated that it is irrelevant that the cost of the interpreter would be twice the salary of the plaintiff.<sup>183</sup>

The size and financial resources of the employer was very relevant in these cases. While the court was not willing in the above case (*Searls*) to find an undue hardship for a full-time interpreter, in another case involving a non-profit organization, the court stated that it was an issue of fact regarding whether a sign language interpreter for all staff meetings (but presumably not the rest of the time) was an undue hardship.<sup>184</sup>

In *Anderson v. Gus Mayer Boston Store of Delaware*, the court also held that the question of undue hardship is a question of fact for the jury.<sup>185</sup> This case involved the issue of whether the defendant violated the ADA by discriminating in the provision of health benefits.<sup>186</sup> The plaintiff had cancer and was diagnosed with AIDS.<sup>187</sup> Accordingly, the cost of the employer's health insurance plan increased.<sup>188</sup> Because of these increased costs, the employer switched to a new insurance company that refused to cover the plaintiff.<sup>189</sup> In discussing the undue hardship issue, the court stated:

The ADA explicitly recognizes that integrating disabled individuals into the workforce often will result in increased costs. Increased costs are thought to be the price we as a people must pay for equal dignity. There comes a point, however, where enormous expense involved in providing equal terms of employment to an otherwise qualified individual may result in an undue burden for a covered entity. The ADA takes account of these rare situations where an accommodation may be financially crippling . . . .<sup>190</sup>

In the context of health insurance, the court pointed to the EEOC guidelines, which “state that an [e]mployer must prove that coverage for a discrete group of disabilities would be so expensive as to cause the employer's plan to become financially insolvent. The employer must also [demonstrate] that there is no alternative that would avoid the insolvency.”<sup>191</sup> Thus, the court denied

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182. *Id.* at 438–39.

183. *Id.* at 439.

184. *EEOC v. Placer ARC*, 114 F. Supp. 3d 1048, 1053, 1058–59 (E.D. Cal. 2015) (finding that the extent to which an interpreter is needed and the costs of providing one were speculative).

185. 924 F. Supp. 763, 781 (E.D. Tex. 1996).

186. *Id.* at 768.

187. *Id.* at 769.

188. *Id.* at 871.

189. *Id.* at 770.

190. *Id.* at 780.

191. *Id.* at 781.

the employer's motion for summary judgment, claiming this issue was a question of fact for the jury.<sup>192</sup>

Similarly, in *Kane v. Carmel Central School District*, the plaintiff was a middle school music teacher who had multiple sclerosis, which required her to use a wheelchair.<sup>193</sup> The defendant school district provided some accommodations to her but refused others, claiming the cost was too high.<sup>194</sup> For instance, the defendant estimated that installing a power-assist door and constructing a ramp would be \$20,000 and \$30,000.<sup>195</sup> The court criticized the defendant for not researching the costs of any of these accommodations and for not considering anything but the cost.<sup>196</sup> For instance, the school district did not consider its overall budget, whether the budget could accommodate this request, or the overall benefits of providing the accommodations.<sup>197</sup> Thus, the court held that it could not conclude as a matter of law that the plaintiff's proposed accommodations would cause an undue hardship.<sup>198</sup>

In some cases, the cost seemed pretty low and yet the employer still argued undue hardship. For instance, in *McGregor v. United Healthcare Services, Inc.*, the court rejected the employer's undue hardship argument and held that the \$2,375 that it would cost to install an automatic door opener for the plaintiff, who used a wheelchair, was not an undue burden.<sup>199</sup> In another case, the court held that providing a sign language interpreter for one meeting where the plaintiff (who was deaf) was being investigated for theft did not cause an undue hardship because the benefit of having the interpreter outweighed the limited costs.<sup>200</sup>

Sometimes courts do not have the opportunity to analyze the "how much is too much" question because the parties are disputing what the costs actually are. For instance, in *Garza v. Abbott Laboratories*, the parties disputed the cost of the voice-activated software that the plaintiff needed to perform her duties

192. *Id.*

193. No. 12 CV 5429(VB), 2014 WL 7389438, at \*1 (S.D.N.Y. Dec. 15, 2014).

194. *Id.* at \*2–3.

195. *Id.* at \*2.

196. *Id.* at \*7.

197. *Id.*

198. *Id.* at \*8; *cf.* *Picinich v. United Parcel Serv.*, 321 F. Supp. 2d 485, 507–08 (N.D.N.Y. 2004) (stating that UPS claimed undue hardship for the cost of having to search for a position that the plaintiff could perform with his disability related restrictions but did not submit evidence of its overall financial resources in order to allow a meaningful consideration of the undue hardship defense).

199. No. H-09-2340, 2010 WL 3082293, at \*10 (S.D. Tex. Aug. 6, 2010).

200. *Mohamed v. Marriott Int'l, Inc.*, 905 F. Supp. 141, 153 (S.D.N.Y. 1995). This case was unusual because the hotel employed about fifty deaf employees, receiving substantial tax advantages for doing so, and therefore the defendant was accustomed to having interpreters on staff. *See id.* at 146. The problem in this case was that there was no interpreter for the first investigatory meeting after they accused the plaintiff of stealing, and this caused the plaintiff to be unable to adequately defend himself against the theft accusation. *Id.* at 151.

after an arm condition restricted her ability to comfortably type on a keyboard.<sup>201</sup> The employer's estimate for providing that software was \$1 million as well as additional costs for significant programming to get the software to work.<sup>202</sup> However, the plaintiff's expert estimated the cost at \$9,500.<sup>203</sup> One interesting issue that arose was that the employer tried to argue that as long as it made its cost "estimate in good faith, it does not matter whether the estimate was objectively wrong."<sup>204</sup> The court, however, disagreed with the employer, stating that the undue hardship inquiry is an objective one and that because there was a dispute over the costs, it should be a fact issue for the jury.<sup>205</sup>

Similarly, in *Reyazuddin v. Montgomery County*, the county-employer opened a new call center that used software that was inaccessible for blind employees.<sup>206</sup> Thus, because the plaintiff was blind, the employer did not transfer her to the new call center with her sighted coworkers.<sup>207</sup> The estimates of the cost to make this software accessible varied widely from \$129,600 to \$648,000.<sup>208</sup> The court compared this to the county's total budget of \$3.73 billion per year and to the call center's budget of \$4 million per year.<sup>209</sup> The court reversed the lower court's grant of summary judgment to the defendant, stating that the district court had improperly weighed conflicting evidence and did not view the evidence in the light most favorable to the plaintiff.<sup>210</sup> Similar to the *Searls* case discussed above, the court also disagreed with the district court's reliance on the fact that the county's budget had only a \$15,000 line item for accommodations.<sup>211</sup> The court stated:

Allowing the County to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue to the employer that allegedly failed to accommodate an employee with a disability. Taken to its logical extreme, the employer could budget \$0 for reasonable accommodations and thereby always avoid liability. The County's overall budget (\$3.73 billion in fiscal year 2010) and [the call center's] operating budget (about \$4 million) are relevant factors. But the County's line-item budget for reasonable accommodations is not.<sup>212</sup>

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201. 940 F. Supp. 1227, 1229–31 (N.D. Ill. 1996).

202. *Id.* at 1240.

203. *Id.* at 1241.

204. *Id.*

205. *Id.* at 1243.

206. 789 F.3d 407, 409 (4th Cir. 2015).

207. *Id.*

208. *Id.* at 412.

209. *Id.*

210. *Id.* at 417.

211. *Id.* at 418.

212. *Id.* at 418 (citations omitted). The court also stated that costs cannot be viewed in isolation; it is the relative costs that should be considered. *Id.*



Interestingly, of the sixteen cases I identified where the court based its decision on costs, only one granted an employer's motion for summary judgment based on the undue hardship defense. In *D'Eredita v. ITT Corp.*, the plaintiff worked in a commercial facility and "committed numerous fabrication errors that led to an extensive disciplinary record" before he was diagnosed with mild dyslexia.<sup>213</sup> His job required him to read designs and use scales, gauges, and similar instruments.<sup>214</sup> He had difficulty with all of these tasks, causing him to be laid off and unable to successfully bid on another job.<sup>215</sup> The two accommodations he requested were to have additional employees added to his line and to have the motors he used color coded.<sup>216</sup> The court held that both accommodations would unduly burden the employer.<sup>217</sup> The first accommodation, involving extra employees, would cause the employer to assume superfluous labor expense, which would interfere with the employer's desired profit margins.<sup>218</sup> The second accommodation would also impose an undue hardship on the employer because color coordinating the manufacturing process would involve fifty different types of complex motors of varying types, which would be unduly burdensome and expensive.<sup>219</sup> Interestingly, however, the employer never identified the specific costs, and unlike other cases, the court did not require the employer to identify the specific costs.<sup>220</sup>

Despite this last case, my take-away from this group of cases is as follows: When the issue is truly one of direct costs (as opposed to indirect costs of additional supervision or restructuring job tasks, etc.), courts seem to be willing to carefully analyze the undue hardship factors in the statute and require the employer to prove why the accommodation would be costly enough to reach that relatively high bar for proving undue hardship.

### C. Restructuring Job Tasks

The cases I have placed in this category generally did not reference costs at all. Instead, these are cases where the plaintiff's requested accommodation involved restructuring of job tasks and the employer argued undue hardship not because of the cost of the accommodation but because accommodating the plaintiff would be difficult or unworkable. Similar to the category above, for some of these cases, the undue hardship issue was not dispositive because the court could have dismissed the case for some other reason (often because the

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213. No. 11–CV–6575–CJS–MWP, 2015 WL 6801828, at \*1 (W.D.N.Y. Nov. 5, 2015).

214. *Id.* at \*2.

215. *Id.*

216. *Id.*

217. *Id.* at \*8.

218. *Id.*

219. *Id.*

220. *See id.*

individual did not meet the statutory definition of disability).<sup>221</sup> But for some of them, the employer's failure to prove undue hardship was the reason the case was not dismissed, and the plaintiff's claim survived the employer's motion for summary judgment.<sup>222</sup>

For instance, in *Carmichael v. Verso Paper, LLC*, the plaintiff had several work injuries that caused physical restrictions, including lifting limitations and limitations on the repetitive use of his arms.<sup>223</sup> The employer argued that his requested accommodation, taking breaks when needed, was a hardship to the employer because it limited the plaintiff's work capacity.<sup>224</sup> The court stated that the employer had not proven why plaintiff's position could not be modified to allow the plaintiff to take breaks when needed.<sup>225</sup> The court noted that the employer presented no evidence that indicated the employees had to complete

221. See, e.g., *EEOC v. Amego, Inc.*, 110 F.3d 135, 148–49 (1st Cir. 1997) (stating that eliminating the plaintiff's medication dispensing duties after plaintiff tried to commit suicide by overdosing on medications would alter the nature of the position in a way that would cause an undue hardship but also holding that the claim could have been dismissed for other reasons); *O'Bryan v. State ex. rel. Dep't. of Conservation & Nat. Res.*, No 3:04–CV–00482–RAM, 2006 WL 2711550, at \*4 (D. Nev. Sept. 21, 2006) (holding that requiring the employer to hire and compensate two employees to perform one job when the plaintiff's injury made it impossible for her to fulfill her main job duty of filing would be unreasonable and cause an undue hardship, but the court did not dismiss the claim because the employer did not consider whether it would have been an undue hardship to transfer the plaintiff); *Wiggins v. Davita Tidewater, LLC*, 451 F. Supp. 2d 789, 798–99 (E.D. Va. 2006) (holding that the plaintiff was not disabled, but even if she was, her requested accommodation of avoiding all supervision that was critical or caused her stress was not reasonable and would impose an undue hardship on the employer); *Mertes v. Westfield Ford*, 220 F. Supp. 2d 904, 909–10 (N.D. Ill. 2002) (holding that plaintiff's proposed accommodation of having his coworkers perform all of the tasks on his behalf that involved lifting more than ten pounds or repetitive arm motions would have caused an undue hardship but also holding that the plaintiff was not disabled).

222. Only one case in this category (out of twenty-two) involved an outright win for the plaintiff. In *Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121 (5th Cir. 2009), the court affirmed the jury verdict for the plaintiff on his failure to accommodate claim. *Id.* at 124. The plaintiff was terminated from his job as a sales representative selling insurance policies after he had difficulty meeting his quotas due to his bipolar disorder. *Id.* at 125. His requested accommodation was “to assign[] him to manage a ‘Mass Marketing’ account, . . . [which] is a group insurance program offered to businesses . . . in which employees [can] purchase insurance policies at a discount.” *Id.* at 127. These accounts are valuable because the representative gets to meet with many potential clients at once, thereby making it easier for someone, like the plaintiff, whose disability makes it difficult for him to stay on track with several smaller clients. *Id.* at 127. The court affirmed the jury verdict, stating that the jury had the opportunity to consider the employer's undue hardship argument for refusing to assign the plaintiff to one of these accounts and ultimately disagreed with it. *Id.* at 140–41.

223. 679 F. Supp. 2d 109, 117 (D. Me. 2010).

224. *Id.* at 130.

225. *Id.*

tasks within a specific time limit; therefore, the court held that there was a fact issue as to whether the plaintiff should have been given more time to complete some of the more strenuous tasks, which would have accounted for breaks to accommodate his tolerance level.<sup>226</sup> Thus, there was a question of fact with respect to the undue hardship argument.<sup>227</sup>

Similarly, in *Hill v. Clayton County School District*, the court reversed summary judgment for the defendant.<sup>228</sup> The plaintiff was a bus driver for special needs students.<sup>229</sup> The bus had no air conditioning, which caused the plaintiff, who had lung disease, to have difficulty breathing in the hot Atlanta, Georgia, weather.<sup>230</sup> The school district argued that providing her an air-conditioned bus would have caused it an undue hardship because it would upset its seniority system with respect to bus allocation.<sup>231</sup> The court held that the school district did not provide any evidence to support its assertion of undue hardship.<sup>232</sup>

In *Jernigan v. Bellsouth Telecommunications, LLC*, the plaintiff was a service technician whose job duties included installing, repairing, and testing phone lines, cable, and internet.<sup>233</sup> He had an on-the-job back injury that left him unable to lift more than fifteen pounds or climb poles.<sup>234</sup> The court stated that it was a jury question whether the heavy lifting and climbing duties were essential functions, given that they comprised a very small percentage of his duties.<sup>235</sup> The court held that, given that plaintiff's supervisor testified that he did not believe that accommodating the plaintiff would cause an undue hardship, the employer had not yet presented sufficient concrete evidence to prove undue burden.<sup>236</sup> The court also stated that the purported unfairness of reassigning a minor portion of the duties of a disabled employee to other employees available to perform such duties does not make the accommodation unreasonable as a matter of law.<sup>237</sup>

One fairly progressive case is *Lovejoy-Wilson v. Noco Motor Fuel, Inc.*<sup>238</sup> In this case, the plaintiff had epilepsy and experienced seizures daily, which rendered her unable to drive.<sup>239</sup> She worked for one of the defendant's gasoline service stations, which was located six blocks from her home.<sup>240</sup> She applied

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226. *Id.*

227. *Id.*

228. 619 Fed. App'x 916, 916 (11th Cir. 2015).

229. *Id.*

230. *Id.* at 917–18.

231. *Id.* at 918.

232. *Id.* at 922.

233. 17 F. Supp. 3d 1317, 1320 (N.D. Ga. 2014).

234. *Id.*

235. *Id.* at 1324.

236. *Id.* at 1324–25.

237. *Id.* at 1324.

238. 263 F.3d 208 (2d Cir. 2001).

239. *Id.* at 213.

240. *Id.*

to be promoted to assistant manager, but the employer refused to promote her because assistant managers had to take their stores' receipts to the bank for deposit and the plaintiff could not drive.<sup>241</sup> The employer refused all of her quite reasonable accommodation requests, referred to her letter requesting accommodations as "slanderous," and threatened legal action.<sup>242</sup> The employer eventually offered her an assistant manager position at a location serviced by an armored car (thus negating the need to drive to the bank), but it was also in a bad area of town (and not close to her home).<sup>243</sup> The district court held that this accommodation was a reasonable accommodation, and therefore the employer was not required to do more.<sup>244</sup> The appellate court, however, disagreed, stating that "Congress intended that disabled persons have the same opportunities available to them as are available to nondisabled persons."<sup>245</sup> In response to the employer's argument that accommodating the plaintiff by allowing her to become assistant manager at her current store would cause an undue hardship, the court held that the employer had provided no evidence that the accommodations suggested by the plaintiff would create an undue hardship, especially in light of the fact that one of the plaintiff's suggestions was that she pay for her own transportation to the bank.<sup>246</sup>

In another appellate case, the plaintiff was a cashier at a Family Dollar store who suffered from degenerative osteoarthritis of her cervical and lumber spine, which created pain in her legs and back, making it difficult for her to sit or stand for long periods of time.<sup>247</sup> She requested a stool to sit on as an accommodation, which some of her supervisors allowed but others did not.<sup>248</sup> The court held that there was a factual dispute as to whether this accommodation would cause an undue hardship for the employer, stating that the defendant has not set forth specific facts of an undue hardship.<sup>249</sup> The court stated:

While the defendants allege that co-workers had complained about unfair treatment, given Talley's and other workers' testimony that she was

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241. *Id.*

242. *Id.* at 213–14.

243. *Id.* at 214.

244. *Id.* at 217. The district court likely based its decision on the well-known rule that an employer does not have to provide an employee with her preferred accommodation as long as the employer provides an accommodation that is effective. See cases cited in Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 56, n.222 (2013) [hereinafter Porter, *Martinizing*].

245. *Lovejoy-Wilson*, 263 F.3d at 218.

246. *Id.* at 221 (stating that it will be an uphill battle for the employer to prove that the accommodation would create any hardship at all).

247. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1103 (6th Cir. 2008).

248. *Id.* at 1103.

249. *Id.* at 1108.

able to perform her job adequately when using the stool, there is a genuine issue of material fact as to whether this accommodation would have imposed an “undue hardship” on Family Dollar . . . .<sup>250</sup>

Other cases where the court held that the defendant had not presented enough evidence to prove undue hardship at the motion for summary judgment stage included: *Kacher v. Houston Community College System*,<sup>251</sup> *Morse v. Jet-blue Airways Corp.*,<sup>252</sup> *Puckett v. Park Place Entertainment, Corp.*,<sup>253</sup> *Rooney v. Sprague Energy Corp.*,<sup>254</sup> and *Service v. Union Pacific Railroad Co.*<sup>255</sup>

The plaintiffs in the cases below were not as lucky; the courts found that the defendant *had* proven the undue hardship defense, and the courts granted the defendants’ motions for summary judgment.<sup>256</sup> For instance, in *Dey v. Milwaukee Forge*, the plaintiff had work restrictions including bending, lifting, and repetitive motions after injuring his back at work and having back surgery.<sup>257</sup> His employer considered reassignment to another position, but the

250. *Id.* at 1108–09.

251. 974 F. Supp. 615, 622 (S.D. Tex. 1997) (holding that the employer had not proven that providing the plaintiff with only classroom teaching duties and not clinical teaching duties after her liver transplant would be an undue hardship).

252. 941 F. Supp. 2d 274, 301 (E.D.N.Y. 2013) (holding that allowing the plaintiff to work as an inflight supervisor, even though her back injury precluded her from flying, was not an undue hardship because the plaintiff had worked in this job for six months without being able to fly and that the defendant offered no evidence as to the statutory undue hardship factors to substantiate its claim that allowing the plaintiff to work as an in-flight supervisor would have been unduly burdensome, especially given that other flight attendants were happy to perform her inflight observation duties).

253. No. 3:03–CV–0327–ECRVPC, 2006 WL 696180, at \*1, \*7 (D. Nev., Mar. 15, 2006) (holding that the employer’s reasons for not allowing the plaintiff (who was a cocktail waitress) to push a drink cart after her multiple sclerosis precluded her ability to carry trays did not amount to an undue hardship).

254. 483 F. Supp. 2d 43, 47, 59 (D. Me. 2007) (holding that the employer had not presented sufficient evidence to prove that accommodating the plaintiff’s macular degeneration by not making him operate large equipment would cause an undue hardship).

255. 153 F. Supp. 2d 1187, 1193 (E.D. Cal. 2001) (holding that the employer had not provided any evidence to demonstrate that providing the plaintiff (who had asthma) with a smoke-free work environment would have caused an undue hardship).

256. *See, e.g., Frumusa v. Zweigle’s, Inc.*, 688 F. Supp. 2d 176, 191–92 (W.D.N.Y. 2010) (holding that moving the plaintiff’s office to the first floor after an ankle surgery caused her to be unable to climb steps was an undue hardship because the items needed for her job, including the filing cabinets and company safe, could not be moved to the first floor); *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075, 1080 (S.D. Ga. 1995) (“Requiring a company to employ a person in a particular department while forbidding her supervisor from having any contact with her [because of her emotional disability] would be an undue burden on the employer. Such a ludicrous notion would undermine the effectiveness and authority of management. Therefore, the court dismissed plaintiff’s claim.”).

257. 957 F. Supp. 1043, 1047–48 (E.D. Wis. 1996).

court held that there was no position that could have been modified enough for the plaintiff to be able to perform the functions.<sup>258</sup> The court stated that reallocation of job duties requiring other employees to perform them would cause those employees to be unable to perform their own duties and would result in an undue hardship on the employer's business.<sup>259</sup>

Similarly, in *EEOC v. Eckerd Corp.*, the plaintiff's osteoarthritis in her knees made it difficult for her to walk without a cane or to stand for long periods of time, both of which were required of her job as a cashier for Rite Aid.<sup>260</sup> Her doctor requested that she be allowed to sit on a stool for half her shift.<sup>261</sup> Because Rite Aid operated on a lean staffing model, where employees were expected to stock and clean the store when there were no customers at the register, the court stated that "having a cashier sit idly for half of her shift would necessarily cause productiv[it]y and morale issues."<sup>262</sup> In response to the EEOC's argument that the defendant could absorb the costs of this accommodation because it employs over 80,000 employees with over 4,700 stores, the court focused on the cost of the accommodation to the particular store where the plaintiff worked.<sup>263</sup> The court stated that the plaintiff's sitting accommodation was "inconsistent with many of the essential functions of the cashier position" and would require the employer to pay the plaintiff for twice the hours that she actually worked while assigning many of her responsibilities to other employees.<sup>264</sup> "As such, the accommodation met the definition of 'undue hardship' under the ADA."<sup>265</sup>

#### D. Structural Norms Cases

By far, the most numerous of all of the undue hardship cases I read were cases involving modifications to the "structural norms" of the workplace.<sup>266</sup> The term "structural norms" refers to the hours, shifts, schedules, attendance requirements, and leave of absence policies—basically, when and where work is performed.<sup>267</sup> The frequency of these issues is not surprising, given that

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258. *Id.* at 1051–52.

259. *Id.* at 1053.

260. No. 1:10-cv-2816-JEC, 2012 WL 2726766, at \*1 (N.D. Ga. July 9, 2012).

261. *Id.* at \*1.

262. *Id.* at \*9.

263. *Id.*

264. *Id.* at \*10.

265. *Id.*

266. As mentioned, *supra* note 17, I read over 120 cases that discussed the undue hardship defense and fifty-three of them involved accommodations to the structural norms of the workplace.

267. Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 963 (2014); *see also* Porter, *Backlash*, *supra* note 8, at 70–71.

some studies indicate that the most frequently requested accommodation is an accommodation to one of these structural norms.<sup>268</sup>

Several cases involved attendance violations. In many of these cases, the court stated in rather a perfunctory manner that attendance is an essential function of the job and that requiring the employer to accommodate an employee's disability-related erratic attendance would cause an undue hardship.<sup>269</sup> Therefore, I was surprised to see the court's unprecedented discussion in this relatively early ADA case. In *Dutton*, the plaintiff worked as a laborer, truck driver, and heavy equipment operator, and he suffered from migraine headaches, which led to his termination for absenteeism.<sup>270</sup> The plaintiff's requested accommodation was to allow him to use vacation time for unscheduled absences due to illness even if he had exhausted his available sick leave.<sup>271</sup> The employer argued that this accommodation would be unreasonable and would impose an undue hardship on the employer, but the court disagreed and held that the employer had not proven that the plaintiff's proposed accommodation would cause an undue hardship.<sup>272</sup> The court reasoned that the employer had not established that regular and predictable attendance is critical to the plaintiff's particular job and that the plaintiff had not exceeded his allowed leave banks.<sup>273</sup> Thus, even though the unscheduled absences were disruptive for managers and other employees, the court held that the employer had not established that the plaintiff's unscheduled absences were *unduly* disruptive.<sup>274</sup> This case was surprising to me for several reasons. First, it was unusual for migraine headaches to have been considered a disability before the ADAAA. Second, it is fairly uncommon for a court to say that regular and predictable attendance is not important. And third, most courts would have said that the disruption caused by plaintiff's frequent unscheduled absences (which often occurred on Mondays and Fridays) *did* cause an undue hardship.

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268. Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 88 (2016) (citing Lisa Schur et al., *Accommodating Employees with and Without Disabilities*, 53 HUM. RES. MGMT. 593, 601 (2014)).

269. See, e.g., *Thomas v. Trane, A Bus. of Am. Standard, Inc.*, 2007 WL 2874776, at \*8 (M.D. Ga. Sept. 27, 2007) (stating that plaintiff's requested accommodation of a last minute excused absence whenever he needed time off for his disability would cause an undue hardship because it could potentially cause the assembly line to back up and increase overtime hours for other employees called to fill in); *Lu Frahm v. Holy Family Hosp. of Estherville, Inc.*, No. C95-3011, 1996 WL 33423407, at \*6-7 (N.D. Iowa Oct. 30, 1996) (stating that attendance is an essential function of the job and that plaintiff's proposed accommodation for flexible scheduling because of her severe migraines would impose an undue hardship on the employer).

270. *Dutton v. Johnson Cty. Bd. of Cty. Comm'rs*, 859 F. Supp. 498, 501 (D. Kan. 1994).

271. *Id.* at 507.

272. *Id.*

273. *Id.* at 508.

274. *Id.*

In *La Porta v. Wal-Mart Stores, Inc.*, another arguably plaintiff-friendly case, the court held that the plaintiff's one-day absence to pursue in vitro fertilization was a reasonable accommodation and that the employer's undue hardship defense was an issue of fact for the jury.<sup>275</sup> The court stated that the employer's arguments about the lack of substitute personnel and the need for predictable attendance are questions of fact for the jury.<sup>276</sup>

On the opposite end of the spectrum is *Switala v. Schwan's Sales Enterprise*.<sup>277</sup> In this case, the plaintiff was a route manager for a frozen food delivery company who was responsible for driving delivery trucks on sale routes and training other drivers.<sup>278</sup> The court held that the employer's refusal to accommodate one of the plaintiff's physical therapy appointments after a work-related injury did not violate the ADA because accommodating this last minute request would have meant that the delivery route did not get completed, that an inexperienced driver had to complete the route alone, or that one of two available supervisors would have had to accommodate the trainee on the delivery run.<sup>279</sup> The court held that all of these options would have caused an undue hardship on the defendants even though the employee was seeking only one absence as an accommodation.<sup>280</sup>

As I have discussed elsewhere, it is understandable that an employer would not want "to continue to employ [someone] who misses an excessive amount of work."<sup>281</sup> In these situations, employees are usually looking for one of two accommodations—either the ability to work from home or a leave of absence in order to recover or get the symptoms of their disability under control.<sup>282</sup>

Taking the latter first, at least twenty-two of these cases involved leaves of absence, with the courts regularly holding that an indefinite leave of absence would cause the employer an undue hardship<sup>283</sup> but a leave of absence with a

275. 163 F. Supp. 2d 758, 762–63, 768 (W.D. Mich. 2001).

276. *Id.* at 768.

277. 231 F. Supp. 2d 672 (N.D. Ohio 2002).

278. *Id.* at 676.

279. *Id.* at 686.

280. *Id.*

281. See Porter, *Backlash*, *supra* note 8, at 76.

282. *Id.*

283. See, e.g., *Alston v. Microsoft Corp.*, 851 F. Supp. 2d 725, 733 (S.D.N.Y. 2012) (stating that, even if plaintiff could establish his prima facie case, "requiring [the employer] to extend an indefinite leave of absence is an undue hardship"); *Graves v. Finch Pruyn & Co., Inc.*, No. 1:03-CV-266, 2009 WL 819380, at \*7 (N.D.N.Y. Mar. 27, 2009) (holding that because the employer had offered various leave and light duty accommodations for one year, and because there was "a lack of any prognosis that an additional two weeks of leave would lead to his reasonable return to work," an undue hardship was created for the employer, and therefore the employer was not obligated to provide additional leave under the ADA); *Whitaker v. Wis. Dep't. of Health Serv.*, No. 13-cv-938, 2016 WL 3693766, at \*5 (E.D. Wis. Mar. 17, 2016) (holding that plaintiff's failure to accommodate claim failed because continued medical leave was not a



set return date would not.<sup>284</sup> Often, the courts held that there was an issue of fact regarding whether the leave was indefinite or not; therefore, the courts would not grant the employers' motions for summary judgment.<sup>285</sup> And some courts simply held that the defendants had not met their burden of demonstrating that the leave of absence would cause an undue hardship.<sup>286</sup> One case made

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reasonable accommodation in that "[n]o employer is required to implement an accommodation that would impose an undue hardship" and plaintiff's leave request amounted to an open-ended leave, which would have a "substantial impact on the employer's operation"); *Ventura v. Hanitchak*, 719 F. Supp. 2d 132, 140 (D. Mass. 2010) (holding that it was an undue hardship to require the employer to hold open plaintiff's position as an executive assistant beyond the original seventeen weeks of leave, especially because it was uncertain when plaintiff would be able to return and her boss was dealing with problems caused by untrained, temporary employees); *Watkins v. J&S Oil Co., Inc.*, 977 F. Supp. 520, 521–22, 526 (D. Me. 1997) (holding that the employer was not required to hold open the plaintiff's job as a station manager while he was recovering from a heart attack because the plaintiff did not know when he would be able to return and it caused an undue hardship for the employer to leave the station manager position vacant).

284. *See, e.g.*, *Gibson v. Lafayette Manor, Inc.*, No. 05-1082, 2007 WL 951473, at \*11 (W.D. Pa. Mar. 27, 2007) (rejecting the employer's argument that the plaintiff's leave of absence would cause an undue hardship because the defendant did not present sufficient evidence that the plaintiff's leave would have been for an indefinite period of time); *Rogers v. N.Y. Univ.*, 250 F. Supp. 2d 310, 317 (S.D.N.Y. 2002) (holding that the employer's undue hardship argument failed because the plaintiff's leave could not fairly be characterized as indefinite and whether his six-week leave would cause an undue hardship was a question of fact for the jury).

285. *See, e.g.*, *Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 701–02 (E.D. Pa. 2010) (holding that it is a jury question whether plaintiff's request for leave was an indefinite amount of leave); *Moore v. Md. Dep't. of Pub. Safety & Corr. Servs.*, No. 08-4335, 2011 WL 4101139, at \*4 (D. Md. Sept. 12, 2011) (holding that the issue of whether the plaintiff's eight-month absence from her job to receive cancer treatment was a reasonable accommodation under the ADA or constituted an indefinite leave of absence that imposed an undue hardship was an issue of material fact); *Shelton v. Bridgestone Metalph, U.S.A., Inc.*, No. 3-11-0001, 2012 WL 1609670, at \*4 (M.D. Tenn. May 8, 2012) (holding that, because it was unclear whether plaintiff's request for leave was indefinite or not, the court could not hold that the employer carried its burden of demonstrating an undue hardship).

286. *See, e.g.*, *Cleveland v. Fed. Express Corp.*, 83 Fed. App'x 74, 80 (6th Cir. 2003) (stating that there was an issue of fact regarding whether providing plaintiff a leave of absence would cause an undue hardship); *Coffman v. Robert J. Young Co., Inc.*, 871 F. Supp. 2d 703 (M.D. Tenn. 2012) (holding that the defendant did not prove that providing the plaintiff with an additional unpaid leave of absence would have caused it an undue hardship, despite the fact that defendant contended that her absence created a hardship because it had to find a replacement for her); *Burress v. City of Franklin*, 809 F. Supp. 2d 795, 814 (M.D. Tenn. 2011) (holding that there was a genuine issue of material fact regarding whether granting additional leave time would have posed an undue burden on the City); *Casteel v. Charter Comm'n Inc.*, No. C13-5520 RJB, 2014 WL 5421258, at \*7 (W.D. Wash. Oct. 23, 2014) (stating that there were issues of fact regarding whether extending plaintiff's leave would impose an undue

a point that scholars often make—that it is more efficient to accommodate an employee’s leave of absence than to deal with the cost of attrition.<sup>287</sup> On the other end of the spectrum, some courts held that what seemed like a relatively short leave of absence caused an undue hardship.<sup>288</sup>

Another frequently requested accommodation when an employee’s disability prevents the employee from being physically present at work is to work from home. Obviously, for some jobs, this is not a feasible accommodation—particularly in the service, healthcare, or manufacturing industries. When it is possible, some courts allowed the plaintiff’s claim to go forward, holding that working from home does not create an undue hardship as a matter of law.<sup>289</sup>

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hardship); *Donelson v. Providence Health & Servs.*, 823 F. Supp. 2d 1179, 1190 (E.D. Wa. 2011) (holding that there was an issue of fact regarding whether additional leave caused an undue hardship because it interfered with the employer’s goal of providing its residents with continuous and consistent care or whether the unpaid medical leave caused no financial harm); *Fink v. Printed Circuit Corp.*, 204 F. Supp. 2d 119, 128 (D. Mass. 2002) (holding that, because the plaintiff’s duties might make it difficult to find a temporary replacement, there was an issue of fact as to whether accommodating his leave of absence request would cause an undue hardship); *Harper v. Honda of Am. Mfg., Inc.*, No. C-2-97-0338, 1998 WL 1788072, at \*7 (S.D. Ohio Nov. 13, 1998) (stating that the undue hardship defense is a fact-intensive, case-by-case determination so the defendant could not argue that anything more than a twelve-month leave was an undue hardship); *Rascon v. U.S. W. Commc’n, Inc.*, 143 F.3d 1324, 1335 (10th Cir. 1998) (stating that the employer could not allege undue hardship for providing a leave of absence to the plaintiff simply because the plaintiff’s duties had to be covered by his coworkers); *Shim v. United Air Lines, Inc.*, No. 11-00161 JMS-BMK2012 WL 6742529, at \*9-10 (D. Ha. Dec. 13, 2012) (holding that there was a material issue of fact regarding whether plaintiff’s unpaid leave created an undue hardship because there were questions of fact regarding (1) whether plaintiff was even in violation of the employer’s policy on leaves of absence and (2) whether an additional leave period would cause an undue hardship).

287. See *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (rejecting defendant’s argument on appeal from a jury trial in favor of the plaintiff that giving the plaintiff a leave of absence caused an undue hardship because a defense witness testified that disability leaves did not financially burden IBM in that it is always more profitable to allow an employee time to recover than to hire and train a new employee).

288. See, e.g., *Walton v. Mental Health Ass’n of S.E. Pa.*, 168 F.3d 661, 665, 671 (3d Cir. 1999) (holding that the plaintiff, who had a mental illness, was not entitled to continued leave beyond the three months she had already been given because additional leave would have created an undue hardship, despite the fact that the additional leave had a set date of return); *Pate v. Baker Tanks Gulf S., Inc.*, 34 F. Supp. 2d 411, 418 (W.D. La. 1999) (holding that plaintiff’s six-week leave of absence caused an undue hardship on the employer because customers were frustrated with the lack of knowledgeable support from the other staff during the plaintiff’s absence).

289. See, e.g., *Bisker v. GGS Info. Serv., Inc.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at \*3 (M.D. Pa. June 2, 2010) (holding that the employer “failed to meet its burden of demonstrating that the proposed accommodation [to work from home wa]s unreasonable or impose[d] an undue hardship on its business.”); *Meachem v. Memphis Light, Gas & Water Div.*, 119 F. Supp. 3d 807, 817-18 (W.D. Tenn. 2015) (holding that the defendant had not presented sufficient evidence to allow the court to analyze

Other courts held that a work from home accommodation would cause an undue hardship to the defendant.<sup>290</sup>

Several cases involved requested modifications of the hours an employee worked, either requesting fewer hours<sup>291</sup> or more flexible hours.<sup>292</sup> For instance, in *McMillan v. City of New York*, the plaintiff had schizophrenia that was treated with medication.<sup>293</sup> He was a case manager for the defendant, doing home visits, processing social assessments, and certifying clients' Medicaid eligibility.<sup>294</sup> The employer had a flex-time policy that allowed employees to arrive between 9:00-10:15 a.m., but because his medications made him drowsy, he often arrived to work late—after 11:00 a.m.<sup>295</sup> This arrangement was approved for ten years.<sup>296</sup> The employer eventually stopped allowing this

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the undue hardship factors and that without more, providing the plaintiff, who was an attorney, remote access to her files so that she could work from home when complications from her pregnancy put her on bed rest, did not create an undue hardship).

290. *See, e.g., Stanley v. Lester M. Prange, Inc.*, 25 F. Supp. 2d 581, 585 (E.D. Pa. 1998) (stating that the loss in productivity caused by plaintiff, who was a log clerk for a trucking company, working from home and the additional time it would take for truck drivers to travel to plaintiff's residence would be unduly costly to the defendant).

291. *See, e.g., Anderson v. Harrison Cty.*, 639 Fed. App'x 1010, 1015 (5th Cir. 2016) (stating that the plaintiff's request to work eight hours per day when all other corrections officers worked twelve-hour shifts caused an undue hardship); *Kralik v. Durbin*, 130 F.3d 76, 82 (3d Cir. 1997) (stating that the employer did not have to grant the plaintiff's requested accommodation of not working overtime because doing so would conflict with the collective bargaining agreement's seniority rights and would therefore cause an undue hardship); *Zieba v. Showboat Marina Casino P'ship*, 361 F. Supp. 2d 838, 844 (N.D. Ind. 2005) (holding that there are material issues of fact regarding whether plaintiff's accommodation request for shorter days would cause an undue hardship); *Butka v. J.C. Penney Co., Inc.*, 359 F. Supp. 2d 649, 669–70 (N.D. Ohio 2004) (stating that there was an issue of fact regarding whether allowing the plaintiff, who was a manager at JC Penney, to work part-time would cause an undue hardship); *Kinlaw v. Alpha Baking Co., Inc.*, No. 02 C 1014, 2003 WL 21089042, at \*6–7 (N.D. Ill. May 14, 2003) (stating that the employer could not prove that allowing the plaintiff to work six hours per day instead of ten hours per day would cause an undue hardship even though the employer argued that this accommodation required the employer to force supervisors to work extra hours); *Dropinski v. Douglas Cty.*, No. 8:00CV313, 2001 WL 1580201, at \*6 (D. Neb., Dec. 5, 2001) (holding that accommodating the plaintiff's inability to work overtime would cause an undue hardship for the employer); *Lamb v. Qualex, Inc.*, 28 F. Supp. 2d 374, 378 (E.D. Va. 1998) (stating that allowing the plaintiff to work part time would cause an undue hardship because it would eliminate an essential function of the job—working full time).

292. *See, e.g., Crabill v. Charlotte-Mecklenburg Bd. of Ed.*, 708 F. Supp. 2d 542, 547, 556 (W.D. N.C. 2010) (stating that allowing the plaintiff, who was a school guidance counselor, to have a flexible work schedule would create an undue hardship), *aff'd in part, vacated in part, and remanded to* 423 Fed. App'x 314 (4th Cir. 2011).

293. 711 F.3d 120, 123 (2d Cir. 2013).

294. *Id.*

295. *Id.*

296. *Id.*

arrangement, claiming that it could not work because there was not a supervisor present after 6:00 p.m.<sup>297</sup> The plaintiff's suggested accommodation was to work through lunch and work late in order to bank time to make up for the late arrivals.<sup>298</sup> In response to the employer's alleged undue hardship defense, the court noted that the employer already had a policy of allowing employees to bank hours if they worked more than seven hours per day and to apply those banked hours against approved late arrivals.<sup>299</sup> There was no evidence that pre-approving the plaintiff's late arrivals would cause an undue burden.<sup>300</sup> Although the court noted that the district court correctly concluded that assigning a supervisor past 6:00 p.m. would be an undue burden, the plaintiff was often unsupervised when he made home visits or when he had worked late in the past; so, there was not sufficient evidence of this arrangement causing an undue hardship.<sup>301</sup> Finally, the employer argued that its collective bargaining agreement precluded allowing employees to work through lunch unless they received advance approval.<sup>302</sup> But the court disagreed with the employer that the advanced approval mechanism would cause an undue hardship, stating that this pre-approval process would not cause "significant difficulty or expense."<sup>303</sup>

In a similar case, *Ward v. Massachusetts Health Research Institute, Inc.*, the plaintiff requested a flexible schedule as a reasonable accommodation for his arthritis.<sup>304</sup> The court stated that the defendant needed to produce evidence demonstrating that a flexible schedule would cause a hardship—financial or otherwise.<sup>305</sup> The only evidence the employer presented was that it would be burdensome to require the plaintiff's supervisor to match his schedule, but the court had already found that there was a factual dispute as to whether the plaintiff needed constant supervision to perform the functions of the job.<sup>306</sup>

The final structural norm that frequently arises in accommodation cases is a request to change the shift that the employee is scheduled to work. This is especially true when the employee is scheduled to work night shifts or rotating shifts.<sup>307</sup> For instance, in *Grubb v. Southwest Airlines*, the plaintiff, who was a flight instructor for the defendant, had sleep apnea and therefore requested afternoon-only shifts.<sup>308</sup> The employer's witnesses testified that the accommodation would impose inordinate burdens on other employees and require the

297. *Id.* at 124.

298. *Id.* at 127–28.

299. *Id.* at 128.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. 209 F.3d 29, 32 (1st Cir. 2000).

305. *Id.* at 37.

306. *Id.*

307. See generally Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 243–47 (2016) [hereinafter Porter, *Stigma*] (discussing some of these cases).

308. 296 Fed. App'x 383, 386 (5th Cir. 2008).

employer to fundamentally alter its schedules; the court agreed and held that the accommodation would cause an undue hardship and was not required.<sup>309</sup>

In prior work, I noted that most courts that had decided the issue of whether rotating shifts were an essential function of the job held that they were.<sup>310</sup> Therefore, *Holt v. Olmsted Township Board of Trustees*<sup>311</sup> was a surprising case to me. It was surprising because the court held that allowing the plaintiff, who was a civilian dispatcher for a police department, to work straight shifts instead of rotating shifts was a reasonable accommodation.<sup>312</sup> The employer argued that this accommodation would impose an undue hardship because it would make other employees work the less desirable shift more often.<sup>313</sup> The court held that this argument was just “employee grumbling” and did not rise to the level of undue hardship.<sup>314</sup> Moreover, the defendant had not presented any evidence that it would incur financial stain or difficulties in staffing if the shift change was instituted.<sup>315</sup>

#### IV. THREE NOTABLE TRENDS

As I was reviewing this body of cases, I was struck by the recurrence of three themes that were repeated over and over again in the cases. The first theme I noticed is that courts frequently struggled with differentiating between reasonable accommodations and the undue hardship defense. In other words, they held that some accommodations caused an undue hardship even when they did not meet the traditional undue hardship factors but rather seemed unreasonable for some factor other than cost.<sup>316</sup> To be clear, it is not just courts that are confused—scholars also debate the meaning of the reasonable accommodation requirement and its relationship to the undue hardship defense.<sup>317</sup>

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309. *Id.* at 388.

310. Porter, *Stigma*, *supra* note 307, at 243.

311. 43 F. Supp. 2d 812 (N.D. Ohio 1998).

312. *Id.* at 815, 823–24.

313. *Id.* at 823.

314. *Id.* at 824. In a similar case, the court held that accommodating the plaintiff’s day shift request to accommodate his psychiatric disability would not result in an undue hardship simply because other employees complained about the shift. *Vera v. Williams Hosp. Grp., Inc.*, 73 F. Supp. 2d 161, 168–69 (D.P.R. 1999).

315. *Holt*, 43 F. Supp. 2d at 825.

316. *See, e.g.*, *Arneson v. Sullivan*, 946 F.2d 90, 92 (8th Cir. 1991) (noting that an unreasonable accommodation is one that causes an undue hardship).

317. Compare Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010) (arguing that reasonable accommodations and undue hardship are flip sides of the same coin) with Porter, *Martinizing*, *supra* note 244, at 545–46 (arguing that “reasonable accommodation” has meaning and substance aside from whether or not it causes an undue hardship).

I also noted two other trends when exploring the undue hardship cases. Perhaps not surprisingly, both of these were concepts I had explored before.<sup>318</sup> First, a relatively large number of cases dealt with a concept I have identified as “special treatment stigma.”<sup>319</sup> As I will elaborate on below, special treatment stigma refers to the resentment of coworkers when accommodations given to employees with disabilities either place burdens on nondisabled coworkers or are accommodations that those nondisabled coworkers covet.<sup>320</sup> Special treatment stigma also manifests in courts often being reluctant to require employers to provide accommodations that place burdens on other employees, concluding that those accommodations create an undue hardship for the employer.

Finally, the third trend I noticed in the cases was the prevalence of a phenomenon I have called “withdrawn accommodations.”<sup>321</sup> Withdrawn accommodations refers to the situation where an employer has provided an accommodation to an employee with a disability but, after a period of time, the employer takes the accommodation away.<sup>322</sup> This happens either because the employer thought the accommodation was temporary and then realizes the employee will need it permanently or because a new supervisor comes onto the scene and disagrees with an accommodation that was previously provided.<sup>323</sup> Several of the undue hardship cases tackled this issue.

#### *A. Unreasonable Accommodation or Undue Hardship?*

As noted above, the most prominent theme in the undue hardship cases was the confusion over the meaning of the undue hardship defense in relation to the reasonable accommodation provision. Recall the statutory language, which defines discrimination to include

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate

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318. This is not surprising because we are more likely to notice things that we are already familiar with. This is called the “availability heuristic.” See Kendra Cherry, *How the Availability Heuristic Affects Decision-Making*, VERYWELLMIND (Sept. 10, 2018), <https://www.verywellmind.com/availability-heuristic-2794824>. For instance, if you are shopping for a new car, and looking at one particular model, you are much more likely to notice that model of car on the roads than you were before you had considered it.

319. See generally Porter, *Stigma*, *supra* note 307, at 217. I first coined this phrase in Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 359 (2010).

320. Porter, *Stigma*, *supra* note 307, at 233–34.

321. See generally Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885 (2015) [hereinafter Porter, *Withdrawn*].

322. *Id.* at 890.

323. *Id.* at 890 n.29.

that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity . . . .<sup>324</sup>

Courts are often confused about whether the reasonable accommodation and undue hardship provisions are simply two sides of the same coin (i.e., an unreasonable accommodation is also an undue hardship) or whether they are separate inquiries (i.e., an accommodation can be unreasonable even if it does not cause an undue hardship).

This confusion is perhaps most evident in early disability discrimination cases. In one of the cases brought under the Rehabilitation Act, the court appeared to conflate the reasonable accommodation inquiry with the undue hardship defense.<sup>325</sup> In this case, the plaintiff, who suffered from dyslexia that severely affected his ability to read, applied to work as a firefighter at West Point.<sup>326</sup> Because he could not read from the firefighters' manual as part of his physical examination, he was rejected.<sup>327</sup> In determining whether there was an accommodation that would allow the plaintiff to safely perform his duties as a firefighter despite his inability to read, the court listed the undue hardship factors.<sup>328</sup> It then immediately stated:

If, after exploring these criteria, the finder of fact believes by a preponderance of the evidence that accommodating [the plaintiff] would endanger the health or safety of the fire fighters at West Point, then such accommodation is unreasonable, and the Secretary would have shown that the West Point fire fighting force did not illegally discriminate against [the plaintiff] because of his handicap.<sup>329</sup>

In determining whether there was a reasonable accommodation that would allow the plaintiff to perform the duties of a firefighter, the court cited to the undue hardship factors and then immediately concluded that there was no accommodation that was *reasonable*.<sup>330</sup> In other words, to this court, reasonable accommodation and undue hardship were simply facets of the same inquiry.

In another early ADA case, the plaintiff suffered from stress and depression and was diagnosed with Dythmia and agoraphobia after being moved from one department to another.<sup>331</sup> The plaintiff's requested accommodation was to be allowed to remain in her department without having any contact with her

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324. 42 U.S.C. § 12112(b)(5)(A) (2018) (emphasis added).

325. See *DiPompo v. W. Point Military Acad.*, 708 F. Supp. 540 (S.D.N.Y. 1989).

326. *Id.* at 542.

327. *Id.*

328. *Id.* at 550.

329. *Id.*

330. *Id.*

331. *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075, 1078 (S.D. Ga. 1995).

supervisor.<sup>332</sup> The court stated that this was not a “reasonable accommodation” and then defined reasonable accommodation as one that “does not impose an undue hardship on the employer.”<sup>333</sup> Not surprisingly, the court held that requiring an employer to employ a person in a particular department “while forbidding her supervisor from having any contact with her would be an undue burden on the employer. Such a ludicrous notion would undermine the effectiveness and authority of management.”<sup>334</sup> Thus, the court held that the “[p]laintiff failed to request a ‘reasonable accommodation’ during her employment.”<sup>335</sup>

Other courts seem to conflate the reasonable accommodation inquiry and the undue hardship defense without much discussion at all. For instance, in *Dropinski v. Douglas County*, the plaintiff was an automotive equipment operator and was responsible for road maintenance.<sup>336</sup> After he fell at work and injured his back, he could only return to work with restrictions of no heavy lifting and no overtime.<sup>337</sup> The employer would not allow him to return and instead offered to hold open his job for one year with the hope that he would recover.<sup>338</sup> In discussing the possible accommodations that would allow him to drive the trucks without any heavy lifting and to avoid overtime, the court held that these accommodations would amount to a restructuring of the job.<sup>339</sup> The court then summarily stated: “A restructuring of the job would place an undue burden on Douglas County. Thus, Dropinski’s requested accommodations were unreasonable as a matter of law.”<sup>340</sup>

Similarly, in *Stanley v. Lester M. Prange, Inc.*, the plaintiff was a log clerk for a trucking company whose disability, a back injury, caused her to request a work-from-home accommodation, whereby the truck drivers would have to travel to her home so that she could review their logs.<sup>341</sup> In discussing why a work-from-home accommodation was not required, the court conflated the reasonable accommodation inquiry and undue hardship defense.<sup>342</sup> The court stated that, based on the fact that there were safety concerns with the drivers parking their trucks by her home, “it would certainly be unreasonable and would cause an undue hardship on the [d]efendant to allow the [p]laintiff to work at home.”<sup>343</sup> The court never discussed any cost issues at all—this is

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332. *Id.* at 1080.

333. *Id.*

334. *Id.*

335. *Id.*

336. No. 8:00CV313, 2001 WL 1580201 (D. Neb. Dec. 5, 2001).

337. *Id.* at \*1.

338. *Id.* at \*2.

339. *Id.* at \*5.

340. *Id.* at \*6.

341. 25 F. Supp. 2d 581, 582–83 (E.D. Pa. 1998).

342. *See id.* at 583–84.

343. *Id.* at 585.



another case where the court simply should have held that the accommodation was unreasonable.<sup>344</sup>

In another case, *Lamb v. Qualex, Inc.*, the plaintiff was seeking a part-time schedule as a reasonable accommodation for his disability.<sup>345</sup> Even though a “modified schedule” is listed in the statute as a possible reasonable accommodation,<sup>346</sup> courts often hold (erroneously, in my opinion)<sup>347</sup> that a request for a part-time schedule is a request to create a new position rather than to modify the hours of the current position.<sup>348</sup> The court in *Lamb* used the same analysis, stating, “The ADA does not require that an employer create a position to accommodate a disabled employee.”<sup>349</sup> The court also stated that the ADA does not “require an employer to accommodate an employee when that accommodation would impose an undue hardship on the employer.”<sup>350</sup> Nothing surprising there. But then the court stated that an “accommodation imposes an undue hardship if it requires elimination of an essential duty of the position in question.”<sup>351</sup> This is a strange statement because normally courts hold that the elimination of an essential function of the job makes the accommodation not reasonable—not that it causes an undue hardship.<sup>352</sup> And in fact, there is little

344. *See id.* 583–85. In a similar case, the court held that allowing the plaintiff to have one day off to attend physical therapy for his disability would have meant that he could not perform his job as a sales manager, which required him to ride along with delivery driver trainees on delivery routes. *Switala v. Schwan’s Sales Enter.*, 231 F. Supp. 2d 672, 677 (N.D. Ohio 2002). Accommodating his request for the day off would have meant that either the delivery route did not get completed, an inexperienced driver was sent alone, or his supervisor would have had to perform his job for him. *Id.* The court stated that “plaintiff’s last-minute request for leave was unreasonable, and accommodating it . . . would have worked an undue hardship on defendants.” *Id.* at 686.

345. 28 F. Supp. 2d 374, 378 (E.D. Va. 1998).

346. 42 U.S.C. § 12111(9)(B) (2018).

347. Porter, *Backlash*, *supra* note 8, at 79; *see also* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 62 (2005).

348. *See, e.g.*, *White v. Standard Ins. Co.*, 529 Fed. App’x 547, 550 (6th Cir. 2013); *Meinen v. Godfrey Brake Serv. & Supply, Inc.*, No. CIV. 10-5077-JLV, 2012 WL 1038676 (D.S.D. Mar. 26, 2012).

349. *Lamb*, 28 F. Supp. 2d at 378.

350. *Id.*

351. *Id.*

352. *See, e.g.*, *Mason v. Avaya Commc’ns*, 357 F.3d 1114, 1122–24 (10th Cir. 2004) (stating that working at home is unreasonable if it requires the elimination of an essential function); *Lopez v. Tyler Refrigeration Corp.*, No. 99-10637, 2000 WL 122387, at \*3 (5th Cir. Jan. 4, 2000) (holding that it was unreasonable to accommodate an employee who could not perform the essential functions of his job); *Blackard v. Livingston Parish Sewer Dist.*, No. 12–704–SDD–RLB, 2014 WL 199629, at \*8 (M.D. La. Jan. 15, 2014) (finding that the elimination of an essential function is not a reasonable accommodation); *Bogner v. Wackenhut Corp.*, No. 05-CV-6171, 2008 WL 84590, at \*5 (W.D.N.Y. Jan. 7, 2008) (holding that because rotating shifts were an essential function of the job, it was unreasonable to allow the plaintiff to avoid working rotating shifts as an accommodation). *See generally* BEFORT & PORTER, *supra* note 14, at 165.

to no discussion of the *costs* of providing the plaintiff with a part-time schedule, which is the focus of the undue hardship defense.

Similarly, in *Terrazas v. Medlantic Healthcare Group, Inc.*, after the plaintiff had back surgery, he had several physical restrictions that precluded him from performing his job.<sup>353</sup> The employer did not reassign him to another position but instead placed him on leave.<sup>354</sup> When the court was discussing his failure to accommodate claim, it stated that, because he had previously been removed from one of the positions to which he was applying due to performance problems, “it would have constituted an undue hardship to require [the employer] to reassign Mr. Terrazas to that position as an accommodation for his disability.”<sup>355</sup> The court also stated that “because the plaintiff [could not] seriously contest his inability to perform the essential functions of the front desk position irrespective of his physical disability, any accommodation the [employer] would have had to make to tailor that job’s duties to the plaintiff’s abilities would have constituted an undue hardship.”<sup>356</sup> Again, this case conflates the reasonable accommodation provision and undue hardship defense by holding that an accommodation that is unreasonable necessarily causes an undue hardship.

Many of these are older cases, where it makes some sense that the parties and courts are confused about the relationship between the reasonable accommodation provision and the undue hardship defense. But even in some more recent cases the court’s analysis revealed confusion. For instance, in *Jernigan v. Bellsouth Telecommunications, LLC*, the plaintiff was working as a service technician when he injured his back on the job, which led to restrictions of not being able to lift more than fifteen pounds and no climbing.<sup>357</sup> He was given light duty accommodations until it was determined that his injury was permanent, and then the employer refused to accommodate him.<sup>358</sup> The court’s analysis turned on whether there was a reasonable accommodation that would allow the plaintiff to perform the duties of the technician position despite his limitations on heavy lifting and climbing.<sup>359</sup> The accommodation contemplated was a manual override, or “helper tickets,” which were routinely used to have technicians dispatched “to assist other technicians in performing duties that were either technically or physically difficult for whatever reason for an employee to perform.”<sup>360</sup> The employer argued that allowing the plaintiff to use this manual override system to avoid the heavy lifting and climbing duties would cause an undue hardship.<sup>361</sup> The court stated that the employer had not

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353. 45 F. Supp. 2d 46, 48–49 (D.D.C. 1999).

354. *Id.*

355. *Id.* at 53.

356. *Id.*

357. 17 F. Supp. 3d 1317, 1320 (N.D. Ga. 2014).

358. *Id.* at 1321.

359. *Id.* at 1323–24.

360. *Id.* at 1324.

361. *Id.*

yet proven as a matter of law that this accommodation would impose an undue hardship and then stated that “the purported ‘unfairness’ of accommodations entailing reassignment of a minor portion of the duties of a disabled employee where many employees are available to perform such duties does not as a matter of law mean that the accommodation is per se unreasonable.”<sup>362</sup> Again, this case reveals the court’s confusion about the relationship between the reasonable accommodation provision and the undue hardship defense.

Arguably, this confusion should have been cleared up by the United States Supreme Court’s decision in *U.S. Airways, Inc. v. Barnett*.<sup>363</sup> In this case, the Court was called upon to resolve the conflict between a disabled employee’s right to reassignment to a vacant position as an accommodation and the superior seniority rights of other employees who also sought reassignment to the vacant position.<sup>364</sup> In doing so, the Court had to address the relationship between the reasonable accommodation provision and the undue hardship defense. The plaintiff had argued that the seniority system had nothing to do with whether the accommodation was reasonable; rather, it should only come up as part of the undue hardship analysis.<sup>365</sup> Otherwise, reasonable accommodation and undue hardship would be “virtual mirror images—creating redundancy in the statute.”<sup>366</sup> The Court disagreed with the plaintiff, stating that the statute refers to the “undue hardship on the operation of the business.”<sup>367</sup> And yet a

demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to . . . modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.<sup>368</sup>

The Court also discussed the burdens of proof for these issues. The plaintiff must show that the accommodation seems “reasonable on its face, i.e., ordinarily or in the run of cases.”<sup>369</sup> And then the employer must show case-specific

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362. *Id.* A similar issue was discussed in *Mertes v. Westfield Ford*, 220 F. Supp. 2d 904 (N.D. Ill. 2002). The plaintiff argued that he would be qualified to work as a technician if the employer directed his coworkers to perform tasks that involved heavy lifting. *Id.* at 909. The court stated that requiring that would have been so disruptive to other employees that it would have been unreasonable and that “it is well established that an accommodation that imposes an ‘undue hardship’ on an employer’s business operation need not be made.” *Id.* at 910.

363. 535 U.S. 391 (2002).

364. *Id.* at 393–94.

365. *Id.*

366. *Id.* at 400.

367. *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A) (2018)).

368. *Id.* at 400–01.

369. *Id.* at 401 (italics omitted).

circumstances to demonstrate an undue hardship under the particular circumstances.<sup>370</sup>

Thus, my reading of this case is that the Court disagreed with the idea that reasonable accommodation and undue hardship are simply two sides of the same coin. Yet, as we saw above in the discussion of the *Jernigan* case,<sup>371</sup> some courts still appear to conflate reasonable accommodation and undue hardship. Furthermore, at least one highly regarded disability law scholar also believes that reasonable accommodation and undue hardship are flip sides of the same coin. In his article, *Unreasonable Accommodation and Due Hardship*, Professor Mark Weber argued that reasonable accommodation and undue hardship are two sides of the same coin.<sup>372</sup> Specifically, relying on the “ADA’s text, its history, its agency interpretation, and its social context,” Weber argued that

reasonable accommodation and undue hardship are a single concept. The words form parts of a statutory sentence that links them together into the same statutory term. The duty to make reasonable accommodations exists up to the limit of undue hardship. At the point of undue hardship, the accommodation is no longer reasonable . . . . If “unreasonable accommodation” seems not to make sense, it is because reasonable accommodation lacks a meaning other than the absence of undue hardship. The terms should be read together, and the opposite of the one is the other. Hence the play on words to make the title of this article: There is no such thing as unreasonable accommodation or due hardship.<sup>373</sup>

Although Weber’s article made convincing arguments, I am ultimately not persuaded. In my article, *Martinizing Title I of the Americans with Disabilities Act*, I argued that reasonable accommodation and undue hardship are *not* two sides of the same coin.<sup>374</sup> Instead, I argued that “there is *some* limitation to an employer’s obligation to provide a reasonable accommodation besides the undue hardship limit. In other words, some accommodations are ‘unreasonable’ even though they do not cause an undue hardship to the employer.”<sup>375</sup> Some examples that I identified include: (1) requiring an employer to create a position for a disabled employee; (2) requiring an employer to allow a disabled employee to bump another employee out of his job; (3) requiring an employer to promote an employee with a disability; (4) requiring an employer to provide an accommodation that is of a personal nature, such as medication or assistive devices like eyeglasses or hearing aids that the employee uses in

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370. *Id.* at 402.

371. *See supra* notes 357–62 and accompanying text.

372. Weber, *supra* note 317, at 1124.

373. *Id.* at 1148.

374. Porter, *Martinizing*, *supra* note 244, at 543–58.

375. *Id.* at 545 (alteration in original).

his personal life; and (5) requiring an employer to monitor an employee's medication or health condition.<sup>376</sup> These examples are ones that are always held to be unreasonable. Similarly, there are some accommodations that are *sometimes* deemed unreasonable. For example, some courts have held that providing assistance with transportation to work is unreasonable.<sup>377</sup> Similarly, some courts have held that a work-from-home accommodation is unreasonable.<sup>378</sup>

The point of this discussion is not to argue that I am right and Weber is wrong (although I do believe that).<sup>379</sup> The point is to explain that the confusion in the cases is not that surprising even though I think it might be frustrating to litigants, their lawyers, and the courts. And I think it is heartening that *most* of the cases I have identified in this Section are early cases, decided shortly after the ADA was passed and before the Court's decision in *Barnett*. It indicates that we are hopefully on the right track.

### B. Special Treatment Stigma

The second trend I noticed in the undue hardship cases was a significant number of cases describing what I have termed "special treatment stigma." As described above, special treatment stigma arises when nondisabled coworkers are resentful of an accommodation needed by an employee with a disability either because it does (or is perceived to) place burdens on other employees or because it is an accommodation that other employees covet.<sup>380</sup> Employers are aware of this resentment (and sometimes believe the resentment is or will be worse than it actually is) and this (along with the actual or perceived costs of accommodations) causes employers to be less willing to hire or promote employees who will need accommodations (seen as "special treatment") in the workplace.<sup>381</sup> A significant portion of the undue hardship cases revealed that burdens on coworkers were a significant concern of both employers and the courts.

Before a discussion of the cases, it is important to remember that the four statutory factors of undue hardship do not explicitly mention the effect on other employees.<sup>382</sup> Only the EEOC regulations suggest that "the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business" is an additional factor that should be considered in the undue hardship analysis.<sup>383</sup> Courts often cite to this EEOC regulation when

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376. *Id.* at 546–47.

377. *Id.* at 547–49.

378. *Id.* at 549–51.

379. To be clear, our point of disagreement is pretty minor. As I argued in the *Martinizing* article, our differing analyses will nevertheless most often lead to the same result. *Id.* at 531.

380. Porter, *Stigma*, *supra* note 307, at 236–37.

381. *Id.* at 235–36.

382. See 42 U.S.C. § 12111(10)(B) (2018).

383. 29 C.F.R. § 1630.2(p)(2)(v) (2014).

holding that an accommodation does not have to be granted because of burdens it may place on other employees.

For instance, in an early ADA case, *Dey v. Milwaukee Forge*, the court discussed the employer's undue hardship defense.<sup>384</sup> It first noted that an "accommodation that would result in other employees having to work harder or longer is not required under the ADA."<sup>385</sup> The court then stated that requiring other workers to assist the plaintiff would involve a reallocation of some job duties, which would affect the ability of other employees to do their jobs.<sup>386</sup> Thus, the court declared, "Such an accommodation would impose an undue hardship on the defendant and is not required under the ADA."<sup>387</sup>

In *Mertes v. Westfield Ford*, the plaintiff argued that he would be qualified to work as a technician if the employer directed his coworkers to perform tasks that involved heavy lifting.<sup>388</sup> The court stated that providing that accommodation would have been so disruptive to other employees that it would have been unreasonable, and "it is well established that an accommodation that imposes an 'undue hardship' on an employer's business operation need not be made."<sup>389</sup> In response to the plaintiff's argument that it was not uncommon for certain tasks to be performed by the most qualified technician for that specific task, the court stated that "splitting certain jobs between technicians with different qualifications is materially different from requiring other technicians to assist a disabled employee with just about every job."<sup>390</sup>

Similarly, in *Butka v. J.C. Penney Co., Inc.*, because of the plaintiff's psychiatric disability, her doctor recommended she be allowed to temporarily work part-time in her job as a manager.<sup>391</sup> In discussing whether this would cause an undue hardship, the court discussed that while the employer had temporarily allowed her to work a part-time schedule (tasks that she normally would have done had to be reassigned to other employees), those employees would have to complete their own work plus the plaintiff's duties without any extra pay.<sup>392</sup> The defendant alleged that this "atmosphere contributed to low morale in the store and to a decline in sales volume as well."<sup>393</sup> Ultimately, however, the court found that there was a genuine issue of material fact as to whether the accommodation caused an undue hardship because the employer did not actually replace the plaintiff for six months after she was fired.<sup>394</sup> In other words, if filling in for the plaintiff's part-time schedule was really causing

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384. 957 F. Supp. 1043 (E.D. Wis. 1996).

385. *Id.* at 1052.

386. *Id.*

387. *Id.*

388. 220 F. Supp. 2d 904, 909–10 (N.D. Ill. 2002).

389. *Id.* at 910 (citation omitted).

390. *Id.*

391. 359 F. Supp. 2d 649, 665 (N.D. Ohio 2004).

392. *Id.* at 669.

393. *Id.*

394. *Id.* at 669–70.

the employer an undue hardship, presumably she would have been replaced sooner.

Other cases have held that an accommodation creates an undue hardship in part because of the special treatment stigma the accommodation causes. For instance, in *Grubb v. Southwest Airlines*, the plaintiff was a flight instructor with sleep apnea, which caused attendance problems as well as the plaintiff occasionally sleeping during meetings.<sup>395</sup> The accommodation that plaintiff requested was a set shift assignment.<sup>396</sup> The court held that such an accommodation would impose “inordinate burdens on other [Southwest Airlines] employees and require [Southwest Airlines] to ‘fundamentally alter’ its schedules” and was therefore not required.<sup>397</sup>

In *Crabill v. Charlotte-Mecklenburg Board of Education*, the plaintiff’s disability led her to request various accommodations for her position as a guidance counselor in defendant’s school district, including “a reduced student caseload, not carrying heavy materials, and not driving in the dark or on ice or snow.”<sup>398</sup> Some internal employer communications revealed concern over special treatment stigma, specifically regarding placing burdens on other employees.<sup>399</sup> At one point, the plaintiff’s manager emailed the human resources department for guidance on how to address plaintiff’s request for a workload reduction, stating that it would be hard to reduce the plaintiff’s workload because it would just be adding additional work to other counselors.<sup>400</sup> Apropos of the discussion in the above Section, the court’s analysis interchangeably referred to the plaintiff’s accommodation requests as either *unreasonable* or *causing an undue hardship*. For instance, the court held that reducing the plaintiff’s workload would have shifted these duties to other counselors in the department, thereby increasing their workload, which the court held would be an *unreasonable* accommodation.<sup>401</sup> But in discussing whether the plaintiff’s request for a flexible work schedule was reasonable, the court pointed to the fact that any students who were assigned to the plaintiff while she was absent would lead to other counselors having to see those students, which would result in an undue burden.<sup>402</sup>

Similarly, in *EEOC v. Eckerd Corp.*, the charging party (Strickland) was a cashier at a RiteAid drug store who was diagnosed with osteoarthritis of both knees, which “made it difficult for her to walk without the assistance of a cane or to stand for prolonged periods of time.”<sup>403</sup> Accordingly, when she did not have customers at the register, Strickland would occasionally sit down in a

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395. 296 Fed. App’x 383, 385 (5th Cir. 2008).

396. *Id.* at 388.

397. *Id.*

398. 708 F. Supp. 2d 542, 547–48 (W.D.N.C. 2010), *aff’d in part, vacated in part* 423 F. App’x 314 (4th Cir. 2011).

399. *Id.* at 548–49.

400. *Id.* at 551–52.

401. *Id.* at 556.

402. *Id.* at 557.

403. No. 1:10-cv-2816-JEC, 2012 WL 2726766, at \*1 (N.D. Ga. July 9, 2012).

lawn chair behind the register.<sup>404</sup> The employer was unhappy with this because the cashiers were supposed to “productively work on the sales floor . . . when they were not helping a customer at the register.”<sup>405</sup> Eventually, the employer refused to continue allowing Strickland to sit while working.<sup>406</sup>

Citing the *Dey* case discussed above, the court started its undue hardship discussion with the often-cited statement that “accommodations that result in other employees having to work harder or longer are often denied on the ground of undue hardship.”<sup>407</sup> Because the RiteAid store operated on a lean staffing model—where there are generally only one or two cashiers and a manager on duty, and the cashiers were expected to stock merchandise or clean—“having a cashier sit idly for half of her shift would necessarily cause productiv[ity] and morale issues.”<sup>408</sup> The EEOC countered that the sitting accommodation was essentially cost-free and that the defendant could easily absorb the impact caused by the accommodation because it was a large corporation with over 80,000 employees.<sup>409</sup> The court responded that the true cost of the accommodation and its impact should be judged at the store where Strickland worked.<sup>410</sup> Allowing Strickland to sit would mean that other employees would have to do her job duties, and the court held “the accommodation me[t] the definition of ‘undue hardship’ under the ADA.”<sup>411</sup>

To be clear, not all courts hold that accommodations that cause burdens on other employees create an undue hardship for the employer. In *Holt v. Olmsted Township Board of Trustees*, the court disagreed with the employer that an accommodation requiring other employees to work a less desirable shift would result in an undue hardship.<sup>412</sup> The court emphasized that “employee disapproval of a proposed accommodation, in and of itself, does not rise to the level of undue hardship.”<sup>413</sup> Neither does the fact that an accommodation would force other employees to work an altered schedule.<sup>414</sup> The court held that defendant’s evidence amounted to “employee grumbling,” which did not rise to the level of an undue hardship.<sup>415</sup> Thus, the defendant did not meet its burden of establishing an undue hardship.<sup>416</sup>

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404. *Id.*

405. *Id.*

406. *Id.* at \*3.

407. *Id.* at \*9 (citing *Dey v. Milwaukee Forge*, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996)).

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at \*10.

412. 43 F. Supp. 2d 812, 823–24 (N.D. Ohio 1998).

413. *Id.* at 824.

414. *Id.* at 825.

415. *Id.* at 824.

416. *Id.* at 825.



Similarly, in *Morse v. JetBlue Airways Corp.*, the plaintiff was an inflight supervisor, whose job included overseeing other flight attendants and supervising them during flights.<sup>417</sup> Because of back problems, the plaintiff's doctor told her that she was unable to fly.<sup>418</sup> The employer at first accommodated this restriction by asking other inflight supervisors to perform the "check rides" of flight attendants who reported to the plaintiff, which did not cause any notable problems.<sup>419</sup> Because the plaintiff could not complete the required recurrent training due to her no-flying restriction, she was placed on leave and eventually terminated.<sup>420</sup> In discussing whether the employer must allow the plaintiff to continue working as an in-flight supervisor without requiring her to fly, the court rejected the employer's undue hardship defense, stating that [the employer] "ha[d] offered no detailed evidence as to the statutory factors to substantiate that allowing plaintiff to remain employed in a non-flying capacity would have been unduly burdensome."<sup>421</sup> In response to the employer's argument that accommodating plaintiff's accommodation request would require another inflight supervisor to "perform [the] plaintiff's inflight observation duties, resulting in additional costs and loss of scheduling continuity,"<sup>422</sup> the court credited the plaintiff's evidence that other inflight supervisors "gladly took on inflight duties without resulting scheduling difficulties" and held that the accommodation did not impose an undue burden on the employer.<sup>423</sup>

Finally, in *Rodal v. Anesthesia Group of Onondaga*, the U.S. Court of Appeals for the Second Circuit reversed a district court's grant of summary judgment in favor of the employer because the district court improperly relied on the burdens placed on other employees by a schedule accommodation when finding that the employer had proved its undue hardship defense.<sup>424</sup> In this case, the plaintiff-doctor experienced problems related to a metastatic islet cell tumor—a form of cancer.<sup>425</sup> He continued working, but he could not perform night and weekend shift duty.<sup>426</sup> The employer accommodated this for a period of time but eventually refused to continue the accommodation, leading the plaintiff to take forced disability leave.<sup>427</sup> In discussing whether the requested accommodation would cause an undue hardship, the court disagreed with the district court's conclusion that requiring other physicians to cover the plaintiff's night and weekend shifts would result in an undue hardship.<sup>428</sup> The court noted that the undue hardship defense is an affirmative defense and that the

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417. 941 F. Supp. 2d 274, 278–79 (E.D.N.Y. 2013).

418. *Id.* at 280–81.

419. *Id.* at 281.

420. *Id.* at 281–83, 285.

421. *Id.* at 301.

422. *Id.*

423. *Id.* at 301–02.

424. 369 F.3d 113, 115 (2d Cir. 2004).

425. *Id.* at 116.

426. *Id.*

427. *Id.* at 116–17.

428. *Id.* at 121.

employer had never introduced evidence of its financial resources, the costs of the accommodation, or the impact of those costs on the employer.<sup>429</sup> Although the court recognized that if the plaintiff were relieved from night and weekend duty, the burden of these “not-insignificant responsibilities would fall on other doctors,” it concluded that “without concrete information,” it could not hold that “as a matter of law that the burden was so disproportionately heavy as to absolve the [employer] from its reasonable accommodation obligations under the ADA.”<sup>430</sup>

Most of these cases focused on the burden an accommodation places on other employees. But another way that special treatment stigma manifests is when employees are upset or resentful about the accommodation because it is one they also covet.

An example of this was found in *McDonald v. Menino*, which involved two plaintiffs who were physically disabled and fired by the City of Boston for “failing to comply with Boston’s municipal residency ordinance.”<sup>431</sup> One of the plaintiffs could not comply with the residency requirement because she lived with family members (who lived outside of Boston) who cared for her and she could not afford a private nurse.<sup>432</sup> The other plaintiff used a wheelchair and could not find accessible housing in Boston.<sup>433</sup> The court fairly easily rejected the employer’s undue hardship defense, noting that the employer did not specify the hardship it would have endured if forced to grant a waiver of the residency requirement.<sup>434</sup> The court noted that the plaintiffs successfully performed their jobs for ten years without any accommodation.<sup>435</sup> Instead, the court surmised that the employer “fear[ed] the deleterious precedent that an exception for these plaintiffs might pose in its efforts to enforce the residency policy on other employees.”<sup>436</sup> Ultimately, it was not decided whether the problem of enforcing the residency requirement amidst employees who obtain a waiver of the policy as an accommodation for a disability would cause an undue hardship because the employer had not yet attempted to enforce its new residency requirement on a citywide basis.<sup>437</sup>

Similarly, in *Talley v. Family Dollar Stores of Ohio, Inc.*, the plaintiff had several disabilities that made it difficult for her to stand or sit for long periods of time.<sup>438</sup> Some of her supervisors had allowed her to bring a stool to work to use at the cashier station, but others had refused to allow this accommodation,

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429. *Id.* at 122.

430. *Id.* at 122.

431. No. 96–10825–RGS, 1997 WL 106955, at \*1 (D. Mass., Jan. 3, 1997).

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at \*4.

436. *Id.*

437. *Id.*

438. 542 F.3d 1099, 1103 (6th Cir. 2008).

asserting that “other employees had complained that [the plaintiff] was receiving unfair treatment.”<sup>439</sup> Without this accommodation, the plaintiff was unable to perform her position and was forced to go on leave.<sup>440</sup> When addressing the employer’s assertion of the undue hardship defense, the court stated:

The defendants have not set forth specific facts indisputably demonstrating that the use of a stool would have presented an undue hardship for the company. While the defendants allege that other co-workers had complained about unfair treatment, given [the plaintiff’s] and other workers’ testimony that she was able to perform her job adequately when using the stool, there is a genuine issue of material fact as to whether this accommodation would have imposed an ‘undue hardship’ on Family Dollar . . . .<sup>441</sup>

Another case addressing this same resentment is *Vera v. Williams Hospitality Group, Inc.*, where the plaintiff requested to be placed on the day shift to accommodate her disability.<sup>442</sup> The employer alleged that changing the plaintiff’s shift would cause an undue hardship—specifically, that other employees who had more seniority than the plaintiff were upset by the fact that the plaintiff had been given a day shift at one point.<sup>443</sup> The court disagreed and held that there was an issue of fact regarding whether accommodating the plaintiff constituted a hardship for the defendant.<sup>444</sup> The court stated:

Although [the d]efendants state that employees with more seniority would have complained over [the p]laintiff being assigned to the day shift, the extent of such complaints is far from established. Although employee disapproval does not per se rise to the threshold of undue hardship, if such protest reaches “chaotic personnel problems,” the accommodation will result in undue hardship.<sup>445</sup>

A final case addressed this issue indirectly. In *Stone v. City of Mount Vernon*, the plaintiff was a firefighter who had an off-duty accident that left him a paraplegic.<sup>446</sup> He asked to be assigned to a light-duty position, but the employer refused.<sup>447</sup> One of the witnesses testified that the employer was con-

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439. *Id.*

440. *Id.*

441. *Id.* at 1108–09.

442. 73 F. Supp. 2d 161, 162–63 (D.P.R. 1999).

443. *Id.* at 163.

444. *Id.* at 169.

445. *Id.*

446. 118 F.3d 92, 93 (2d Cir. 1997).

447. *Id.*

cerned about assigning the plaintiff to a light-duty position permanently because it did not want to have an “overload” of disabled individuals in those jobs.<sup>448</sup> Relevant portions of this witness’ deposition testimony include:

I don’t think there’s a finer young person I ever met than [the plaintiff] and I think he would be an asset up there. I just envisioned what happens or what would happen down the road. Would we be forced to put everybody that got hurt there? Would it open the door for individuals who may already have some sort of a physical—a physical handicap who are not capable of meeting this standard[?] <sup>449</sup>

The court disagreed with the district court’s conclusion that the accommodation would cause the employer an undue hardship.<sup>450</sup> It stated:

The concern expressed by [the employer] that operations would be hampered if the Department . . . were forced to hire [five to ten] disabled persons is not material to the present case. Each request for a reasonable accommodation under the federal disability statutes must be decided on the basis of the existing circumstances. To the extent that an employer has needs for a number of persons who have no disability, the number of employees already on staff who had disabilities would be a material factor to be considered. The suggestion that hiring [five to ten] disabled persons would be an undue hardship is not a defense when the employer has hired none.<sup>451</sup>

Although the court does not say it as explicitly as it could have, the employer here was worried about special treatment stigma. The employer was worried that if it gave the light-duty accommodation to the plaintiff, it would experience a backlash from other employees who desired a similar accommodation.

As is obvious from above, courts are not consistent in how they address issues of special treatment stigma. Because the ADAAA has expanded the protected class of individuals with disabilities, we should expect to see more employees seeking accommodations. This increase in the number of individuals with disabilities seeking accommodations has the possibility to exacerbate special treatment stigma, as employers struggle to find ways to accommodate more employees and those accommodations place burdens on other employees.<sup>452</sup> But it is also possible that, if providing accommodations becomes the new normal, employees might become accustomed to accommodating each other.<sup>453</sup> And perhaps more importantly, employers might start restructuring

448. *Id.* at 95.

449. *Id.* (first alteration in original).

450. *Id.* at 100–01.

451. *Id.* at 101.

452. Porter, *Stigma*, *supra* note 307, at 254–55.

453. *Id.* at 257–58.

their workplaces to provide accommodations more easily to all employees who need them.<sup>454</sup>

### C. *Withdrawn Accommodations*

The third trend I noticed in the undue hardship cases was what I refer to as “withdrawn accommodations.” As I stated above, withdrawn accommodations are when an employer has provided an accommodation to an employee with a disability but, after a period of time, the employer takes it away. This often happens either because what the employer thought was a temporary accommodation has become permanent or because a new supervisor comes onto the scene and disagrees with an accommodation that was previously provided.<sup>455</sup>

As I discussed in other work, which explored whether employers who had withdrawn previously-provided accommodations violated the ADA, courts vary on what weight they give to the fact that an employer had previously accommodated a disabled employee.<sup>456</sup> Some courts hold that the fact an employer previously offered an accommodation indicates that the accommodation is reasonable.<sup>457</sup> Other courts hold that just because an employer was kind enough to provide an accommodation on a trial basis does not mean that the employer should be obligated to continue providing it once the accommodation becomes permanent or has started to cause a hardship.<sup>458</sup>

Several of the undue hardship cases I reviewed for this Article tackled this issue. Because my prior Article discovered that this issue of withdrawn accommodations was more often decided in favor of employers, I was shocked that *all* of the undue hardship cases addressing this issue ruled in favor of the plaintiffs—denying the employer’s dispositive motions and allowing the plaintiff’s claim to survive to be litigated another day. Perhaps this had something to do with the fact that the undue hardship argument was not very strong in the first place. In other words, the employer might have been better off arguing that the accommodation was simply unreasonable rather than arguing that the accommodation caused an undue hardship.

For instance, in *EEOC v. Placer ARC*,<sup>459</sup> the defendant (a non-profit organization that provided programs for individuals with disabilities) hired the plaintiff, who was deaf, as an instructional aide. Her job requirements “included reading information in client files, creating reports detailing the client’s behavior, and creating daily reports.”<sup>460</sup> The employer provided an American

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454. *Id.* at 258–59.

455. Porter, *Withdrawn*, *supra* note 321, at 890, 890 n.29.

456. *Id.* at 896.

457. *Id.* at 890–12 (citing cases).

458. *Id.* at 896–905 (citing cases).

459. 114 F. Supp. 3d 1048, 1053 (E.D. Cal. 2015).

460. *Id.*

Sign Language (“ASL”) interpreter for almost every meeting the plaintiff attended.<sup>461</sup> Later, the employer transferred the plaintiff to a different location, where she was only occasionally provided an ASL interpreter and accordingly was confused and frustrated.<sup>462</sup> The plaintiff sent a letter requesting a sign language interpreter for any meetings as a reasonable accommodation, but it is unclear from the facts if the request was ever granted.<sup>463</sup> Eventually, the plaintiff resigned, claiming that the lack of a sign language interpreter, among other things, prevented her from doing her job well.<sup>464</sup>

The employer raised an undue hardship defense and supported it with submitted declarations, which stated that “a financial hardship [was] posed by hiring a certified ASL interpreter.”<sup>465</sup> In response, the court stated that “the fact that defendant retained an interpreter for at least some staff meetings from 2005 to 2008 . . . , and hired [another employee] at least in part to serve as an interpreter, undermine[d] its showing of hardship.”<sup>466</sup>

Similarly, in *Morse v. JetBlue Airways Corp.*, the plaintiff requested an accommodation that would allow her to continue as an in-flight supervisor even though she could no longer fly on planes.<sup>467</sup> Among the many factors the court considered in deciding that the plaintiff’s suggested accommodation did not cause an undue hardship on the employer, the court noted “the fact that [the] plaintiff satisfactorily worked for defendant for six months in a non-flying capacity suggest[ed] that [the] plaintiff’s accommodation request would not have been unduly burdensome on defendant.”<sup>468</sup>

In another case, the court was not as explicit about its reasoning but ultimately ruled in favor of the employee on his failure-to-accommodate claim. In *Jernigan v. Bellsouth Telecommunications, LLC*, the plaintiff was a service technician for the defendant-employer when he suffered an on-the-job injury that resulted in a back impairment restricting his ability to lift more than fifteen pounds and to climb poles.<sup>469</sup> When he returned from leave he was given light-duty accommodations, which entailed the company assigning him his regular tasks and then “manually overriding or accommodating assignments that required heavy lifting or [pole] climbing.”<sup>470</sup> Once supervisors learned that the plaintiff’s injury would be permanent, the employer withdrew the accommodations, claiming that it was company policy to not accommodate a permanent

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461. *Id.* at 1053.

462. *Id.* at 1053–54.

463. *Id.* at 1054.

464. *Id.* at 1055.

465. *Id.* at 1059.

466. *Id.* (citation omitted).

467. 941 F. Supp. 2d 274, 283 (E.D.N.Y. 2013).

468. *Id.* at 301.

469. 17 F. Supp. 3d 1317, 1321 (N.D. Ga. 2014).

470. *Id.* at 1320–21.

disability.<sup>471</sup> Eventually the plaintiff exhausted his leave and was terminated.<sup>472</sup> Although the court did not discuss the withdrawn accommodation explicitly, it did require the employer to actually prove that the previously provided accommodation would cause an undue hardship if given permanently.<sup>473</sup>

Similarly, in *McMillan v. City of New York*, the plaintiff was a case manager for his employer and he had schizophrenia, which was treated with medication.<sup>474</sup> His morning medications made him drowsy and he often arrived late to work.<sup>475</sup> His tardy arrivals were explicitly or tacitly approved for at least ten years; however, eventually the plaintiff's supervisor (at the request of *her* supervisor) refused to approve any more late arrivals, simply stating that she "wouldn't be doing [her] job if [she] continued to approve a lateness every single day."<sup>476</sup> After this practice was stopped, the plaintiff made several requests for a later start time to avoid being disciplined for tardiness.<sup>477</sup> He was told that it was not possible "because he could not work past 6:00 p.m. without a supervisor present."<sup>478</sup> His tardiness led to a thirty-day suspension without pay.<sup>479</sup>

When analyzing whether on-time arrival was an essential function of his position, the court initially stated that his suggested accommodation of working through lunch and working late in order to bank time, and then using this banked time against future late arrivals, was a plausible accommodation.<sup>480</sup> Analyzing the undue hardship issue, the court held that assigning a supervisor to work past 6:00 p.m. would constitute an undue hardship.<sup>481</sup> But the court noted that the plaintiff "was presumably unsupervised when he made home visits for his clients or when he worked past 7:00 p.m." from home.<sup>482</sup> It was unclear whether those hours could be banked.<sup>483</sup> The court also noted that even if he could not bank post-6:00 p.m., he was willing to work through his lunch and could bank that time.<sup>484</sup> The court disagreed with the district court, which had held that because the collective bargaining agreement had a provision that precluded employees from working through lunch unless they received advance approval, this accommodation would cause an undue hardship.<sup>485</sup> The court stated that such pre-approval did not strike it as "requiring significant

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471. *Id.* at 1321.

472. *Id.*

473. *See id.* at 1324.

474. 711 F.3d 120, 123 (2d Cir. 2013).

475. *Id.*

476. *Id.* at 123–24 (alterations in original).

477. *Id.* at 124.

478. *Id.*

479. *Id.*

480. *Id.* at 127–28.

481. *Id.* at 128.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

difficulty or expense.”<sup>486</sup> Thus, the court stated that it could not find as a matter of law that the plaintiff’s “suggested accommodations would constitute undue hardships to the [employer].”<sup>487</sup> Thus, even though the court did not analyze this under the rubric of “withdrawn accommodations,” it did seem willing to consider the past history of the plaintiff being allowed to bank time to make up for his late arrivals.

Finally, in another case of withdrawn accommodations, the court in *Talley v. Family Dollar Stores of Ohio, Inc.*, held in favor of the plaintiff, reversing the district court’s grant of summary judgment in favor of the employer-defendant.<sup>488</sup> In this case, the plaintiff suffered from degenerative osteoarthritis of her spine, which caused pain in her legs and back that made it difficult for her to stand for long periods of time.<sup>489</sup> After she fell at work, the pain was so bad that “she could not stand for more than fifteen minutes without experiencing severe pain.”<sup>490</sup> Accordingly, some of her supervisors allowed her to bring a stool to work to use at her cashier station.<sup>491</sup> Eventually the employer withdrew that permission, and because she could no longer perform the tasks of her position, she was forced to take medical leave.<sup>492</sup> Although the court never explicitly discussed the fact that the accommodation had been previously provided and then withdrawn, the court did rule that the employer had not established the undue hardship defense.<sup>493</sup>

## V. CONCLUSION

The undue hardship defense is an instrumental piece of the reasonable accommodation puzzle under the ADA. And yet, it has received much less attention in case law than the other components of the reasonable accommodation analysis, such as determining the essential functions of the job, exploring whether an accommodation is reasonable, and analyzing whether the employer engaged in the interactive process. The undue hardship provision has also received very little attention by scholars. After the ADAAA made it much more likely that cases would proceed to a discussion of the merits—including discussions of reasonable accommodations and the correlating undue hardship defense—it seemed time to give the undue hardship defense a closer look.

What I found was both surprising and unsurprising. It was surprising that, at first glance, there seemed to be so many undue hardship cases.<sup>494</sup> But, upon

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486. *Id.*

487. *Id.* at 128–29.

488. 542 F.3d 1099, 110 (6th Cir. 2008).

489. *Id.* at 1103.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* at 1110.

494. As stated earlier, a Westlaw search (as of June 18, 2017) of “ADA /s ‘undue hardship’” resulted in 1,997 results. *See supra* note 16.



closer look, only 120 of them actually discussed the undue hardship provision at any length, which was still more than I had expected to find. And yet, an even closer look revealed that only sixteen of them actually involved costs,<sup>495</sup> which is the main focus of the statutory language of the ADA's undue hardship defense.<sup>496</sup> This is because accommodations that are truly expensive are rare, and the reasons that most employers object to accommodations are because they appear to interfere with the business or, more likely, because of special treatment stigma. So, the fact that there were so few cases that actually discussed costs was not surprising.

Finally, the three themes identified in this Article were also not surprising to me even though I did not begin this project looking for them. Courts and scholars will continue to be confused by, or to debate, the interrelationship between the reasonable accommodation provision and the undue hardship defense. The reluctance to provide accommodations when those accommodations seem like special treatment will continue to vex employers and courts. Finally, courts will continue to struggle with how to analyze the situation where an employer provides an accommodation for a period of time and then takes it away.

In sum, even though my initial gut reaction that the undue hardship provision played a fairly limited role in determining if and when employers have to provide accommodations to individuals with disabilities was correct, the instances where it does play a role in the outcome provide crucial insight into the broader question of when employers are obligated to accommodate individuals with disabilities.

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495. *See supra* Section III.B.

496. 42 U.S.C. § 12111(10)(B) (2018).