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Nicole Buonocore Porter

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Special Treatment Stigma After the ADA Amendments Act

Nicole Buonocore Porter*

Abstract

This Article explores a unique source of stigma suffered by individuals with disabilities in the workplace. Instead of focusing on those with the most stigmatizing disabilities, I focus on those individuals who have disabilities that are not perceived as very severe, yet they still suffer stigma. These individuals are stigmatized because of the special treatment they receive (or are perceived as receiving) through workplace accommodations provided pursuant to the Americans with Disabilities Act (ADA). In prior work, I have called this phenomenon “special treatment stigma,” the harm that arises from receiving special treatment in the workplace, especially when coworkers believe that the special treatment is unwarranted or unfair. In this Article, I explore the scope and magnitude of the harm experienced by individuals with disabilities because of special treatment stigma. This stigma not only manifests itself in resentment and other negative treatment of individuals with disabilities by their coworkers, but it also can cause employers to avoid accommodations that place any burdens on other employees, which limits the ability to accommodate the employee with the disability. After describing the concept of special treatment stigma, this Article turns to exploring whether the ADA Amendments Act will exacerbate or improve the problem of special treatment stigma. Because the ADA Amendments Act has made it much easier to prove that an individual has a disability and therefore might be entitled to a reasonable accommodation, it is likely that there will be many more individuals requesting and receiving

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workplace accommodations. Thus, this increase in accommodations could exacerbate the problem of special treatment stigma, especially if some of these individuals have what are perceived as relatively minor impairments. On the other hand, as more individuals are considered disabled under the ADA, we could possibly see a growing acceptance of individuals with disabilities; thus, requesting and receiving accommodations might become the “new normal.”

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I. INTRODUCTION

There is no doubt that individuals with disabilities suffer from stigma, bias, exclusion, and sometimes even harassment and bullying in many different settings—schools, public accommodations such as restaurants and stores, and in the workplace.¹ As has been well documented by others, some of the most stigmatizing disabilities include infectious diseases such as

1. JODY HEYMANN, MICHAEL ASHLEY STEIN & GONZALO MORENO, *DISABILITY & EQUITY AT WORK* 1–14 (2014).

HIV,² mental disabilities,³ severe intellectual disabilities,⁴ and cosmetic disfigurements.⁵ But even when an individual has a disability that is not seen as very severe or stigmatizing, and sometimes is even invisible, this individual may still suffer from stigma and bias in the workplace. This Article argues that the reason individuals with less severe disabilities are stigmatized and resented is because of the special treatment they receive in the workplace in the form of reasonable accommodations.⁶

The Americans with Disabilities Act (ADA) requires employers to grant reasonable accommodations to qualified individuals with disabilities unless the employer can prove that an accommodation would cause an undue hardship.⁷ Accommodations can take many forms.⁸ Some individuals might need a stool to sit on because they cannot stand for their entire shift. Others might need additional breaks to adequately monitor and treat their diabetes. A visually impaired employee might need enlarging software on his computer to accommodate his vision impairment. Coworkers of individuals with disabilities are unlikely to object to any of these accommodations.⁹

2. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 634 (1998) (discussing HIV); *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 281–82 (1987) (discussing tuberculosis).

3. See generally Michael L. Perlin, “What’s Good Is Bad, What’s Bad Is Good, You’ll Find Out when You Reach the Top, You’re on the Bottom”: *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than “Idiot Wind?”*, 35 U. MICH. J.L. REFORM 235 (2002) (discussing the stigma associated with mental disabilities).

4. See generally Peter David Blanck, *The Emerging Work Force: Empirical Study of the Americans with Disabilities Act*, 16 J. CORP. L. 693 (1991) (discussing intellectual disabilities).

5. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 113–26 (2005) (discussing the second way of establishing a “regarded as disabled” claim, using the example of a cosmetic disfigurement that does not limit the employee but causes coworkers or the public to shun the individual).

6. 42 U.S.C. § 12112(a), (b)(5)(A) (2012).

7. *Id.* § 12112(a), (b)(5)(A).

8. The statute states that reasonable accommodations include:

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

Id. § 12111(9).

9. To be clear, all of these accommodations can have effects on other employees. See generally Nicole Buonocore Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313 (2007).

But reasonable accommodations can also include part-time or modified schedules, the elimination of non-essential tasks of the job, and reassignment to a vacant position.¹⁰ All of these accommodations can cause coworkers to resent the individuals who receive these accommodations for two reasons. First, other employees might also want these types of accommodations. A woman with small children might prefer a modified or part-time schedule. An employee who is not very strong might want to avoid some non-essential tasks of the job that are physically arduous. And other employees might covet the vacant position that is given to the individual with the disability. Second, the coworkers of the individual with a disability who receives accommodations might resent the accommodated employee because the accommodation given will cause burdens on his coworkers. For instance, if an employer does not require an individual with a disability to perform a non-essential (but perhaps physically arduous) task, coworkers will likely be called upon to perform the task more frequently. If an employee with a disability receives a modified or reduced-hour schedule, the employer might require other employees to fill in for the disabled employee when she is not there.

This Article will explore the effects of this problem—what I refer to as “special treatment stigma.”¹¹ My goal is to both describe the negative effects of special treatment in the workplace and to analyze whether this stigma is likely to change in light of the fairly drastic expansion of the coverage of the ADA after the ADA Amendments Act¹² (“ADAAA” or “Amendments”) was passed in 2008. As others and I have discussed, the ADAAA has made it much easier for an individual to establish that he meets the threshold coverage issue of being an “individual with a disability,” as that term is defined in the ADA.¹³ The question, therefore, is what effect the increased coverage will have on special treatment stigma. Because of the

10. 42 U.S.C. § 12111(9).

11. I first described this phenomenon in 2010. Nicole Buonocore Porter, *Why Care About Caregivers: Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 KAN. L. REV. 355, 359 (2010) [hereinafter Porter, *Why Care*]; see also Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099 (2014) [hereinafter Porter, *Mutual Marginalization*].

12. ADA Amendments Act of 2008, 42 U.S.C. §§ 12101–213.

13. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 199–204 (2010); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 19–46 (2014) [hereinafter Porter, *Backlash*]; Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 536–37 (2013) [hereinafter Porter, *Martinizing*].

increased coverage of the ADAAA, it is likely that there will be many more individuals requesting and receiving workplace accommodations. One might argue that these increased numbers could exacerbate the problem of special treatment stigma, especially if some of these individuals have what is perceived to be a relatively minor impairment. Alternatively, as more individuals are perceived to have a disability under the ADA, we could possibly see a growing acceptance of individuals with disabilities and requesting and receiving accommodations might become the “new normal.”

This Article will proceed in four additional parts. Part II will first set out the basic structure of the ADA and its reasonable accommodation provision. This Part will then turn to the significant changes in the ADAAA and will also take a preliminary look at the effect it has had on the case law. Part III will explore the harm of special treatment stigma. I will first describe what I mean by special treatment stigma and how it manifests itself in the workplace. I will then turn to a more detailed description of some of the facts of the cases where this stigma is most prevalent, giving the reader a flavor of how this stigma affects individuals with disabilities. Part IV will hypothesize about the future of this type of stigma in the workplace, specifically whether the stigma is likely to increase as more employees are receiving accommodations or dissipate as “disability” becomes more normalized. Part V will conclude.

II. THE ADA AND ITS AMENDMENTS

This Part will briefly describe the history and structure of the ADA, including some of the most prominent cases decided under the ADA. It will then turn to the significant changes the ADA Amendments Act brought to the definition of disability. Finally, it will briefly summarize the case law since the ADAAA was enacted.

A. The Americans with Disabilities Act

1. The ADA’s Primary Provisions¹⁴

The ADA was passed in 1990 with overwhelming bipartisan support in

14. This sub-part is derived in part from prior work. Porter, *Backlash*, *supra* note 13, at 15–18.

Congress.¹⁵ It was the first statute to prohibit discrimination based on disability in the private sector.¹⁶ There are two unique features of the ADA. First, unlike Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, and national origin¹⁷ and protects *all* individuals from discrimination based on those categories,¹⁸ the ADA only provides protection to a particular class of individuals—those who can show that they meet the definition of disability.¹⁹ An “individual with a disability” is defined as someone who has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment.²⁰ As will be discussed below, prior to the ADAAA, the courts narrowly interpreted the definition of disability, which resulted in a very restricted class of those who were entitled to protection of the ADA.²¹

The second unique feature of the ADA is the reasonable accommodation provision,²² which requires employers to accommodate individuals with disabilities if those individuals need an accommodation to allow them to perform the essential functions of the position.²³ This affirmative obligation, in addition to the negative prohibition against discrimination based on disability, is what makes the ADA unique.²⁴ However, it is likely that this same provision has caused courts to narrowly construe the definition of disability under the ADA. In past work, I have argued that courts’ reluctance to make employers broadly restructure a job or the physical workspace and the difficulty in determining which accommodations are

15. See, e.g., Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008).

16. COLKER, *supra* note 5, at 19.

17. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

18. Porter, *Martinizing*, *supra* note 13, at 535–36.

19. Porter, *supra* note 9, at 316.

20. 42 U.S.C. § 12102(2).

21. See, e.g., Cox, *supra* note 13, at 201; Long, *supra* note 15, at 220; Ani B. Satz, *Symposium: Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 983–84 (2010).

22. Porter, *supra* note 9, at 316. Title II and Title III of the ADA contain similar provisions, referred to as the “reasonable modification” provision.

23. 42 U.S.C. § 12112(a), (b)(5)(A).

24. SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 34 (2009); Nicole Buonocore Porter, *Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos*, *Law and the Contradictions of the Disability Rights Movement*, 20 CORNELL J.L. & PUB. POL’Y 761, 770 (2011).

reasonable has contributed to courts narrowly construing the definition of disability.²⁵ In other words, if the plaintiff never proceeds past the coverage question, the court never has to answer the more difficult question of whether the plaintiff should succeed on the merits, which often involves an issue of whether the employer is obligated to provide a reasonable accommodation to the employee.²⁶

2. The Courts' Narrow Construction of Disability Under the ADA²⁷

Since 1998, three Supreme Court cases defining disability drastically narrowed the scope and size of the protected class under the ADA. In what has been referred to as the *Sutton* trilogy of cases, the Court held that courts must consider the ameliorative effects of mitigating measures when deciding whether an individual has a disability.²⁸ The *Sutton* case involved twin sisters with severe myopia who applied for positions as global airline pilots for United Airlines.²⁹ They were both rejected because their uncorrected vision did not meet United Airlines' requirement of uncorrected vision of 20/100, even though they both had 20/20 vision with glasses or contacts.³⁰ The Court held that the Sutton sisters were not protected by the ADA because the determination of whether they were disabled must be made considering any mitigating measures, which in that case, included their corrective eyewear.³¹

The Supreme Court decided two other cases on the same day as *Sutton*. In *Murphy v. United Parcel Service*,³² the plaintiff, a mechanic for UPS who had high blood pressure, was terminated when he failed the Department of Transportation's (DOT) medical certification because of his high blood pressure. Even though Murphy was not a UPS driver, his job as a mechanic required that he occasionally drive the trucks, which necessitated the DOT certification.³³ The Court applied the mitigating measures rule it has just

25. Porter, *Martinizing*, *supra* note 13, at 542.

26. *Id.*

27. This sub-part is derived in part from prior work. Porter, *Backlash*, *supra* note 13, at 9–12.

28. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 477–78 (1999).

29. *Id.* at 475.

30. *Id.* at 476.

31. *Id.* at 488.

32. 527 U.S. 516 (1999).

33. *Id.* at 519–20.

announced in *Sutton* and held that, in determining whether Murphy had a disability under the ADA, he must be viewed in his mitigated state, which means considering the medication he takes for his high blood pressure.³⁴ In *Albertson's, Inc. v. Kirkingburg*,³⁵ the third of the trilogy of cases, the Court held that the plaintiff, who had monocular vision, might not be disabled when considering that his brain can mitigate his vision impairment by developing techniques to cope with his monocular vision.³⁶

As several scholars have discussed, after the Court's announcement of the mitigating measures rule, the lower courts used this rule to hold that many impairments were not disabilities because those impairments, in their mitigated state, did not cause any substantial limitation on major life activities.³⁷ For instance, if an employee has diabetes and must regulate his blood sugar by a closely monitored regimen of eating frequent and proper meals, testing blood sugar levels, and occasionally using insulin to regulate the blood sugar, courts have often held that such an employee is not disabled because, in his mitigated state, his diabetes does not cause any long-lasting physical problems.³⁸

A few years after the *Sutton* trilogy of cases, the Court struck a further blow against ADA plaintiffs in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.³⁹ In this case, the Court clarified the proper meaning of "substantially limits" and "major life activities." The Court held that when looking at the major life activity of "manual tasks," those tasks have to be of "central importance to most people's daily lives."⁴⁰ Furthermore, the Court defined "substantially limits" as "considerable" or "to a large degree,"⁴¹ stating: "We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central

34. *Id.* at 521.

35. 527 U.S. 555 (1999).

36. *Id.* at 565–66.

37. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J.C.L. & C.R. 187, 192–93 (2008); Long, *supra* note 15, at 220 (stating that, as a result of the mitigating measures rule, "numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA"); Porter, *supra* note 24, at 771.

38. See, e.g., *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002).

39. 534 U.S. 184 (2002).

40. *Id.* at 197.

41. *Id.* at 196.

importance to most people's daily lives. The impairment's impact must also be permanent or long term."⁴²

Between the mitigating measures rule in *Sutton* and the more stringent test for substantially limiting a major life activity in *Toyota*, the protected class was drastically narrowed. Conditions such as diabetes,⁴³ cancer,⁴⁴ AIDS,⁴⁵ bipolar disorder,⁴⁶ multiple sclerosis (MS),⁴⁷ monocular vision, epilepsy,⁴⁸ cerebral palsy,⁴⁹ intellectual disability,⁵⁰ and many others were found not to be disabilities under the original statute.⁵¹

B. *The ADA Amendments Act*⁵²

Dissatisfied with the narrow interpretation courts had given to the definition of disability under the original ADA, Congress amended the statute to bring the coverage of the statute into line with the high expectations for the original ADA.⁵³ Although there were several attempts at amendments,⁵⁴ George W. Bush signed the ADAAA into law on September 25, 2008, and it went into effect on January 1, 2009.⁵⁵ As summarized by Professor Alex Long in one of the first articles written about the Amendments:

42. *Id.* at 198.

43. *See Orr*, 297 F.3d at 724.

44. Long, *supra* note 15, at 218 (discussing one particularly egregious case where, after the plaintiff had died from cancer, the court still decided that he was not substantially limited in a major life activity); Satz, *supra* note 21, at 984.

45. Long, *supra* note 15, at 218.

46. *Id.*

47. Satz, *supra* note 21, at 984.

48. *Id.*

49. Cox, *supra* note 13, at 200 & n.63 (citing *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762 (10th Cir. 2006)).

50. *Id.* at 200 & n.64 (citing *Littleton v. Wal-Mart Stores, Inc.*, Fed. App'x 874 (11th Cir. 2007)).

51. Feldblum et al., *supra* note 37, at 193.

52. This sub-part is derived in part from prior work. Porter, *Backlash*, *supra* note 13, at 15–18.

53. Long, *supra* note 15, at 217 (stating that expectations for the original ADA had been very high).

54. *See generally* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267 (2009) (discussing the differences between the earlier proposed amendments and the amendments that were finally enacted).

55. Long, *supra* note 15, at 217; *see* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, 256 N.J. LAW. 37, 37 (2009).

The ADAAA's most important revisions involve the definition of disability. These revisions include instructions to the courts regarding how the terms of the Act should be interpreted; attempted clarification to the Act's "substantially limits" language; expansion of the "major life activities" concept; and dramatic changes to the Act's "regarded as" prong.⁵⁶

The ADAAA does not change the basic definition of actual disability: "[A] physical or mental impairment that substantially limits one or more major life activities."⁵⁷ Instead, the ADAAA includes several rules of construction to help courts interpret the definition of disability.⁵⁸ The ADAAA makes clear Congress disagreed with both the "demanding standards" language in *Toyota* as well as the mitigating measures rule announced in *Sutton* and its progeny.

The ADAAA mandates that the Court's "demanding standards" language in *Toyota* was incorrect, and thus, the ADA should be interpreted in favor of broad coverage.⁵⁹ As discussed above, in *Toyota*, the Court defined the phrase "substantially limits one or more . . . major life activities" to mean "prevent[ing] or severely restrict[ing] the individual from doing activities that are of central importance to most people's daily lives."⁶⁰ Although there was debate on how to define "substantially limits,"⁶¹ Congress ultimately chose to leave the term undefined and put the power in the hands of the Equal Employment Opportunity Commission (EEOC) to define this term, with the admonition that it is "Congress's expectation that the EEOC will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this Act, including the Amendments made by this Act."⁶²

The ADAAA also overrules *Sutton* by expressly rejecting the mitigating

56. Long, *supra* note 15, at 218.

57. 42 U.S.C. § 12102(1)(A) (2012).

58. Anderson, *supra* note 54, at 1287–88.

59. Long, *supra* note 15, at 219.

60. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 187, 198 (2002).

61. Anderson, *supra* note 54, at 1285–86 (discussing the fact that the old version of the Amendments, which would have been called the Americans with Disabilities Restoration Act, would have gotten rid of any reference to substantial limitation of major life activities). In other words, as long as the individual had an impairment, the individual would be considered to have met the definition of disability. *Id.*

62. 42 U.S.C. § 12102(4)(B); Long, *supra* note 15, at 219–20.

measures rule announced in that case.⁶³ The ADAAA states that a court should determine “whether an impairment substantially limits a major life activity ‘without regard to the ameliorative effects of mitigating measures.’”⁶⁴ The one exception to this rule is that courts can consider ordinary eyeglasses or contact lenses in determining whether an individual is disabled.⁶⁵ However, Congress also added a section stating that if an employer has a qualification standard based on uncorrected vision, the employer has to justify the standard as being job related and consistent with business necessity.⁶⁶

The ADAAA also makes changes to the major life activities provision.⁶⁷ The original ADA did not define major life activities, and the EEOC’s promulgated list was very brief, which led to much litigation regarding which activities qualified as major life activities.⁶⁸ The ADAAA makes several changes to this provision.⁶⁹ First, it clarifies that if an impairment limits one major life activity, it need not limit other major life activities.⁷⁰ Second, the ADAAA rejects the Supreme Court’s “demanding standards” language announced in *Toyota* in favor of a looser standard that “major” should not be interpreted strictly.⁷¹ Third, the ADAAA provides a non-exhaustive list of major life activities, but one that is much broader than the list in the EEOC’s regulations.⁷² Additions to the prior list include: “eating, sleeping, . . . standing, lifting, bending, . . . reading, concentrating, thinking, [and] communicating.”⁷³

Very significantly (and ingeniously, in my opinion), Congress defined “major life activity” to include “major bodily functions,” including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and

63. Long, *supra* note 15, at 220.

64. § 12102(4)(E)(i); Long, *supra* note 15, at 220–21.

65. § 12102(4)(E)(ii); Long, *supra* note 15, at 221.

66. § 12113(c).

67. Long, *supra* note 15, at 222.

68. *Id.*

69. *Id.*

70. § 12102(4)(C); Long, *supra* note 15, at 222.

71. § 12102(4)(A); Long, *supra* note 15, at 222.

72. § 12102(4)(A); Long, *supra* note 15, at 222.

73. § 12102(2)(A); Long, *supra* note 15, at 222.

reproductive functions.”⁷⁴ These bodily functions basically track many of the impairments that some courts previously held were not disabilities—impairments such as diabetes (endocrine); HIV (immune system); cancer (normal cell growth); MS (neurological); and high blood pressure (circulatory).⁷⁵

Congress also addressed the situation where an individual has an impairment that is episodic in nature.⁷⁶ The ADAAA states that if an impairment is substantially limiting when it is active, it is still considered substantially limiting even when it is in remission.⁷⁷ This is very significant for impairments like MS where periodic flare-ups are common. Combined with the “major bodily functions” addition to the major life activities provision discussed above, these provisions will make it much easier for courts to hold that some episodic impairments, such as cancer or MS, are disabilities.⁷⁸ Congress also made significant changes to the “regarded as disabled” prong of the definition.⁷⁹ However, those changes are not relevant to this Article because this Article addresses situations where employees request accommodations, and Congress made clear in the Amendments that there is no right to a reasonable accommodation under the “regarded as” prong.⁸⁰

C. Case Law Under the ADA Amendments Act⁸¹

Virtually everyone who has discussed the Amendments has agreed that the Amendments will likely have two interrelated effects. First, many more individuals will be considered disabled under the ADAAA.⁸² Second, because many more plaintiffs will survive the initial inquiry of whether the plaintiff has a disability, many more cases will proceed to the merits of the

74. § 12102(2)(B); Long, *supra* note 15, at 222–23.

75. Long, *supra* note 15, at 218.

76. *Id.*

77. § 12102(4)(D); Long, *supra* note 15, at 221.

78. Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 45 (2013).

79. Long, *supra* note 15, at 223.

80. § 12201(h); Long, *supra* note 15, at 224.

81. This sub-part is derived in part from prior work. Porter, *Backlash*, *supra* note 13, at 19–67, 70–79.

82. Cox, *supra* note 13, at 202; Long, *supra* note 15, at 228; cf. Wilson & Krulewicz, *supra* note 55, at 37 (stating that the new statute will open the floodgates for employees to bring lawsuits).

case.⁸³ In order to test these hypotheses (among others), in a prior article I examined all of the federal cases decided since the Amendments went into effect up until December 31, 2013.⁸⁴ That article describes all of the cases where the court decided whether the plaintiff had a disability under the amended ADA;⁸⁵ the cases where the court addressed the issue of whether the plaintiff is a qualified individual with a disability;⁸⁶ and the cases where the court addressed whether the employer failed to accommodate the plaintiff.⁸⁷

As I summarized in that article, there is strong evidence that, as I suspected, courts have followed Congress's mandate to broadly interpret the definition of disability under the ADA.⁸⁸ Many plaintiffs who would have had their cases dismissed before the Amendments based on the coverage question (whether the plaintiff is an individual with a disability, as defined in the statute) are now able to survive summary judgment.⁸⁹ In many cases, the employer did not even contest the issue.⁹⁰ Recent empirical work supports my conclusion. For instance, in Professor Stephen Befort's empirical piece, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*,⁹¹ he "compared the pre-ADAAA win rate for employers on the issue of coverage" with the post-ADAAA win rate for employers on the issue of

83. Cox, *supra* note 13, at 188 (stating that "by enabling more plaintiffs to overcome the initial hurdle of establishing membership in the ADA's protected class, the amendments will require courts to address many important [questions], such as the scope of the amorphous [reasonable accommodation provision]"); Long, *supra* note 15, at 228 ("By amending the ADA's definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff's requested accommodation was reasonable."); Porter, *Martinizing*, *supra* note 13, at 543; Satz, *supra* note 21, at 990 n.57 (stating that an emphasis will be placed on whether an individual with a disability is qualified for a position, meaning whether they can perform the essential functions with or without a reasonable accommodation); Wilson & Krulewicz, *supra* note 55, at 40 (stating that the obligation to accommodate will become very important after the amendments).

84. Porter, *Backlash*, *supra* note 13.

85. *Id.* at 19–47.

86. *Id.* at 48–67, 70–79. The statute defines a qualified individual as one who can perform all of the essential functions of the job with or without reasonable accommodations. 42 U.S.C. § 12111(8) (2012).

87. Porter, *Backlash*, *supra* note 13, at 73–78.

88. *Id.* at 47.

89. *Id.* at 46–47.

90. *Id.*

91. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013).

coverage over the same period of time.⁹² His research revealed that courts granted summary judgment to employers on the issue of disability in 74.4% of the cases pre-Amendments, whereas the employer win rate in the post-Amendments cases was only 45.9%.⁹³ He also argued that the data might understate the actual expansion in coverage because, in many cases, the employer did not contest disability status.⁹⁴ Similarly, the July 23, 2013 report by the National Council on Disability establishes that plaintiffs are faring much better on getting past the coverage question under the ADAAA.⁹⁵

With regard to cases that were decided on the merits,⁹⁶ my sample size was too small to draw any definitive conclusions.⁹⁷ The cases were useful, however, in getting a feel for what the courts are doing in this post-Amendments era. My research revealed a difference in the case results depending on what type of accommodation the employee was requesting. Specifically, was the employee requesting an accommodation to modify a physical function of the job or that the employer provide certain equipment that a disabled employee might need, on the one hand, or was the employee requesting a modification of the structural norms of the workplace?⁹⁸ By structural norms, I am referring to the schedules, hours, shifts, attendance policies, and any other policy regarding when and where work is performed (as opposed to the actual work performed).⁹⁹

With respect to issues regarding whether the plaintiff was qualified to perform the physical functions of the job with or without a reasonable

92. *Id.* at 2050–51. He was able to compare pre- and post-Amendments cases over the same period of time because the ADA does not apply retroactively. So, depending on when the facts of the case occurred, federal courts were applying both pre- and post-Amendments law during the same time period. *Id.* at 2031.

93. *Id.* at 2050–51.

94. *Id.* at 2051.

95. NATIONAL COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 13 (2013).

96. To be clear, my research in that article did not include cases that were decided on the issue of causation, or whether the disability *caused* the employer's adverse employment action. I also did not address cases where the claim is that the employer failed to engage in the interactive process. I focused on cases where the employee alleged that the employer failed to provide her a reasonable accommodation or cases where the employer alleges that the reason for the adverse employment action was that the plaintiff was not qualified. Porter, *Backlash*, *supra* note 13, at 48.

97. *Id.* at 67.

98. *See id.*

99. *Id.* at 70.

accommodation, plaintiffs fared fairly well.¹⁰⁰ In many cases, courts denied summary judgment to the defendants, requiring them to actually prove what the essential functions of the job were when those functions were in dispute rather than just accepting the defendants' allegation of the essential functions.¹⁰¹ Courts were also willing to draw inferences in plaintiffs' favor.¹⁰² For instance, in *Chicago Regional Council of Carpenters v. Thorne Associates, Inc.*, the plaintiff, a journeyman carpenter, failed a fitness for hire exam that included physical tests that were related to the necessary tasks of carpentry.¹⁰³ Despite the plaintiff's failure, the court denied the defendant's motion to dismiss because the plaintiff had twenty-nine years of experience as a carpenter and worked periodically for the defendant from 1995–2008, which demonstrated that he was qualified to perform the job for which he applied.¹⁰⁴

Courts also seemed willing to require employers to provide reasonable accommodations when needed to perform the physical functions of the job.¹⁰⁵ For instance, a court held that it was unreasonable for the employer to deny the plaintiff voice-activated software to accommodate his carpal tunnel syndrome and anxiety.¹⁰⁶ Similarly, when Wal-Mart denied the plaintiff's request to keep her diabetes testing supplies in her desk, the court held that Wal-Mart was unreasonable in denying the request.¹⁰⁷

When the courts granted the defendants' motions for summary judgment, most of those cases were (in my opinion) correctly decided.¹⁰⁸ Many of these cases involved jobs that legitimately required heavy lifting and the employee had a restriction on lifting.¹⁰⁹ Several cases involved

100. *Id.* at 67–70.

101. *Id.* at 51–53.

102. *Id.* at 53–55.

103. *Chi. Reg'l Council of Carpenters v. Thorne Assocs., Inc.*, 893 F. Supp. 2d 952, 958 (N.D. Ill. 2012) (noting that the exam included lifting objects to prescribed heights, climbing ladders, and pushing carts).

104. *Id.* at 962–63.

105. Porter, *Backlash*, *supra* note 13, at 55–58.

106. *Dentice v. Farmers Ins. Exch.*, No. 10-C-113, 2012 WL 2504046, at *19 (E.D. Wis. June 28, 2012).

107. *Berard v. Wal-Mart Stores E., L.P.*, No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at *1, *3 (M.D. Fla. Oct. 4, 2011).

108. Porter, *Backlash*, *supra* note 13, at 60–65.

109. *Id.*; *see also, e.g., Davis v. N.Y.C. Health & Hosps. Corp.*, 508 F. App'x 26, 28–29 (2d Cir. 2013) (stating that a nurse who could not lift patients or even stand for more than thirty minutes at a

situations where the plaintiff's disability caused the plaintiff to be a danger to others in the workplace.¹¹⁰ There were only a few cases that I believed were decided incorrectly.¹¹¹ For instance, in one case, the court held that the "intermittent" moving of heavy objects was an essential function of the job.¹¹² Because the frequency with which a task has to be performed should be considered in determining whether a function is essential or only marginal, I believe the court erred in determining at the summary judgment stage that intermittent heavy lifting was an essential function of the job.¹¹³

In this earlier article, I concluded that, even though I had predicted that courts might use the merits of the case to limit the protection of the ADA, there was not clear evidence of such a backlash, at least not with respect to cases involving the actual physical functions of the job.¹¹⁴

However, there was a discernible difference when looking at cases where the plaintiff needed a variation of the structural norms of the workplace—policies regarding attendance, hours, schedules, shifts, and leaves of absence. Although there were some cases where courts did require employers to modify their structural norms (or more accurately, allowed the plaintiffs to survive summary judgment on the question),¹¹⁵ there were many

time was not qualified); *Anderson v. United Parcel Serv., Inc.*, No. 09-2526-KHV-DJW, 2010 WL 4822564, at *2 (D. Kan. Nov. 22, 2010) (holding that plaintiff was not qualified because she could not perform the heavy lifting required for the position of package car driver).

110. Porter, *Backlash*, *supra* note 13, at 59. For instance, in one case, the plaintiff was a locomotive engineer who suffered a seizure while working and the court agreed with the employer that continuing to employ him would put others in danger. *Mashek v. Soo Line R.R. Co.*, No. 11-487 (MJD/JJG), 2012 WL 6552795, at *7–8 (D. Minn. Dec. 14, 2012).

111. Porter, *Backlash*, *supra* note 13, at 65–67.

112. *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 530–31 (7th Cir. 2013).

113. Porter, *Backlash*, *supra* note 13, at 65.

114. *Id.* at 67–69.

115. *Id.* at 71–73; *see Hochstetler v. Int'l Bus. Machs., Inc.*, No. 12-10735-NMG, 2013 WL 6909430, at *1, *9 (D. Mass. Dec. 31, 2013) (holding that the defendant failed to reasonably accommodate the plaintiff by denying her request to limit her hours to forty-five per week because of her disability); *Periano v. Momentive Specialty Chems., Inc.*, No. 2:11-CV-00281, 2012 WL 4959429, at *12–13 (S.D. Ohio Oct. 17, 2012) (holding that it was reasonable for the employer to give the plaintiff a flexible start time); *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1379 (N.D. Ga. 2012) (dismissing employer's motion for summary judgment when the defendant argued that plaintiff was not qualified because of her frequent absences); *Thomas v. Bala Nursing & Ret. Ctr.*, No. 11-5771, 2012 WL 2581057, at *1–2, *9 (E.D. Pa. July 3, 2012) (stating that there was a genuine issue of fact regarding whether it would pose an undue hardship for the employer to accommodate the plaintiff's tardiness due to her anemia); *Fleck v. Wilmac Corp.*, No. 10-05562, 2012 WL 1033472, at *19 (E.D. Pa. Mar. 27, 2012) (denying summary judgment on the issue of whether it was a reasonable accommodation to allow the employee to work part-time instead of full-

more cases that did not require such a modification and the courts granted defendants' motions for summary judgment.¹¹⁶ For instance, since the Amendments went into effect, several courts have held that working a particular shift or a rotating shift was an essential function of the job.¹¹⁷ Because it is never a reasonable accommodation to eliminate an essential function of the job,¹¹⁸ these employees had their cases dismissed.

Full-time hours are often considered an essential function of the job. For instance, in *White v. Standard Insurance Co.*, the court held that full-time employment is an essential function of the job; therefore, the plaintiff, whose back pain limited her ability to work more than four hours per day, was not qualified.¹¹⁹

Similarly, several post-ADAAA cases held that attendance is an essential function of the job. For instance, in *Brown v. Honda of America*, the defendant alleged that the plaintiff's "inability to reliably attend work" rendered her unable to perform the essential functions of her job in Honda's factory.¹²⁰ Plaintiff had frequently asked for and received excused absences from work for her depression, anxiety, and migraines.¹²¹ The court found that she was not qualified for her position because the frequency of her absences caused her to be an erratic, unreliable worker.¹²² Similarly, in *Lewis v. New York City Police Department*, the court found that the

time); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 978, 987 (N.D. Ind. 2010) (denying summary judgment on the issue of whether plaintiff could work from home).

116. Porter, *Backlash*, *supra* note 13, at 73–79.

117. *Id.* at 73–75; *Kallail v. Alliant Energy Corp. Servs.*, 691 F.3d 925, 927–28, 931 (8th Cir. 2012); *Tucker v. Mo. Dep't of Soc. Servs.*, No. 2:11-CV-04134-NKL, 2012 WL 6115604, at *1, *4, *6 (W.D. Mo. Dec. 10, 2012); *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 655–56, 662 (W.D. Ky. 2012).

118. *See, e.g.*, *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013) (stating that employers need not eliminate essential functions of the job to accommodate an employee with a disability); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1229 (11th Cir. 2005); *Blackard v. Livingston Par. Sewer Dist.*, No. 12-704-SDD-RLB, 2014 WL 199629, at *8 (M.D. La. Jan. 15, 2014) (stating that the elimination of an essential function is not a reasonable accommodation); *Nelson v. PMTD Rests., LLC*, No. 3:12-cv-369-MEF, 2013 WL 4045086, at *7 (M.D. Ala. Aug. 8, 2013) (holding that the ADA does not require employers to eliminate essential functions as a reasonable accommodation).

119. *White v. Standard Ins. Co.*, No. 12-1287, 2013 WL 3242297, at *2–3 (6th Cir. June 28, 2013).

120. *Brown v. Honda of Am.*, No. 2:10-cv-459, 2012 WL 4061795, at *4–6 (S.D. Ohio Sept. 14, 2012).

121. *Id.* at *1–3.

122. *Id.* at *5.

plaintiff's regular absences meant that she was not a qualified individual.¹²³ Likewise, in *Blackard v. Livingston Parish Sewer District*, the court held that the plaintiff was not qualified because of his attendance problems, noting that regular attendance is an essential function of most jobs.¹²⁴

I do not disagree that an employer should not have to continue to employ an employee who misses an excessive amount of work. If an employee misses work because of a disability, there are two possible accommodations that would allow the employee to eventually perform the essential functions of the job. First, depending on the employee's job and the severity of the employee's disability, the employee might be able to work from home. Second, and more likely, some employees who miss too much work because of their disabilities simply need time to heal or time to get their medical issues resolved. Thus, the attendance issue often coincides with working from home and leaves of absence as possible accommodations.¹²⁵

For instance, in a working from home case, the court held that the plaintiff's absences because of medical problems could not be accommodated.¹²⁶ The plaintiff requested permission to telecommute four days per week as an accommodation for her irritable bowel syndrome.¹²⁷ Because the court deferred to the employer's position that in-person attendance was an essential function of the job, the court held that it was not a reasonable accommodation to allow her to work at home.¹²⁸

There were several cases that involve plaintiffs' requests for leaves of absence to allow them to recover enough to return to work.¹²⁹ In *Robert v. Board of County Commissioners of Brown County*, the plaintiff was terminated because she could not perform her regular duties after undergoing surgery.¹³⁰ The court held that the plaintiff was not a qualified

123. *Lewis v. N.Y.C. Police Dep't*, No. 09-cv-5472 (SLT)(CLP), 2012 WL 5467551, at *10 (E.D.N.Y. Nov. 9, 2012).

124. *Blackard v. Livingston Par. Sewer Dist.*, No. 12-704-SDD-RLB, 2014 WL 199629, at *3-5 (M.D. La. Jan. 15, 2014).

125. Porter, *Backlash*, *supra* note 13, at 76.

126. *EEOC v. Ford Motor Co.*, No. 11-13742, 2012 WL 3945540, at *2, *5 (E.D. Mich. Sept. 10, 2012).

127. *Id.* at *2.

128. Porter, *Backlash*, *supra* note 13, at 76.

129. *Id.*

130. *Robert v. Bd. of Cty. Comm'rs*, 691 F.3d 1211, 1214 (10th Cir. 2012).

individual because she could not perform the essential functions of the job, and her requested accommodation, a leave of absence, was unreasonable because her employer “did not have a reasonable estimate of when she would be able to resume all essential functions of her employment.”¹³¹

Similarly, the court in *Fuentes v. Krypton Solutions, LLC*¹³² stated that regular attendance is an essential function of most jobs and because plaintiff had requested and was granted time off for his diabetes,¹³³ he was not qualified to perform his job without a reasonable accommodation.¹³⁴ The court summarily held that “indefinite leave is not a reasonable accommodation.”¹³⁵

In one of the most troubling cases I have read, the Seventh Circuit held that a plaintiff was not qualified when she violated the employer’s very stringent attendance policy (allowing only eight absences in a year) while she was going through numbness and weakness related to an eventual diagnosis of multiple sclerosis.¹³⁶ Because she had not been employed for more than one year, she was not entitled to leave under the Family and Medical Leave Act (FMLA).¹³⁷ The employer had a policy of offering a thirty-day leave in some circumstances, but the court held that there was not any evidence that thirty days would be enough time for the plaintiff to recover enough to return to work and granted defendant’s motion for summary judgment.¹³⁸ Even though there was no evidence that a thirty-day leave would have been a hardship to the employer, the court held the employer was not required to give the plaintiff thirty days to get properly diagnosed and begin treatment.¹³⁹

Finally, the court in *Brangman v. AstraZeneca, LP* followed an often-stated rule that an indefinite leave of absence is not a reasonable accommodation.¹⁴⁰ Plaintiff had exhausted her short-term disability benefits

131. *Id.* at 1218.

132. *Fuentes v. Krypton Sols., LLC*, No. 4:11cv581, 2013 WL 1391113, at *1 (E.D. Tex. Apr. 4, 2013).

133. *Id.*

134. *Id.* at *3–4.

135. *Id.* at *4.

136. *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1036 (7th Cir. 2013).

137. *Id.* at 1039.

138. *Id.* at 1037.

139. *Id.*

140. *Brangman v. AstraZeneca, LP*, 952 F. Supp. 2d 710, 723 (E.D. Pa. 2013).

when the employer refused to extend her leave.¹⁴¹ The court stated that because she had applied for long-term disability benefits, there was no evidence that any additional leave would have been temporary.¹⁴² Although the court noted that federal courts have permitted a leave of absence as a reasonable accommodation under the ADA if it allowed the plaintiff to perform her essential functions in the near future, the ADA does not require employers to grant indefinite or open-ended leave under the ADA.¹⁴³

In a prior article, I discussed possible reasons why employers and courts are reluctant to accommodate employees' needs for modification of the structural norms of the workplace.¹⁴⁴ One possible explanation is that these types of accommodations are likely to cause resentment by coworkers; therefore, employers want to avoid the morale problems that accompany special treatment in the workplace.¹⁴⁵ Accordingly, I now turn to a further discussion of "special treatment stigma."

III. "SPECIAL TREATMENT STIGMA"

A. Explaining "Special Treatment Stigma"¹⁴⁶

I first defined "special treatment stigma" when I was describing the reason some employees with caregiving responsibilities experience discrimination in the workplace.¹⁴⁷ As I stated in that article:

Special-treatment stigma occurs when employers are unwilling to hire or promote employees who need special benefits or

141. *Id.* at 722.

142. *Id.* at 723.

143. *Id.*; Porter, *Backlash*, *supra* note 13, at 76–77; *see also* Forgione v. City of New York, No. 11-CV-5248, 2012 WL 4049832, at *8–9 (E.D.N.Y. Sept. 13, 2012) (acknowledging that plaintiff's request for an indefinite leave of absence, which failed to indicate whether the limitations would be resolved or if plaintiff could perform the job upon return, was an unreasonable accommodation); Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 1002 (W.D. Tex. 2012) (stating employer is not required to allow "extended indefinite medical leave" in case where employee had not yet scheduled a date for surgery).

144. *See* Porter, *Backlash*, *supra* note 13, at 81–82.

145. *Id.*

146. This sub-part is derived in part from prior work. Porter, *Mutual Marginalization*, *supra* note 11, at 1108–13.

147. Porter, *Why Care*, *supra* note 11, at 359.

accommodations in the workplace because of the real or perceived costs of providing such accommodations. Because most caregivers are women, any suggested reforms that help caregivers may have the perverse effect of causing employers to hire or promote fewer women. Special-treatment stigma also manifests itself in the resentment of other employees over the perceived special treatment given to caregivers.¹⁴⁸

I discussed this problem in much more detail when comparing individuals with disabilities and employees with caregiving responsibilities.¹⁴⁹ As I stated in that article, because individuals with disabilities and workers with caregiving responsibilities cannot conform to the often-stringent norms regarding attendance, shifts, and hours, both groups suffer from special treatment stigma.¹⁵⁰ Special treatment stigma manifests itself in two distinct but related ways. First, having to provide special accommodations to individuals in the workplace makes an employer believe that employing such individuals is more expensive and burdensome than employing other employees.¹⁵¹ This belief, in turn, makes an employer reluctant to hire and promote these individuals.¹⁵² The second way special treatment stigma manifests itself in the workplace is by causing the resentment of coworkers who believe that they have to carry a larger burden to help accommodate the employee or that the employee receiving the accommodation or special treatment¹⁵³ is getting an unfair (and perhaps

148. *Id.*

149. Porter, *Mutual Marginalization*, *supra* note 11, at 1108–11.

150. *Id.* at 1108–09.

151. *Id.* at 1109–10. It should be noted that the fears regarding the costs of accommodation are unwarranted. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1097 (2010) (discussing the fact that there are many benefits to accommodations, such as greater loyalty, increased productivity, and reduced absenteeism and turnover, which can offset the costs of the accommodations); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 332 (2009).

152. Porter, *Mutual Marginalization*, *supra* note 11, at 1108; Porter, *Why Care*, *supra* note 11, at 390.

153. Of course, as pointed out by Samuel Bagenstos, the ADA does not *require* an employer to grant individuals with disabilities special treatment because employers are free to give the same accommodations to nondisabled workers. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 459 (2000); *see also* JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 39 (2012) (stating that women do not need special treatment in the workplace and that framing the issue that way leaves intact the ideal worker norm).

undeserved)¹⁵⁴ advantage.¹⁵⁵ I discuss each of these manifestations of special treatment stigma in turn.¹⁵⁶

1. Employers' Reluctance to Accommodate

In the eyes of most employers, all accommodations are troubling.¹⁵⁷ Employers often see proposals for special treatment as evidence that those employees just “can’t cut it” in the workplace.¹⁵⁸ The primary evidence demonstrating that employers dislike having to provide accommodations is the fact that the ADA has not noticeably improved the employment of individuals with disabilities.¹⁵⁹ Many have argued that the reason for this is because employers are resistant to having to provide accommodations to individuals with disabilities¹⁶⁰ so they simply do not hire them.¹⁶¹ As most would agree, it is far easier for an employer to defend a “failure to hire” claim than it is to defend a termination claim or a “failure to accommodate”

and will create a backlash against women).

154. Anderson, *supra* note 54, at 1283 (noting that, because the rights under the ADA are special, only the truly deserving should get them, and some courts are reluctant to provide benefits to workers they believe are undeserving or lazy).

155. Porter, *Why Care*, *supra* note 11, at 390; Travis, *supra* note 151, at 312.

156. Porter, *Mutual Marginalization*, *supra* note 11, at 1101–15.

157. *Id.* at 1109.

158. WILLIAMS, *supra* note 153, at 50.

159. BAGENSTOS, *supra* note 24, at 117 (stating that the ADA “has failed significantly to improve the employment position of people with disabilities”). In fact, virtually all reports indicate that the employment rate for individuals with disabilities has declined over the time the statute has been in existence. *Id.* Despite the potential of the ADA’s reasonable accommodation provision, many have argued that it has not “effectuated wide-scale changes in the structure of employment.” *Id.*; see also, e.g., Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 363 (2003); Adrien Katherine Wing, *Examining the Correlation Between Disability and Poverty: A Comment from a Critical Race Feminist Perspective—Helping the Joneses to Keep Up!*, 8 J. GENDER RACE & JUST. 655, 656–57 (2005) (discussing research revealing that only 2.7% of plaintiffs prevailed in Title I ADA cases and stating that “[i]t is quite evident some thirteen years after the passage of the ADA that it has failed to vindicate the rights of the disabled in the employment area”).

160. Anderson, *supra* note 54, at 1308 (stating that it has been suggested that the ADA has made it more difficult for individuals with disabilities to obtain employment because employers want to avoid the costly obligations under the statute); Travis, *supra* note 151, at 315 (stating that employers were initially the ADA’s primary opponents because of the concerns about the costs of accommodations).

161. BAGENSTOS, *supra* note 24, at 117 (pointing to, but disagreeing with, some commentators who argue that the employment rates of individuals with disabilities has declined *because of* the ADA).

claim under the ADA.¹⁶² Therefore, anything that arguably increases the costs of employing an individual¹⁶³ or makes it more difficult for an employer to fire an employee might incentivize an employer to not hire the person in the first place.¹⁶⁴ Furthermore, as will be discussed below, because employers know or believe that many coworkers will be resentful of the accommodations that individuals with disabilities receive, employers are often unwilling to provide those accommodations out of fear of angering other employees or harming employee morale.

2. Coworker Resentment

Coworkers are often resentful when individuals with disabilities are given deviations from workplace rules or any other kind of special treatment.¹⁶⁵ One reason for this resentment is that workplace rules are often very rigid so that any deviation is seen as unfair special treatment to the employee getting the benefit.¹⁶⁶ Coworkers resent that others get a benefit

162. *Id.* at 134.

163. There is evidence that employers' fears regarding the excessive costs of accommodation are unwarranted. A United States Department of Labor study indicated that only 22% of individuals with disabilities need any accommodation at all and that of those needing accommodation, 51% of the accommodations cost nothing, and another 30% cost less than \$500 per worker. Arnow-Richman, *supra* note 159, at 364 (stating that most accommodations under the statute tend to be modest and relatively inexpensive); Bagenstos, *supra* note 153, at 469 (stating that available evidence indicates that most accommodations have little or no direct costs and the overwhelming majority cost less than \$500); Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1448–49 (1991); Travis, *supra* note 151, at 321, 353 (regarding the costs of disability accommodations as fairly minimal and noting that the flexible arrangements that many caregivers need can decrease costs).

164. See, e.g., Porter, *Why Care*, *supra* note 11, at 379 (pointing out that perceived costs of employing caregivers might incentivize an employer to not hire employees who might need this leave).

165. Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 326 (2003) (stating that because ADA accommodations are seen as preferences by many, they create resentment by those who are not accommodated); Travis, *supra* note 151, at 315 (stating that the backlash against the ADA is partially caused by fears about the adverse effects on nondisabled coworkers and hostility regarding the perceived preferential treatment).

166. Arnow-Richman, *supra* note 159, at 392 (stating that accommodations are perceived by non-accommodated workers as preferential treatment in tension with merit-based decision making); Travis, *supra* note 151, at 322 (stating that expectation interests are disrupted when nondisabled coworkers see their disabled coworkers receiving desirable job modifications, reduced hours, flexibility, or other exceptions to workplace policies that employers do not give to everyone else); see also *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (stating that, by definition, any

that they do not.¹⁶⁷ These employees might also resent the fact that they might be required to work harder or longer or to vary their working hours in order to accommodate individuals with disabilities and workers with caregiving responsibilities.¹⁶⁸ The accommodations that allegedly benefit employees with disabilities at the expense of others include job restructuring, providing part-time or modified work schedules, allowing leaves of absence,¹⁶⁹ and reassigning individuals with disabilities to vacant positions.¹⁷⁰ In all of these cases, the accommodation would have some effect on other employees.¹⁷¹ Job restructuring, for example, might require other employees to perform tasks that a disabled employee cannot perform because of the disability. Part-time or modified work schedules and leaves of absence could cause other employees to have to work longer or different hours to make up for the absences of the disabled coworker.¹⁷² Finally, reassigning individuals with disabilities to other positions can cause conflicts with non-disabled coworkers who might also be interested in those positions and have either more seniority or superior qualifications for the position.¹⁷³

accommodation “requires the employer to treat an employee with a disability differently, *i.e.*, preferentially”); Porter, *supra* note 9, at 346–47 (noting that the ADA is often referred to as a “special treatment” statute because it requires employers to treat employees differently because of their disability).

167. See Bagenstos, *supra* note 153, at 475 (stating that those who are not disabled may become resentful of the special treatment needed by individuals with disabilities).

168. See, e.g., Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 140 (Judy Fudge & Rosemary Owens eds., 2006); Travis, *supra* note 151, at 318–19 (discussing that courts perceive that different treatment of disabled individuals gives them an unfair advantage, which leads to resentment by coworkers).

169. CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE* 122 (2012) (stating that employers often shift the burden of leaves of absence onto other employees, which causes resentment of the employees receiving leave); WILLIAMS, *supra* note 153, at 35 (stating that when U.S. employers provide paid leave, they often heap the leave-takers’ job duties onto other employees, creating resentment).

170. Travis, *supra* note 151, at 322.

171. Schultz & Hoffman, *supra* note 168, at 140 (stating that employer mandates can result in employers passing off costs of the benefit onto other employees).

172. *Id.*

173. Samuel R. Bagenstos, *U.S. Airways v. Barnett and the Limits of Disability Accommodation*, in *CIVIL RIGHTS STORIES* 35 (Myriam E. Giles & Risa C. Goluboff eds., 2007) (“The accommodation Barnett sought, on its face, looks like charity of a particularly troubling kind—charity in the form of a job that one employee is forced to give another.”); see also Anderson, *supra* note 54, at 1315 (arguing that, at a minimum, the reassignment accommodation acts as a preference

In reality, some of this resentment is not warranted because courts have often held that employers are not obligated to accommodate employees if doing so would require other employees work harder or longer.¹⁷⁴ As stated by Professor Travis, “in most accommodation cases, the ADA’s accommodation mandate does not benefit individuals with disabilities at the expense of their non-disabled coworkers.”¹⁷⁵ The most common types of accommodations, such as making the building more accessible or providing modifications to work equipment, do not negatively affect other employees.¹⁷⁶ Travis recognizes, as do I, that some might think that the overall costs of accommodations negatively affect coworkers indirectly because money being spent on accommodations could be spent on compensation or benefits for the rest of the workforce.¹⁷⁷ However, empirical research has demonstrated that “the costs of accommodations are minimal or may even provide employers net long-term economic gain.”¹⁷⁸ While some accommodations place some burdens on coworkers to take on some additional tasks, those tasks are usually “marginal” tasks and do not place any unreasonable burdens on other employees.¹⁷⁹

Nevertheless, employers’ decisions not to accommodate disabled employees are often because of a fear that coworkers will feel that they are being treated unfairly when accommodations are given to employees with disabilities. Courts share this concern about the resentment of coworkers. For instance, in the first reasonable accommodation case decided by the

to the individual with a disability). Anderson argues that the fact that some courts have allowed reassignment to an individual with a disability even when there are other, more qualified applicants for the position is what makes the reassignment accommodation controversial. *Id.* at 1314–15. However, she also argues that if an impairment is significant enough to be the subject of exclusion and stigma, there is a stronger rationale for requiring reassignment as a reasonable accommodation. *Id.* at 1316.

174. Arnow-Richman, *supra* note 159, at 366; Porter, *supra* note 24, at 799 (citing to cases where courts have said that an employer does not have to accommodate an employee if doing so requires other employees to work harder or longer).

175. Travis, *supra* note 151, at 321.

176. *Id.*

177. Porter, *supra* note 9, at 333 (stating that even when accommodations only cost the employer money and do not otherwise affect coworkers, the money spent on accommodations is arguably money that could be spent on workplace benefits for other employees); Travis, *supra* note 151, at 321.

178. Bagenstos, *supra* note 153, at 469; Travis, *supra* note 151, at 321.

179. Travis, *supra* note 151, at 324.

Supreme Court,¹⁸⁰ the employee with the disability, Robert Barnett, was allowed to transfer into a mailroom position once a back injury disabled him, and he could no longer perform his cargo handler position.¹⁸¹ After Barnett had served in this position for two years, the employer opened it up for seniority bidding and two employees with more seniority than Barnett bid on the mailroom position.¹⁸² I suspect that the employees were willing to bid on this position, even knowing or suspecting that it would cause Barnett's termination, because they were resentful that Barnett was allowed to have this physically less strenuous position in the first place. It appears that the Court was also concerned about this perceived unfairness.¹⁸³

B. The Stigmatic Harm of Special Treatment in the Disability Context

This Part will explore the scope and magnitude of special treatment stigma. To be clear, this is not an empirical piece. Instead, through the case law, I explain what happens in workplaces when employees with disabilities receive some kind of special treatment.

1. Accommodating the Plaintiff Would Require Other Employees to Perform Some of the Tasks

Courts often reject accommodations if those accommodations require assistance from other employees. For instance, in *Meinen v. Godfrey Brake Service & Supply, Inc.*,¹⁸⁴ after the plaintiff was hospitalized and subsequently diagnosed with MS,¹⁸⁵ the company created two part-time positions to cover the parts department (where plaintiff had worked) and to retain his position until he could return to work.¹⁸⁶ When the plaintiff returned to work, he could not work more than four hours per day.¹⁸⁷ The

180. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

181. *Id.* at 394.

182. *Id.*

183. *Id.* at 404. As stated by Samuel Bagenstos, burdens on other employees are the “most significant causes of the social backlash against the ADA, and Justice Breyer’s rule that seniority systems need not ordinarily be modified clearly reflects a fear of exacerbating that backlash.” BAGENSTOS, *supra* note 24, at 345.

184. No. CIV. 10-5077-JLV, 2012 WL 4364669 (D.S.D. Sept. 24, 2012).

185. *Id.* at *1.

186. *Id.* at *2.

187. *Id.* at *1 n.3.

plaintiff's supervisor testified that upon the plaintiff's return, when he was still suffering from some vision loss caused by the MS, the plaintiff required a lot of help from other employees in seeing parts to determine what they were, finding parts in the catalog, and locating parts in the building.¹⁸⁸ The supervisor testified that "it bothered him that other employees had to help [the plaintiff] because it was taking time away from other things that needed to be done."¹⁸⁹ When the defendant terminated the plaintiff, the supervisor stated that a full-time employee would be preferable because the plaintiff required so much help that took away from other employees' time.¹⁹⁰ When the plaintiff's wife went into the workplace to collect plaintiff's check, she asked the owner whether there was anything that her husband could do to keep his job.¹⁹¹ He replied in the negative, stating that the plaintiff "was too slow and that he couldn't have his other employees wasting their time helping" the plaintiff.¹⁹² The court held that creation of a part-time position is not a reasonable accommodation and that simply allowing the plaintiff to work a part-time position for a period of time does not obligate the employer to continue to provide the accommodation.¹⁹³ More importantly for our purposes here, the court also held that the employer was not required to continue to provide the plaintiff with assistance from other employees in performing the essential functions.¹⁹⁴

In a similar case, *Lopez v. Tyler Refrigeration Corp.*,¹⁹⁵ the plaintiff suffered an injury at work that led to permanent restrictions, including an inability to lift objects over twenty-five pounds and only occasional use of hand tools for no more than two hours daily.¹⁹⁶ After allowing the plaintiff to work around his restrictions for a short period of time, the employer fired him because his restrictions would never allow him to return to his regular

188. *Id.* at *3.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *10. I find it interesting (and somewhat infuriating) that even though the ADA lists "part time or modified work schedules" as possible reasonable accommodations, courts easily ignore this by stating that the accommodation requested is not a modification to the current position by allowing the employee to reduce his hours but rather is the creation of an entirely new part-time position. *Id.* at *8–9.

194. *Id.* at *13.

195. No. 99-10637, 2000 WL 122387 (5th Cir. Jan. 4, 2000) (per curiam).

196. *Id.* at *1.

assembler position according to the employer.¹⁹⁷ His supervisor testified that when he created a temporary modified job for the plaintiff, the more strenuous aspects of the job were given to other employees so that the plaintiff could work on the easier functions.¹⁹⁸ In holding that the plaintiff was not qualified to perform the essential functions of the position, the court stated that it was “unreasonable” to modify the job permanently to meet the plaintiff’s restrictions because it forced other employees to perform the heavy lifting of the job.¹⁹⁹

The plaintiff in *Knutson v. Schwan’s Home Service, Inc.*²⁰⁰ was a manager for a food delivery company.²⁰¹ His job description stated that he must have DOT certification to drive the trucks because the manager occasionally was required to make some of the deliveries.²⁰² He was DOT-certified until an accident caused him to lose vision in one eye; thus, the doctor would not certify him to drive DOT trucks.²⁰³ The parties disputed whether driving a DOT truck was an essential function of his job, and the court agreed with the employer that it was.²⁰⁴ The plaintiff argued that the employer should be required to offer him an accommodation that would excuse him from driving the DOT trucks and the court held that the employer was not required to assign existing workers to do this part of his job, even though the managers only had to drive the trucks on a sporadic basis.²⁰⁵

Some cases demonstrate coworkers’ resistance to accommodations that arguably make other employees work harder or longer.²⁰⁶ In *Petrosky v. New York State Department of Motor Vehicles*,²⁰⁷ the plaintiff suffered stigma and resentment when she was diagnosed with Type II diabetes and

197. *Id.*

198. *Id.* at *2.

199. *Id.* at *3.

200. 711 F.3d 911 (8th Cir. 2013).

201. *Id.* at 913.

202. *Id.*

203. *Id.*

204. *Id.* at 914.

205. *Id.* at 915–16.

206. See, e.g., *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (indicating it is unreasonable to accommodate a disabled employee if doing so would require other employees to work harder or longer); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124–25 (10th Cir. 1995) (“An accommodation that would result in other employees having to work[] harder or longer hours is not required.”).

207. 72 F. Supp. 2d 39 (N.D.N.Y. 1999).

was required to take regular breaks to eat and manage her condition properly.²⁰⁸ Although she requested a lighter workload, she was given a heavier load after her diabetes diagnosis, which sometimes caused her to be unable to take the breaks she needed to properly manage her diabetes.²⁰⁹ The facts indicate that she was the “subject of derogatory comments and complaints from coworkers who contended that they were required to do more” because of her illness.²¹⁰ In addition, when she requested reduced hours, two of her supervisors complained about her request.²¹¹ Although she ultimately survived summary judgment, this case demonstrates the type of bias employees face when they ask for accommodations in the workplace.²¹²

In *Dunlap v. Liberty Natural Products, Inc.*, the plaintiff was a shipping clerk who became injured and could no longer perform the heavy lifting required of the job.²¹³ The employer gave her a temporary accommodation, allowing other employees to help her tape and lift the boxes.²¹⁴ The employer argued that the accommodation became onerous because other employees had complained to the employer regarding the physical toll of having to do their jobs and hers.²¹⁵ The court never addressed this argument by the employer but instead held that the employer could have considered other accommodations, such as a pneumatic device that would help the plaintiff lift.²¹⁶ An inference can be drawn that because the court ignored the possibility of accommodating the plaintiff by asking other employees to help her with the heavy lifting, the court was concerned about putting that burden on the plaintiff’s coworkers.

Finally, the plaintiff in *Nelson v. PMTD Restaurants, LLC*²¹⁷ had cerebral palsy, which left her with a weakened left hand.²¹⁸ She had surgery to control her seizures, which caused short-term memory loss and sensitive

208. *Id.* at 46.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 60 (“The record reflects that Petrosky’s supervisors and coworkers were upset by realignments made in the work schedule to accommodate Petrosky.”).

213. *Dunlap v. Liberty Nat. Prods., Inc.*, No. 3:12-CV-01635-SI, 2013 WL 6177855, at *1 (D. Or. Nov. 25, 2013).

214. *Id.*

215. *Id.* at *2.

216. *Id.* at *6.

217. No. 3:12-CV-369-MEF, 2013 WL 4045086 (M.D. Ala. Aug. 8, 2013).

218. *Id.* at *2.

hearing.²¹⁹ The defendant, a Kentucky Fried Chicken franchisee, hired her as a cashier but the employer initially trained her on how to pack boxes.²²⁰ Because of her weakened left hand, she had difficulty packing boxes and sometimes required help from other employees.²²¹ A few of her coworkers complained to the employer about her slow speed and the employer fired her after one month on the job.²²² The court held that even though the employer argued that the cashiers had to pack boxes occasionally, this was not an essential function for the cashier position.²²³ By so holding, the court was able to completely side-step the issue of whether it is a reasonable accommodation to require other employees to help the plaintiff pack boxes.

2. Structural Norms of the Workplace

As discussed above, in prior work I argued that courts are more reluctant to require employers to accommodate employees when the accommodation requested is to modify the structural norms of the workplace (the policies and practices regarding hours, schedules, shifts, attendance, and leaves of absence) in part because of a concern over special treatment stigma.²²⁴ As stated by Professor Albiston, when employees seek changes to the structural norms of the workplace, backlash results because coworkers perceive these changes to be illegitimate special treatment of a particular group, rather than recognizing how our entrenched structural norms implicitly incorporate an able-bodied norm.²²⁵

One of the most common accommodations that could cause special treatment stigma is if an employer allows an employee to avoid working rotating shifts.²²⁶ Although the Supreme Court has not weighed in on this issue, I think it is fair to say that almost all courts who have decided the issue have held that if an employer uses rotating shifts for its employees, it is unreasonable to allow the plaintiff to work only one shift.²²⁷ The rhetoric

219. *Id.* at *1–2.

220. *Id.* at *2.

221. *Id.* at *3.

222. *Id.*

223. *Id.* at *7.

224. See Porter, *Backlash*, *supra* note 13, at 70; *supra* Part II.C.

225. ALBISTON, *supra* note 169, at 70.

226. See Porter, *Backlash*, *supra* note 13, at 73–79.

227. See, e.g., *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996); see also

used by many of these courts is that employers should not have to provide an accommodation that would cause other employees to have to work the less desirable shift more often.

I dealt with this issue for the first time when I was in-house counsel before I started teaching. One of the plants at the company where I worked had a shipping and receiving department that operated 24/7 and had three shifts to cover those hours: a day shift (7 AM to 3 PM), an afternoon shift (3 PM to 11 PM), and a night shift (11 PM to 7 AM). All employees in the department were required to work one week on each shift—one week on the day shift, one week on the afternoon shift, and one week on the night shift. The employee in question had kidney failure and had to go on kidney dialysis while he waited and hoped for a kidney transplant to save his life. Because of his kidney dialysis schedule and the resulting fatigue after the treatment, he asked for an accommodation to work only the day shift. The plant management allowed this for a period of time. When the plant finally called me, it was to say that they could no longer accommodate him, and they wanted to terminate him. I asked why they considered continuing to accommodate him to be unreasonable. Their answer was that they had been operating the department overstaffed on the day shift (to allow the employee with a disability to always work the day shift) and understaffed on the afternoon and night shifts. I asked why they did not just start a rotation schedule where the other employees would rotate through the two non-day shifts more often so they would not be overstaffed or understaffed, and their response was that they could not do that to the other employees because those employees would resent having to rotate through the more undesirable shifts more often. I will admit to being shocked by this response (I might have even blurted out: “Do those other employees want kidney failure too?”). This event began my interest (some might call it a fascination) with

supra notes 104–05 and accompanying text. One recent case is an exception to this general rule. In *Maes v. City of Española*, No. 1:12-CV-01250, 2014 BL 8102 (D.N.M. Mar. 19, 2014), the court held that the employer should have abided by the plaintiff’s request to only work the day shift (6:00 AM to 6:00 PM) and not the graveyard shift (6:00 PM to 6:00 AM), which exacerbated her insomnia, migraine headaches, and depression. *Id.* at *8. Interestingly, the court did not even address whether working rotating shifts was an essential function of the job. *See id.* at *5–6. Instead, the court skipped straight to the analysis of whether it was a reasonable accommodation to allow the plaintiff to work only the day shift, and the court held that there were genuine issues of material fact regarding the reasonable accommodation issue and denied the employer’s motion for summary judgment. *Id.* at *8, *15–17.

special treatment stigma.²²⁸ My review of the case law demonstrates that other employers and coworkers have the same reaction as the plant management in my story.

For instance, in *Bogner v. Wackenhut Corp.*,²²⁹ the plaintiff, who had epilepsy and suffered from occasional seizures, asked to work only the day shift because his doctor believed that it would limit the recurrence of his seizures.²³⁰ In holding that rotating shifts were an essential function of the job, and therefore it was unreasonable to allow the plaintiff to avoid working rotating shifts as an accommodation, the court stated: “Such accommodation is not reasonable since it would permit plaintiff to work shifts different from those of all other armed security officers.”²³¹ This not only eliminates an essential function of Bogner’s position but it also creates an entirely new position and imposes an additional burden on Bogner’s coworkers.”²³²

In another case, *Kallail v. Alliant Energy Corporate Services, Inc.*, the plaintiff had Type I diabetes and related complications.²³³ The plaintiff worked as a resource coordinator and all resource coordinators were required to work rotating shifts, rotating between 12-hour and 8-hour shifts and between day and night shifts.²³⁴ Because of the difficulties associated with managing her diabetes, her doctor advised her to work a straight day shift.²³⁵ Apparently, the rotating shift was causing her to experience erratic changes in her blood pressure and blood sugar and was putting her at higher risk of diabetic complications, including death.²³⁶ The plaintiff appealed from the district court’s grant of summary judgment in favor of the defendant, arguing that the court erred in finding that working rotating shifts was an essential function of the position.²³⁷ The employer argued that working rotating shifts was an essential function because it enhances the

228. This story has a happy ending. I was able to stop the plant from firing the employee, although they did force him to go on long-term disability leave (which paid almost all of his salary). Within a year or so, the employee had gotten the kidney transplant he had been waiting for and was back at work as a fully productive employee.

229. No. 05-CV-6171, 2008 WL 84590 (W.D.N.Y. Jan. 7, 2008).

230. *Id.* at *1–2.

231. *Id.* at *6.

232. *Id.*

233. 691 F.3d 925, 927 (8th Cir. 2012).

234. *Id.*

235. *Id.* at 928.

236. *Id.*

237. *Id.* at 930.

training of the resource coordinators, by allowing them to become familiar with all geographic territories and working with additional partners.²³⁸ Moreover, and relevant to this topic, the court also said:

Shift rotation also enhances the non-work life of Resource Coordinators by spreading the less desirable shifts—nights and weekends—among all Resource Coordinators. If Kallail were switched to a straight day shift and not required to work the rotating shift, then other Resource Coordinators would have to work more night and weekend shifts.²³⁹

Apparently, the company had considered adding a couple of straight-shift positions, but it abandoned that idea because other employees complained.²⁴⁰ The court reacted to this fact by stating that avoiding “employee complaints and maintain[ing] morale are legitimate business reasons for a scheduling decision.”²⁴¹

In *Dicksey v. New Hanover Sheriff's Department*, plaintiff was a deputy sheriff and detention officer who suffered from a seizure disorder.²⁴² Although he had been seizure-free for many years, he had a seizure in a jail cell and then was transferred to a job that worked rotating shifts.²⁴³ His doctor advised that he would be better able to control his seizure disorder if he worked a straight shift.²⁴⁴ The day after he requested an accommodation for his disability, to be given a straight shift rather than having to work a rotating shift, he was terminated.²⁴⁵ In holding that the employer should not have to reallocate essential functions of the job (working a rotating shift) or create a new position (a straight day shift), the court used the often-stated rule that any accommodation that makes other employees work harder or longer is unreasonable.²⁴⁶ The court also stated: “Assigning plaintiff to the day shift on an indefinite basis would have placed upon plaintiff’s coworkers

238. *Id.* at 931.

239. *Id.*

240. *Id.*

241. *Id.*

242. 522 F. Supp. 2d 742, 744–45 (E.D.N.C. 2007).

243. *Id.* at 745.

244. *Id.*

245. *Id.*

246. *Id.* at 748–49.

or his boss the burden of working plaintiff's night shifts.”²⁴⁷

Finally, in *Rehrs v. Iams Co.*,²⁴⁸ the plaintiff, who suffered from Type I diabetes, began having trouble managing his diabetes when his company implemented a rotating-shift schedule for all warehouse technicians.²⁴⁹ He suffered a heart attack and when he was ready to return to work, his doctor submitted a letter requesting that plaintiff be placed on a fixed daytime schedule because his diabetes had become difficult to control.²⁵⁰ He was allowed to work this schedule until Proctor and Gamble (P & G) learned that this would be a permanent schedule change, at which point he was put on short-term disability leave.²⁵¹ When defending the lawsuit, P & G stated that not enforcing the shift rotation would “adversely affect other technicians, creating inequities, because these other technicians would be forced to work the night shift exclusively or for longer periods and lose the benefits of shift rotation, thereby decreasing their opportunities for promotion and development.”²⁵² The court found that the rotating shift was an essential function of the job and that allowing plaintiff to work a straight day shift would have placed a “heavier or unfavorable burden on other technicians.”²⁵³

Leaves of absence or working from home are sometimes viewed as accommodations that would affect other employees because other employees might be called upon to pick up the slack for the employee with the disability who is absent from work.²⁵⁴ For instance, in *Mason v. Avaya Communications, Inc.*,²⁵⁵ the court held that plaintiff's request for an accommodation to allow her to work at home was unreasonable.²⁵⁶ The plaintiff worked as a service coordinator, which required her to schedule

247. *Id.* at 749.

248. 486 F.3d 353 (8th Cir. 2007).

249. *Id.* at 354–55. For the first two years of his employment, he worked a fixed schedule from 4:00 PM to midnight. *Id.* at 354. It was only after January 2000 when Procter & Gamble acquired Iams that it began the rotating shift schedule, which consisted of two daily twelve-hour shifts. *Id.*

250. *Id.* at 355.

251. *Id.* Interestingly, shortly after this time, P & G outsourced the operation of the Aurora facility to Excel, which operates the facility using a straight-shift schedule. *Id.*

252. *Id.* at 357.

253. *Id.*

254. See *supra* note 169 and accompanying text.

255. 357 F.3d 1114 (10th Cir. 2004).

256. *Id.* at 1116.

service appointments for technicians working in the field.²⁵⁷ After a horrific workplace violence scare,²⁵⁸ the plaintiff learned that the threatening employee was going to return to work, and she became sick.²⁵⁹ Doctors confirmed that she was suffering from post-traumatic stress disorder.²⁶⁰ She asked for several accommodations, including relocating the threatening employee, allowing her to work at another facility, and allowing her to work from home.²⁶¹ The employer denied these requests.²⁶² In determining whether working from home was a reasonable accommodation, the court gave great deference to the employer's assertion that teamwork is an essential function of the coordinator position because the coordinators assist and cover for one another.²⁶³ The court stated that the plaintiff's "suggestion that teamwork is not an essential function because other service coordinators can pick up the slack in her stead is simply irrelevant in determining whether teamwork is an essential function of the job."²⁶⁴

Similarly, in *Suvada v. Gordon Flesch Co.*,²⁶⁵ the plaintiff was hired as an on-site production clerk who was responsible for printing and copying services at the customer's location.²⁶⁶ She was diagnosed with cervical cancer and had some time off while she was going through this treatment.²⁶⁷ Her supervisor warned her about taking too much time off work and expressed concern regarding staffing if and when she needed additional time off to treat her cancer.²⁶⁸ The plaintiff felt guilty about the possible burden she would place on her coworkers (only two to three employees were staffed at any given location) and quit, stating she was worried about "screwing [her

257. *Id.* at 1117.

258. *Id.* A co-employee pulled out a knife during a verbal confrontation with another employee. *Id.* Plaintiff did not witness this event first hand but learned afterwards that the threatening employee had previously threatened to "go postal," owned a bunch of weapons, and had compiled a hit list. *Id.* This incident upset the plaintiff, but she was able to continue working because the threatening employee was suspended. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 1121.

264. *Id.* (stating that the "mere fact that others could do [plaintiff's] work does not show that the work is nonessential").

265. No. 11 C 07892, 2013 WL 5166213 (N.D. Ill. Sept. 13, 2013).

266. *Id.* at *1.

267. *Id.* at *2.

268. *Id.*

coworkers] over.”²⁶⁹ Fortunately, the court dismissed the employer’s motion for summary judgment, stating that the employer should have done more to try to accommodate the plaintiff by looking for a reassignment.²⁷⁰

Finally, in *Zimmerman v. Gruma Corp.*,²⁷¹ the plaintiff needed to take time off intermittently because she had several disabilities.²⁷² Her supervisor began questioning her about her frequent absences and told her that every time she was not at work, she was a burden on her coworkers.²⁷³ The plaintiff claimed that she received “ongoing harassment” because of her absences.²⁷⁴

3. Accommodation Perceived as Preferential Treatment

In some cases, the requested accommodation would not directly burden other employees but is seen as preferential treatment by the coworkers of the employee with the disability.²⁷⁵ Thus, employers are concerned about the backlash they might face for giving what seems like special favors.²⁷⁶ Some employers are also concerned about the precedent-setting effect of granting some accommodations.²⁷⁷ For instance, in *Hancock v. Washington Hospital Center*,²⁷⁸ the court considered whether an employer should have to give the plaintiff an accommodation that would be seen as special treatment.²⁷⁹ The plaintiff was a medical assistant whose responsibilities included, among other things, quite a bit of walking and lifting.²⁸⁰ After complications related to a surgery for cysts, she was under doctor’s instructions that limited her ability to lift and walk.²⁸¹ One of the possible accommodations discussed

269. *Id.* at *3.

270. *Id.* at *7.

271. No. 3:11-CV-01990-L, 2013 WL 3154118 (N.D. Tex. June 21, 2013).

272. *Id.* at *1.

273. *Id.* at *2.

274. *Id.*

275. Arnow-Richman, *supra* note 159, at 392 (stating that employees who receive the benefits of accommodations often are resented by coworkers because those coworkers see the accommodation as preferential treatment).

276. *Id.* at 391.

277. *Id.* at 368.

278. 908 F. Supp. 2d 18 (D.D.C. 2012).

279. *Id.* at 19.

280. *Id.* at 20.

281. *Id.* at 20–21.

was to allow her a light duty position of answering the telephones.²⁸² The plaintiff's supervisor responded that "[i]f I only utilize her on the phones (long-term), then it sets me up to have to make likewise accommodations for other staff members in the future."²⁸³

Similarly, in *Lee v. Harrah's New Orleans*, the plaintiff was a dealer in the casino and suffered from severe back pain and fibromyalgia, which limited her ability to stand for long periods of time.²⁸⁴ The dealer position was mostly a standing position, but there was one position, the box person assignment, which was mostly a sitting position.²⁸⁵ As an accommodation for her disability, she asked to be assigned to that position.²⁸⁶ Her supervisor testified that he tried to assign her to the seated position as much as possible without showing favoritism.²⁸⁷ When the employer assigned her to a standing position one day, her condition worsened and she sued.²⁸⁸ The employer argued that she could not perform the essential functions of her job because she could not stand for long periods of time.²⁸⁹ The court disagreed and held that there was a genuine dispute of fact regarding whether she could perform the essential functions of the job by being assigned permanently as the box person.²⁹⁰

The accommodation that might cause the most resentment by other employees involves reassignment or transfer to another position. If the employee can no longer perform the essential functions of the position, the employee might request "reassignment to a vacant position," which is an accommodation specifically referenced in the statute.²⁹¹ In *EEOC v. United Airlines*, the Seventh Circuit overruled its earlier precedent and held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, [even if there is another, more qualified employee seeking the position,] provided that such accommodations would be ordinarily reasonable and would not present an

282. *Id.* at 22.

283. *Id.*

284. No. 11-570, 2013 WL 3899895, at *1 (E.D. La. July 29, 2013).

285. *Id.* at *2.

286. *Id.* at *4-5.

287. *Id.* at *3.

288. *Id.*

289. *Id.* at *5.

290. *Id.*

291. 42 U.S.C. § 12111(9)(B) (2012).

undue hardship to that employer.”²⁹² Despite this decision overruling the Seventh Circuit’s earlier opinion in *EEOC v. Humiston-Keeling, Inc.*,²⁹³ there is still a circuit split on this issue, with at least one circuit holding that the employer is not obligated to reassign the disabled employee if there are other, more qualified employees applying for the position.²⁹⁴

4. Employers Who Do Not Allow Employees to Help

Sometimes employers object to burdens placed on other employees even if those coworkers have not complained about the burdens caused by accommodations given to the employee with a disability. One of the most fascinating cases in this regard is *Miller v. Illinois Department of Transportation*,²⁹⁵ where the employees on a bridge crew demonstrated incredible teamwork in accomplishing the tasks required. The plaintiff had difficulty working from heights, but only when he was working in an unsecured environment.²⁹⁶ He told his team leader of this fact, even though he had not been officially diagnosed with acrophobia.²⁹⁷ He estimated that, because of his fear, he would have difficulty with less than three percent of his job, and he was able to complete his tasks on all but one occasion.²⁹⁸ The crew informally accommodated plaintiff and other team members who could not perform all of the tasks.²⁹⁹ The team leader was unable to weld, and another co-worker could not ride in the snooper bucket, was unable to spray the bridges because of allergies, and was not required to mow the yard or rake patching debris.³⁰⁰ The crewmembers would swap assignments as needed to allow the crew to complete the tasks required.³⁰¹ As stated by the court: “In short, the evidence would allow a jury to find that the team worked effectively as a team, taking advantage of each member’s abilities

292. 693 F.3d 760, 761 (7th Cir. 2012).

293. 227 F.3d 1024, 1028 (7th Cir. 2000).

294. See Porter, *Martinizing*, *supra* note 13, at 538–41 (citing Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007)).

295. 643 F.3d 190 (7th Cir. 2011).

296. *Id.* at 192.

297. *Id.*

298. *Id.*

299. *Id.* at 193.

300. *Id.*

301. *Id.*

and accommodating each member's limitations."³⁰²

The plaintiff worked successfully until he was required to unhook his lifeline and work on the bridge unsecured.³⁰³ He completed his assigned task but filed a grievance because he believed the task had been unsafe.³⁰⁴ Less than two weeks later, the plaintiff was asked to change a light bulb while standing on a bridge beam, and he suffered a panic attack.³⁰⁵ This was the only time that the plaintiff had been unable to complete an assignment because of his fear of heights.³⁰⁶ He described his limitation as being "unable to work at heights above 20 to 25 feet in an exposed, extreme position."³⁰⁷ The employer's doctor concluded that he was "unfit" to work as a highway maintainer, and he was told to request non-occupational disability status or he would be terminated.³⁰⁸ The plaintiff requested an accommodation, asking to be excused from working on bridge beams and other extreme places over twenty-five feet.³⁰⁹ The company's response to this request was to say: "I'll tell you right now, we don't grant requests."³¹⁰ This lawsuit followed the company's formal denial of his accommodation request.³¹¹ The district court held that his requested accommodation, "rearranging job tasks among members of the bridge crew" was unreasonable.³¹² The Seventh Circuit reversed, stating that a reasonable jury could find that the work plaintiff could not perform was not an essential function because the bridge crew worked as a team, accommodating each other's abilities and inabilities.³¹³ This case is unusual, of course, because the employees actually had a practice of substituting and reassigning tasks among themselves.³¹⁴ In this case, therefore, the stigma of special treatment did not come from other employees but from the employer.³¹⁵

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 194.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 198.

314. *Id.* at 200.

315. *See id.*

Similarly, in *Henschel v. Clare County Road Commission*,³¹⁶ the plaintiff, who was an excavator operator, had to have part of his left leg amputated after a motorcycle accident.³¹⁷ He was cleared to return to work as long as he only drove an automatic transmission truck, not a manual transmission.³¹⁸ He could operate the excavator with one leg but the employer objected, stating that transporting the excavator to the worksite involved driving a manual transmission truck, something plaintiff could not do with his prosthetic leg.³¹⁹ The court held that, because in the past other employees had helped with hauling the excavator, and that the excavator often stayed at the worksite for long periods of time, hauling the excavator was not an essential function of the job.³²⁰ In fact, there was testimony from other employees stating that it was not a problem to have someone else haul the excavator.³²¹

Finally, in a recent case, the employer terminated the plaintiff, a firefighter, who lost vision in one eye due to an accident.³²² The only task the employee could not perform safely was driving the fire truck.³²³ The employer insisted that driving the fire truck was an essential function of the job, even though two other firefighters testified that there are three firefighters on every fire run and they rotate which person drives the fire truck.³²⁴ Both employees testified that it would be no trouble at all to take plaintiff out of the rotation.³²⁵ The court ruled in plaintiff's favor, stating that allowing marginal tasks to be shifted to other employees is clearly a reasonable accommodation.³²⁶

These are just some of the cases that demonstrate the negative treatment individuals with disabilities face when they have to request accommodations or other special treatments in the workplace in order to continue to work with their disabilities. I now turn to an analysis of what will happen to

316. 737 F.3d 1017 (6th Cir. 2013).

317. *Id.* at 1019–20.

318. *Id.* at 1021.

319. *Id.* at 1020–21.

320. *Id.* at 1023–24.

321. *Id.*

322. *Rorrer v. City of Stow*, 743 F.3d 1025, 1031–32 (6th Cir. 2014).

323. *Id.*

324. *Id.* at 1034.

325. *Id.*

326. *Id.* at 1044.

special treatment stigma after the ADAAA.

IV. SPECIAL TREATMENT STIGMA AFTER THE AMENDMENTS

This Part will hypothesize what effect the ADAAA will have on special treatment stigma. Two outcomes are possible. First, because the ADAAA has made it much easier for an individual to prove he has a disability and therefore to request and receive a reasonable accommodation, the increase in the number of such employees might lead to more resentment. This is especially true in cases where the plaintiff has what might seem like a relatively insignificant disability. On the other hand, as more and more individuals are found to be disabled, it is possible that this will decrease the stigma of being disabled, leading to a situation where asking for some kind of special treatment in the workplace will be seen as the new normal.

A. More Accommodations = More Stigma

As more employees become entitled to accommodations after the ADAAA, it is not difficult to imagine that this will lead to more stigma and resentment by other employees.³²⁷ That resentment could certainly come from non-disabled coworkers.³²⁸ As discussed above, the most common sources of this resentment are: (1) those who are burdened by individuals with disabilities who receive accommodations³²⁹ and (2) those who also need or want the types of accommodations given to individuals with disabilities and are therefore resentful that they cannot have them.³³⁰ This latter group is most commonly, although not exclusively, individuals with caregiving responsibilities. Individuals with disabilities often request variations of the structural norms of the workplace, such as hours, schedules, shifts, attendance requirements, and leaves of absence. As more and more disabled employees begin requesting these types of accommodations, employees with caregiving responsibilities who could also benefit from these types of accommodations are likely to be resentful, especially if they perceive the disabilities to be relatively minor and not deserving of

327. See Porter, *Backlash*, *supra* note 13, at 80–81 (noting that some employees may resent their fellow disabled employees).

328. *Id.* at 80.

329. *Id.*

330. *Id.* at 81.

accommodation.

In addition to the resentment of non-disabled employees, it is also possible that other employees with disabilities will be resentful of accommodations given, especially if those other disabled employees have arguably more severe disabilities. Professor Jeanette Cox has written about “intra-class discrimination” after the ADAAA.³³¹ Professor Cox was primarily talking about the effects of the Amendments on intra-class discrimination in favor of individuals with arguably more severe disabilities,³³² but there is nothing in the ADA that states an employer is required to grant preferential treatment to an individual with a more severe disability over an individual with a less severe disability.³³³ Although I think Professor Cox is correct that employers might prefer the positive effects of diversity by employing someone with a visible disability (such as someone in a wheelchair), one can also imagine situations where an employer grants an accommodation to an employee with an arguably less severe disability that negatively affects an employee with a more severe disability (again, such as the employee in a wheelchair).³³⁴ There are a couple of ways this could play out in the workplace.

First, an individual with a disability could ask for and receive an accommodation that affects all other employees, including an individual with a more severe disability.³³⁵ For purposes of these examples, I will use the employee in a wheelchair as an example of the employee with a more severe disability, even though the relative severity of various disabilities is impossible to quantify or categorize. For example, an individual with a night vision disability could ask for a waiver from the requirement to work rotating shifts because that individual cannot drive in the dark.³³⁶ This accommodation would mean that all employees, including the employee in a wheelchair, would be required to rotate through the night shift more

331. See generally Cox, *supra* note 13.

332. *Id.* at 214.

333. See ADA Amendments Act of 2008, 42 U.S.C. §§ 12101–213 (2012).

334. I use the word “arguably” because I do not think anyone can judge the relative severity of someone else’s disability. Is someone with a mental disability or autism or a highly contagious disease better off or happier than someone who uses a wheelchair? I think the answer to that question depends on a myriad of circumstances and variables.

335. See Porter, *supra* note 24, at 805 n.371.

336. This is a relevant example because the night vision impairment would likely not have been considered a disability prior to the Amendments but would likely be considered a disability post-Amendments.

frequently.

As a second example, it is possible that the individual with a less severe disability could request an accommodation that negatively affects the employee who uses a wheelchair specifically. For instance, an employee (Mark) who works in a manufacturing plant could have a skiing accident that causes Mark to injure his back and be unable to work in his current job, which requires heavy lifting as an essential function of the job. Thus, Mark requests reassignment to a vacant position as a reasonable accommodation. The vacant position is as a cashier in the cafeteria inside the plant. The employee who uses a wheelchair (Jim) does not work in a job that requires heavy lifting, but he too wants to move into the cafeteria cashier position. His current job is a very solitary job without much interaction with others, and he believes he would prefer the cashier job because he would be interacting with others constantly. The employer believes that Jim is a better fit for the cashier job because of Jim's outgoing personality, although the employer recognizes that Mark is also qualified. This employer is located in the Seventh Circuit, and, following that court's most recent decision in *EEOC v. United Airlines, Inc.*,³³⁷ the employer believes that it must allow Mark to transfer to the cashier position. Jim believes this decision is unfair preferential treatment, and Jim is resentful that Mark, who has a relatively minor disability that will eventually get better (albeit probably not completely) and was caused by his own recklessness, is getting the transfer to the coveted position instead of Jim. Of course, other non-disabled employees who were interested in that position are also likely to be resentful.

Prior to the Amendments, the employee with a back injury from a skiing accident would likely have been deemed not disabled, especially if the back injury would eventually heal, even if not completely. It would have been difficult, pre-ADAAA, to prove that an impairment that precludes an employee from heavy lifting, but does not have other substantial limitations on major life activities, was a disability. Thus, it is possible that, as the ADAAA dramatically increases the number of employees who are considered disabled under the ADA and therefore entitled to reasonable accommodations, this likely will cause more resentment by other employees,

337. *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (holding that an employer must allow an employee with a disability to transfer to a vacant position even if there are other more qualified employees).

both those who are also disabled and those who are not.

B. More Accommodations = The New Normal

1. Accommodating Each Other

On the other hand, it is possible that the increase in the number of individuals who are considered disabled, and therefore entitled to reasonable accommodations, might change the way employees view accommodations. Instead of viewing accommodations as benefitting the rare individual with a disability while disadvantaging the rest of the employees, those co-employees might find themselves in need of accommodations. This could create a situation where employees are both receiving the benefit of an accommodation while simultaneously being burdened by another employee's accommodation. Consider this example that I have used elsewhere.³³⁸

John has a night vision disability, which precludes him from working the night shift, in a job where all employees are required to rotate through the day shift and the night shift. Because the employer accommodates John's disability and does not make him work the night shift,³³⁹ other employees (including co-worker Mike) have to rotate through the night shift more often. One day Mike is in a car accident, which causes a serious back disability, making him no longer able to perform the physically demanding packing position on the plant floor. Accordingly, he requests reassignment to a less-demanding, vacant position doing light maintenance work. John also applies for this vacant job, and even though he is arguably more qualified than Mike, the employer gives the job to Mike to allow Mike to

338. Porter, *supra* note 24, at 805 n.371.

339. As stated above, the employer would likely not be required to accommodate this employee because most courts have held that rotating shifts are an essential function of the job, and therefore the employer does not have to accommodate an employee who cannot work the rotating shifts. *See, e.g.,* *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007). But just because the employer might not be required to accommodate the employee, the employer might choose to accommodate anyway, either because the employer wants to retain the disabled employee rather than terminating him or perhaps the employer is unaware of this line of cases. Risk-averse employers (especially those who do not have in-house counsel and do not like to pay the legal fees associated with asking for their lawyers' advice) often accommodate even when not required to do so by law. Finally, even if this employer had sought counsel's advice, this line of cases is relatively new. There are a few cases that date back several years, but most of them have been more recently decided. *See supra* Part III.B.2.

remain employed. In this example, John and Mike have both been the beneficiaries of accommodations and both have had to bear some of the burdens.³⁴⁰

Although this specific fact pattern might be unlikely to occur very often in the real world, I believe it is possible for employees to be simultaneously the beneficiary of their own accommodations and burdened by others' accommodations. Consider the case discussed earlier, *Miller v. Illinois Department of Transportation*, where the plaintiff had difficulty performing some tasks working on a bridge crew because of a fear of heights.³⁴¹ Other employees helped perform some of the tasks the plaintiff could not, but those other employees also had some limitations on their ability to perform all of the tasks of their jobs. The crew informally accommodated the plaintiff and other team members who could not perform all of the tasks. The crew members would swap assignments as needed to allow the crew to complete the tasks required.³⁴² As stated by the court: "[T]he team worked effectively as a team, taking advantage of each member's abilities and accommodating each member's limitations."³⁴³ Although some of the employees in this case might not have had disabilities that caused their limitations, as more employees are considered disabled under the ADAAA, it is more likely these types of fact scenarios will arise.

2. Accommodating Everyone

Furthermore, as accommodations become more commonplace, this will change the landscape of accommodations in the workplace, making the availability of accommodations the "new normal."³⁴⁴ For instance, if more employees request modifications to the physical functions of the job (perhaps lifting requirements), the employer might find it beneficial to simply modify the way the job is done for everyone rather than make individual accommodations for all of the employees who need them.³⁴⁵ This

340. Porter, *supra* note 24, at 805 n.371.

341. 643 F.3d 190 (7th Cir. 2011).

342. *Id.* at 193.

343. *Id.*

344. Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366 (2010).

345. Michael Ashley Stein, Anita Silvers, Bradley Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014) (proposing a universal

will benefit employees who do not have disabilities but perhaps have difficulty lifting heavy weights because of a pregnancy, advanced age, or simply because of small stature.³⁴⁶ As Professor Travis has argued, if we can get people to stop looking at the ADA as “us against them,” we should be able to reduce some of the stigma experienced by individuals with disabilities.³⁴⁷

Even more promising, perhaps modifications to the structural norms of the workplace for individuals with disabilities can have positive spillover effects for other employees.³⁴⁸ For example, as more employees request flexible schedules or reduced hours to accommodate their disabilities, employers might begin realizing these types of accommodations are feasible; therefore, they might also give thought to whether they could and should restructure the workplace to account for the needs of not only the growing number of individuals with disabilities legally entitled to reasonable accommodations, but to all employees.³⁴⁹ Professor Albiston advocates for a similar approach, one where we move away from individual accommodations and instead restructure the nature of work.³⁵⁰ If we take away the special treatment of accommodations, this will reduce the stigma attached to those accommodations.³⁵¹

I do not mean to suggest such a result is in our immediate future. In fact, as discussed earlier, employers seem to be more reluctant to modify the structural norms of the workplace than they are to modify the physical functions of the job and courts are less willing to force them to do so.³⁵² But, over time, as employers begin to see the relative ease with which employees with disabilities can be accommodated, this will hopefully lead to a willingness to restructure the workplace more broadly.

accommodation mandate that would allow all employees to obtain accommodations if needed to perform the tasks of the job).

346. *Id.*

347. Travis, *supra* note 151, at 377.

348. See Lisa Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susanne M. Bruyerè & Peter Blanck, *Accommodating Employees with and Without Disabilities*, 53 HUM. RESOURCES MGMT. 593, 607 (2014).

349. See *id.*

350. ALBISTON, *supra* note 169, at 129–30.

351. *Id.* at 102 (stating that we should move away from an anti-discrimination norm and instead ask what work should look like because this would allow people to get away from the special treatment stigma that accompanies accommodations).

352. Porter, *Backlash*, *supra* note 13, at 78.

3. An Empirical Study: Hope for the Future

A recent empirical study has made me more optimistic that accommodations might become less stigmatizing. In an article titled *Accommodating Employees with and Without Disabilities*,³⁵³ the authors performed an empirical study on eight companies of different sizes by surveying 5,000 employees and managers and conducting interviews and focus groups with 128 managers and employees with disabilities.³⁵⁴ The authors compared the perspectives of individuals with disabilities, individuals without disabilities, and managers to ascertain their reaction to employees with disabilities receiving accommodations.³⁵⁵ What they found was quite fascinating.

First, although we think of disability accommodations as “special treatment,” the reality (at least with respect to the employers in this study) is that non-disabled employees are often accommodated because of personal needs, especially for family caregiving needs.³⁵⁶ In fact, although 62.1% of employees with disabilities sought an accommodation, so did 28.1% of employees without a disability.³⁵⁷ Second, a change to the employee’s work schedule was the most commonly requested accommodation of both employees with disabilities and employees without disabilities.³⁵⁸ Third, most of the accommodation requests at these eight employers were granted—72.6% of employees with disabilities had their accommodations granted and 79.3% of employees without disabilities had their accommodations granted.³⁵⁹ Fourth, when accommodations were denied,

353. Schur et al., *supra* note 348.

354. *Id.* at 593, 599 (describing the companies that were included in the study). The companies varied in size from 38 to 38,000 employees nationwide. *Id.* at 606. They included a pharmaceutical company, a hospital, a disability service organization, a financial services company, a consumer products manufacturer, a supermarket chain, a restaurant, and an infrastructure services company. *Id.* at 599. The total number of respondents was 5,303, of whom 5.5% were identified as disabled using the 2008 American Community Survey data. *Id.*

355. *Id.*; see also *id.* at 595 (stating that the authors scrutinized accommodation issues from multiple viewpoints—employees who requested accommodations, their coworkers, and their managers—to obtain a more well rounded picture).

356. *Id.*

357. *Id.* at 600.

358. *Id.* at 601. The second most common accommodation was working from home. *Id.*

359. *Id.* at 604. These figures were according to the employees themselves. Interestingly, managers believed that they granted the accommodation requests more frequently—90.5% of the time. *Id.*

only a small percentage of study respondents said that the accommodation was denied because of a burden or inconvenience on other employees.³⁶⁰ Finally, and most importantly for this Article, of the 50% of coworkers who were aware of accommodations granted to other employees, most of them had positive reactions.³⁶¹ A majority of respondents in each group—61% of employees with disabilities, 69% of employees without disabilities, and 68% of managers—reported that no coworkers were negative or resentful of the accommodations provided and most of the employees were positive and supportive.³⁶²

Several observations about this data can be made. First, in companies where accommodations are granted at a high rate to both employees with and without disabilities, there might be little to be resentful about.³⁶³ In other words, if both employees with disabilities and employees without disabilities are having their accommodations granted at the high rates indicated in this study, individuals without disabilities should not be resentful of those employees with disabilities who receive accommodations.³⁶⁴ Second, this study is noteworthy for the level of accommodations granted to individuals with disabilities. If one reads the case law regarding accommodations for individuals with disabilities, one is left with the impression that employers are denying many accommodations, accommodations that they could easily grant and that they *should* grant if they are following the mandate of the ADA.³⁶⁵ But this study demonstrates a much higher level of compliance with the ADA mandate. Perhaps that difference is because case law only captures the accommodations that are not granted and that many cases never get to litigation simply because the employer agrees to accommodate the employee with the disability. That conclusion is consistent with those scholars who have argued that the interactive process required by the ADA has created a kind of “procedural revolution” where workers with disabilities and managers are sitting down

360. *Id.* (stating that 10.9% of employees with disabilities, 10.7% of employees without disabilities, and 9.1% of managers stated that the reason for the denial of the accommodation was because of the burden or inconvenience on other employees).

361. *Id.*

362. *Id.* at 605.

363. *See id.* at 616.

364. *Id.* at 614, 616.

365. *See generally* Porter, *Backlash*, *supra* note 13, at 55–58 (discussing accommodation cases where employers refused to provide the accommodation).

and coming to mutually agreeable solutions for resolving the disabled employee's inability to do some part of the job.³⁶⁶ Another explanation is that the study might be capturing a false sense of positive feedback about accommodations in the workplace. As noted by the researchers: "While these reports are encouraging, the employees and managers who volunteered for interviews or focus groups may not be representative, and participants [of the survey] may have been reluctant to report negative experiences."³⁶⁷

The study is also noteworthy because of the small number of coworkers who were resentful of accommodations granted to disabled employees.³⁶⁸ In fact, in the interviews and focus groups with managers, *none* of the managers identified coworker attitudes as a major barrier to providing accommodations; in fact, most stated that coworkers were supportive of employees with disabilities.³⁶⁹ Of course, as stated earlier, perhaps coworkers at these companies are less resentful because they too are getting accommodations granted. It also bears mentioning that somewhere between 10% to 15% of respondents reported that "at least some coworkers were resentful of disability accommodations."³⁷⁰ Anecdotally, I have observed that it is not uncommon for a few disgruntled employees to make an impact on a supervisor's decision regarding granting an accommodation. Yet, even with those cautionary notes, this data is very encouraging and hopefully not an anomaly.

Although this next finding is fairly obvious, it still bears mentioning. The study found that employees who had their accommodations granted had better attitudes about the workplace. They had higher perceptions of organizational support and higher job satisfaction.³⁷¹ Furthermore, granting accommodations seemed to have a positive spillover effect on other employees.³⁷² Both employees with and without disabilities reported various positive effects because of accommodations given. Almost half of both groups of employees reported that the accommodations have improved the

366. Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 626 (2004); see also Travis, *supra* note 151, at 361.

367. Schur et al., *supra* note 348, at 605.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* at 607.

372. *Id.* at 607–08.

employees' interactions with coworkers.³⁷³ Other benefits reported included improved productivity, greater employee retention, improved morale and job satisfaction, decreased employee stress at work, improved employee attendance, improved workplace safety, improved employee ability to acquire training or new skills, and greater ability for the company to promote a qualified employee.³⁷⁴ The researchers also tried to ascertain whether the benefits outweigh the costs of the accommodation. Because the costs and benefits were reported separately, it was impossible to get a clear picture of this, but the authors concluded that it was likely that the benefits of accommodations outweigh the costs.³⁷⁵ This is, in part, because the costs of accommodations were relatively low.³⁷⁶ Thus, the authors stated that there appears to be a growing recognition of the generalized benefits of workplace accommodations.³⁷⁷ Finally, consistent with what I have discussed here, the authors are in favor of accommodating more employees.

In sum, the authors stated that this study argues against the view that accommodations create tensions and feelings of inequity among coworkers; rather, it supports the idea that accommodating employees with and without disabilities has broad and measurable positive benefits for organizational attitudes and cultures.³⁷⁸ They conclude: "The findings suggest disability accommodations need to be viewed in the context of accommodations for the personal needs of all employees, and that accommodations may not only maximize the inclusion of the people with disabilities but may have positive spillover [effects] on other employees that foster overall workplace productivity."³⁷⁹ Although they recognize that the survey may be subject to "social desirability bias" where people feel the need to express socially acceptable views,³⁸⁰ they are nevertheless optimistic about the future of accommodations. After reading this study, I am too.

373. *Id.* at 613.

374. *Id.*

375. *Id.* at 614.

376. *Id.* at 609, 612 (reporting that most accommodations have no costs or very low costs and very small percentages reported a one-time cost of more than \$5,000).

377. *Id.* at 614.

378. *Id.* at 616.

379. *Id.*

380. *Id.* at 615.

V. CONCLUSION

Many individuals with disabilities experience stigma and bias in the workplace. Some of this stigma is caused by the nature of the disability, such as a mental illness or a contagious disease. But even employees without traditionally stigmatizing disabilities might still face stigma in the workplace. That stigma occurs when these individuals ask for and receive special treatment in the workplace in the form of reasonable accommodations. I call this special treatment stigma, and in this Article, I have described how it manifests itself in the workplace. Employees with disabilities who seek accommodations face resentment from other employees for two main reasons—either because (1) the co-employees are directly burdened by the accommodation, such as when the accommodation makes other employees have to work harder or longer or work less desirable job tasks or shifts; or (2) the co-employees want the type of accommodation that has been given to the disabled employee and are resentful of the perceived special treatment received by the employee with the disability. Because the ADAAA has now made it much easier for employees to prove that they have one or more disabilities and are entitled to reasonable accommodations, this Article has also explored the possible ramifications of the expanded class of protected persons under the ADAAA. One possible effect is that more employees seeking accommodations will lead to more special treatment stigma, or resentment from both coworkers without disabilities and coworkers with disabilities. But another, more promising, potential effect is that more employees requesting accommodations will lead to accommodations in the workplace being seen as “the new normal.” Employees might discard the “us versus them” mentality and see the ADA as providing modest workplace modifications to a large cross-section of the workforce. And employers might see the benefit in restructuring the workplace, rather than providing numerous, often similar accommodations. This restructuring of the workplace has the greatest potential to end special treatment stigma. Of course, I do not have a crystal ball, and I suspect that this change in perception will not come easily. But I am hopeful that we are on our way to a more accommodating workplace for everyone.