Reasonable Accommodation under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent

Barbara A. Lee

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38M33M

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent

Barbara A. Lee†

The Americans with Disabilities Act announced a significant change in social policy surrounding the workplace. Employers now face substantially greater responsibility for assisting individuals with disabilities in gaining access to employment. In this article, the author compares and contrasts ADA requirements with those under the Rehabilitation Act and state discrimination laws. Professor Lee examines federal and state cases interpreting those earlier laws and discusses the relevance of the cases to the ADA. She analyzes differences between the ADA and the Rehabilitation Act which cast doubt on the usefulness of caselaw under the earlier law for predicting judicial outcomes under the ADA. The article also includes a discussion of significant ADA regulations and their likely implication for judicial interpretation of the Act.

I. INTRODUCTION ........................................ 202
II. THE BASICS OF REASONABLE ACCOMMODATION . 209
   A. The Language of the ADA ............................ 209
   B. Regulations Interpreting the ADA .................... 210
   C. Cases under Similar Laws ............................ 211
III. UNDUE HARDSHIP DEFINED ........................... 212

† Ph.D. 1977, The Ohio State University; J.D. 1982, Georgetown University Law Center. The author is Associate Professor of Industrial Relations and Human Resources at Rutgers University. This research was funded by the New Jersey Developmental Disabilities Council and the Cornell University Program on Employment and Disability; however, the opinions expressed are those of the author. The author acknowledges with gratitude the research assistance of Karen Newman, Lea Pavlicek, and Steven Batchelor.

INTRODUCTION

Individuals with disabilities have gained important new legal protections with the enactment of the Americans with Disabilities Act.¹ This law symbolizes a change in social policy regarding individuals with disabilities, from one geared primarily to providing services and financial assistance, to the recognition of disability as a protected category, "a shift from charity to civil rights."² Employers now confront substantially increased responsibility with respect to the employment of people with disabilities. Two factors contribute to this increased responsibility. First, the scope and nature of the ADA's protections are broader than those of earlier laws forbidding disability discrimination. Secondly, students with disabilities are now protected by the Rehabilitation Act of 1973,³ which has produced a larger supply of educated individuals with

---


². Burgdorf, Analysis and Implications, supra note 1, at 426.

Employers in the forty-seven states (all except Alabama, Arkansas and Mississippi) whose laws prohibit discrimination on the basis of disability face liability under both the ADA and their relevant state law. The ADA does not pre-empt state nondiscrimination laws, and in states whose laws provide a higher level of protection for workers, employers are more likely to face actions brought under state law. For most states, however, the ADA provides equal or superior protection, and employers who meet ADA standards very likely will satisfy the requirements of their state nondiscrimination laws as well.

The ADA requires employers to attempt to accommodate applicants and employees with disabilities unless such accommodation creates an "undue hardship" for the employer. The Act holds employers to a high standard: it may require them to make changes in the job itself or in the workplace, or to acquire devices to help an individual with disabilities to do the job. Although many accommodations cost nothing and few pose the significant expense that some employers fear, many employers are not experienced in determining what, if any, accommodations are necessary in a given situation, or how to go about the process of providing reasonable accommodations.

The assumptions which undergird other civil rights laws are not necessarily appropriate when applying the ADA. Under the "Equal Employment Opportunities" provisions of Title VII of the Civil Rights Act of 1964 and related state civil rights laws, an individual's ability to do the job is the primary criterion for selection, and irrelevant characteris-

---

4. For two decades, public schools and virtually all colleges and universities have been subject to the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified individuals with handicaps" by recipients of federal funds. See infra text accompanying note 20. Students with disabilities, including learning disabilities, have been accommodated by these institutions and many have earned college degrees. See LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW §§ 6.01-7.26 (1992).

5. 42 U.S.C.A. §§ 12113, 12201(b).


7. The concepts of "reasonable accommodation" (42 U.S.C.A. § 12111(9)) and "undue hardship" (42 U.S.C.A. § 12111(10)) are used extensively throughout this article. For a discussion of accommodation, see infra text accompanying notes 41-66. Undue hardship is discussed infra, part III.


tics, such as race and national origin, may not be considered. When, however, an applicant or current employee with a disability is under consideration for a position, that individual's disability may have an impact on how that individual performs the job. He or she may not be able to do the job as it has been done in the past. Yet the simple fact that a job always has been performed in a certain way does not presuppose that alternative ways are unacceptable; they may actually be superior. The ADA requires employers to go beyond the analysis they would ordinarily use when selecting individuals without disabilities: can the person do the job as it is presently structured, and how well? If an individual with a disability applies for a position, an employer who performs the traditional "can the person do the job" analysis, but who does not take the next step—considering possible accommodations that would enable a worker with a disability to perform the job—generally will have violated the ADA.

The ADA does not define "reasonable accommodation," but gives examples instead, and the Equal Employment Opportunities Commission ("EEOC") interpretive regulations stress the procedure which the employer should use, while also providing examples of possible accommodations. Clearly, each case is evaluated on its own set of facts; but because the ADA differs from earlier nondiscrimination laws in significant ways, and because of its broad application, it is not clear what standards judges will use (or instruct juries to use) to evaluate particular accommodations. While several scholars have examined the language of the ADA and have suggested its significance for employers' policies and practices, and a few have suggested how judges may interpret the new

11. The ADA defines a 'qualified individual with a disability' as one who "can perform the essential functions" of the position he or she "holds or desires." 42 U.S.C.A. § 12111(8). The determination of a job's essential functions is up to the employer, but it is reasonable to expect courts to apply a rational basis standard to this determination. See infra text accompanying notes 55-66.

12. Given that the definition of "qualified individual with a disability" includes reasonable accommodation, an outright refusal to attempt accommodation would appear to be a per se violation of the Act. 42 U.S.C.A. § 12111(8); see also text accompanying note 41.

13. Section 12111(9) provides the following examples of reasonable accommodations:

(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.


15. For a discussion of how the ADA differs from the Rehabilitation Act with regard to reasonable accommodation, see infra text accompanying notes 23-39.

16. For comparison, the Rehabilitation Act covers only the federal government and recipients of federal contracts of $10,000 or more. See 29 U.S.C.A. §§ 791, 793, 794.

law, the statute itself provides little guidance for courts regarding the reasonableness of particular accommodations or the proper source for determining standards of undue hardship.

Because other federal and state laws prohibiting disability discrimination in employment contain similar reasonable accommodation provisions, precedent under these laws may serve as one source for determining standards under the ADA. This Article describes the reasonable accommodation and undue hardship provisions of the ADA, and the similarities and differences between their interpretation under the Rehabilitation Act and under the ADA. It then describes how federal and state judges have interpreted the reasonable accommodation and undue hardship provisions of federal and state laws similar to the ADA. The Rehabilitation Act, which has been in effect since 1973, prohibits federal agencies and employers that receive federal funds from discriminating against applicants or employees with disabilities. The law also requires federal employers to develop affirmative action plans for the "hiring, placement, and advancement of individuals with handicaps." In addition to the federal Rehabilitation Act, forty-seven states and the District of Columbia have enacted laws prohibiting private sector employers from discriminating against individuals with disabilities. Therefore, because few courts have yet had an opportunity to rule on discrimination claims brought under the ADA, judges will likely use rulings in cases brought under similar state and federal disability discrimination laws for guidance in evaluating whether an employer's at-

---


20. 29 U.S.C.A. § 791(b) (federal contractors in the private sector are not included in this requirement).


22. In the first case brought under the ADA to culminate in a ruling, a federal jury in Chicago awarded $572,000 (including punitive damages of $250,000 each from the agency and its owner) to the former director of a Chicago security firm who was discharged because of his terminal cancer, even though he was still able to perform his essential job functions. EEOC v. A.I.C. Sec. Investigations, Ltd., 823 F. Supp. 571 (N.D. Ill. 1993).
tempt to, or refusal to, accommodate a worker with a disability meets the ADA's standard.

Reliance on Rehabilitation Act precedent may not always be appropriate, however. Although the ADA is based upon and incorporates the language of the Rehabilitation Act and its regulations, and in many respects is very similar to the earlier law, the ADA is stricter than the Rehabilitation Act and related state laws in several ways. First, the ADA includes reassignment as a potential accommodation. In contrast, the federal Rehabilitation Act (and its implementing regulations) and some state laws do not include reassignment, and many judges, prior to the ADA's passage, ruled that reassignment to a different position is not required by these laws. These rulings will not be relevant for interpretation of the ADA.

The second major difference between earlier laws and the ADA is the definition of "undue hardship," one of the defenses an employer can raise to successfully meet a claim of disability discrimination. The United States Supreme Court, in Trans World Airlines, Inc. v. Hardison, considered the issue of undue hardship in the context of religious discrimination under the Civil Rights Act of 1964. In that case, the Court ruled that to require an employer to bear more than "de minimus" cost to accommodate a junior employee's religious beliefs is to burden that employer with an undue hardship. The ADA, however, expressly rejects the Hardison definition of "undue hardship" by defining the term to mean "significant difficulty or expense" in light of the circumstances. Moreover, the inapplicability of Hardison is clearly spelled out by the


25. The Rehabilitation Act's regulations do not list reassignment as a potential accommodation. This omission may be responsible for judicial inconsistency regarding whether an employer was obligated to consider reassignment when making an accommodation decision. For example, the Supreme Court in School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 289 n.19 (1986), ruled that the Rehabilitation Act did not require reassignment. However, some federal trial and appellate courts have ruled otherwise. See infra text accompanying notes 108-29; Mayerson, supra note 17, at 514.


28. Id. at 83 n.14, 84.

drafters of the legislative history. This new standard will be much more difficult for employers to meet than the standard applied by judges under the Rehabilitation Act and similar state laws.

A third difference between the ADA and similar federal and state laws is its provision for compensatory and punitive damages by its adoption of the damage provisions of the Civil Rights Act of 1991. While other disability discrimination statutes have not explicitly provided for damages beyond make-whole remedies (back pay, seniority, etc.), "the ADA's statutory provision for compensation for pain and suffering or emotional distress, as well as its provision for punitive damages, is significant." Although compensatory and punitive damages presently are capped at $300,000 (or less for organizations with fewer than 500 employees), a bill is pending in Congress to remove this cap.

The Civil Rights Act of 1991 does include some language helpful to employers: no compensatory or punitive damages may be awarded

---


31. In determining whether an employer had met the Rehabilitation Act's reasonable accommodation requirement, or a similar requirement under state fair employment laws, several judges ruled that the Rehabilitation Act's reasonable accommodation provision does not require reassignment. See, e.g., Jasany v. United States Postal Serv., 755 F.2d 1244, 1251 (6th Cir. 1985). Others have evaluated the employer's refusal to accommodate a worker with a disability by reassignment under the Title VII standard of "legitimate business reasons" instead of the undue hardship standard. See, e.g., Daubert v. United States Postal Serv., 733 F.2d 1367, 1370 (10th Cir. 1984).


Section 504 of the Rehabilitation Act recently has been interpreted as permitting the award of compensatory damages. In Tanberg v. Weld Co. Sheriff, 787 F. Supp. 970 (D. Colo. 1992), the court relied on the decision by the U.S. Supreme Court in Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028 (1992) that Title IX permitted the award of compensatory and punitive damages. Because the statutory language of neither Section 504 nor Title IX authorizes damages, but does not limit them either, the court determined that the reasoning used by the Court in interpreting Title IX applied with equal force to allegations of an intentional violation of Section 504.


“where the covered entity demonstrates good faith efforts, in consultation with the person with the disability,” to provide a reasonable accommodation.\textsuperscript{36} However, even if an employer complies with this language by attempting a reasonable accommodation, the employer still may be liable for make-whole damages.

A fourth difference between the ADA and similar federal and state laws is that ADA cases may be tried before a jury.\textsuperscript{37} Given the nature of disability discrimination cases, the presence of a jury may enhance a plaintiff’s ability to prevail in cases brought under the ADA in situations where a judge otherwise would have ruled for the employer under the Rehabilitation Act or similar state laws.

Finally, Congress’s decision to apply this nondiscrimination requirement to all employers with fifteen or more employees is a major shift from Rehabilitation Act doctrine. Most Rehabilitation Act cases involve federal employers, and judges in some of these cases, noting that the federal government was expected to be a “model employer,” have held the federal government to a high standard vis-à-vis the rights of workers with disabilities.\textsuperscript{38}

The ADA does not, nor can it, fully define “reasonable accommodation.” Given the similarities between the ADA and the Rehabilitation Act,\textsuperscript{39} however, judicial interpretation of the reasonable accommodation provisions of similar laws can be instructive. But the differences between the two laws, particularly in the higher standard that the ADA sets for “undue hardship,” suggest that use of Rehabilitation Act precedent may not always be appropriate. Furthermore, the generality of the EEOC regulations and their accompanying interpretive guidance will require courts to create a new set of standards for evaluating employer compliance with the ADA.

This Article analyzes the outcomes of federal and state court cases which have addressed the issue of reasonable accommodation of a worker with a disability. These cases are helpful in suggesting how judges analyze fact situations that occur under the ADA, the standards judges apply to evaluate employer conduct, and judicial interpretation of what employer conduct is “reasonable.”

\textsuperscript{36} Id.

\textsuperscript{37} The Civil Rights Act of 1991 added the following language to § 1981 of the Civil Rights Act of 1964: “If a complaining party seeks compensatory or punitive damages under this section—(1) any party may demand a trial by jury.” 42 U.S.C.A. § 1981(c). Since section 1981(a)(2) authorizes compensatory and punitive damages for violations of the ADA, plaintiffs suing under the ADA are entitled to a jury trial.

\textsuperscript{38} The “model employer” language has been used in several cases regarding the sufficiency of accommodation attempts for employees with alcoholism. \textit{See}, \textit{e.g.}, Whitlock v. Donovan, 598 F. Supp. 126, 130 (D.D.C. 1984), \textit{aff’d without op. sub nom}. Whitlock v. Brock, 790 F.2d 964 (D.C. Cir. 1986).

\textsuperscript{39} For a comparison of the ADA and the Rehabilitation Act, \textit{see} Cooper, \textit{supra} note 18.
In tandem with this analysis, the Article discusses situations where differences between the ADA and the Rehabilitation Act cast doubt on the precedential value of certain cases decided under the Rehabilitation Act. It also discusses relevant portions of the ADA regulations, noting their implications for judicial interpretation of the reasonable accommodation requirement and identifying issues which need further clarification.

II

THE BASICS OF REASONABLE ACCOMMODATION

A. The Language of the ADA

Anyone who is a “qualified individual with a disability” is entitled to reasonable accommodation under the ADA, provided the individual, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,” and provided the accommodation does not create an “undue hardship” for the employer. The terms are intertwined and cannot be defined individually: an accommodation is reasonable only if it does not pose an undue hardship. Therefore, reasonable accommodation can be discussed (and evaluated) only in light of whether the individual is “qualified” under the Act and in conjunction with the undue hardship standard.

Although the ADA requires employers to provide reasonable accommodations for qualified individuals with disabilities, the statute does not define the term; rather, it provides examples of possible accommodations. The term “reasonable accommodation” may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or 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.

The examples given reflect Congressional intent that the term be interpreted broadly. However, the accommodation duty is limited in two ways. First, the accommodation must enable the individual to perform the essential functions of the job; and second, if the accommodation is

41. 42 U.S.C.A. § 12111(8).
42. 42 U.S.C.A. § 12111(10)(A).
43. 42 U.S.C.A. § 12111(9).
44. The regulations define “essential function” as: “(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability
unduly expensive or disruptive, the employer need not provide it.45

B. Regulations Interpreting the ADA

The Equal Employment Opportunity Commission ("EEOC"), the federal agency that enforces the ADA, has issued regulations interpreting the law's requirements.46 The regulations create three categories of reasonable accommodation:

(1) accommodations that are required to ensure equal opportunity in the application process;
(2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired;
(3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.47

With respect to those accommodations that enable employees to perform the essential functions of their jobs, the regulations state that an employer need not make the accommodation requested by its employee if a less costly and/or less disruptive accommodation would enable that employee to do her job.48

While the intent of the regulations is to suggest an interactive process, the regulations fail to explain what is meant by an "effective accommodation." Does effective mean that the individual will be able to perform at a minimum level, or must the accommodation enable the worker to perform at the highest level of which he or she is capable?49 Although the employer is not required to implement the accommodation that the employee requests if there is an appropriate accommodation which is less costly and/or less disruptive,50 the regulations state that the employer should select the accommodation that is "most appropriate for both the employee and the employer."51

In addition, employers need only accommodate those disabilities of which they are aware.52 In other words, the burden is on the employee...
to notify the employer about his disability. Such notice triggers the employer’s duty to analyze the need for accommodation. But if the employer becomes aware of the disability without notice from the worker, it is still the employer’s obligation to consider an accommodation, unless the worker refuses it. The employer is permitted to ask an individual with a disability to provide documentation of the nature of the disability and the need for the accommodation.

C. Cases Under Similar Laws

The regulations recognize that it is the employer’s right to define the “essential functions” of a job. However, if it appears that some of the “essential functions” are actually peripheral to the job, or that they easily could be performed by a co-worker on an infrequent basis, a judge (or jury) might conclude that the job description is a pretext for discriminating against the individual with a disability and disregard it.

Judges interpreting the Rehabilitation Act have used the following criteria to determine whether the “essential functions” of a position are appropriately defined by the employer:

1. Do all employees with the same job actually perform the “essential functions” of the job as defined by the employer?
2. How much time is required by the task as a proportion of that worker’s total work schedule?
3. If the task occupies only a small proportion of the employee’s time, what is the context in which that task is performed, and how necessary is it that that employee perform that task? Can the task be reassigned without disrupting the workplace?

An example of a case where a trial judge was willing to evaluate an employer’s argument that all functions were essential appeared in Davis v. Frank. The United States Postal Service had refused to promote a
hearing-impaired worker who was not only well-qualified but also the most senior applicant for promotion to the position of time and attendance clerk. Under agency procedures this would have ensured her the job. However, the Postal Service argued that she could not answer the telephone, an "essential function" of the position, and thus was not "qualified." The judge found that the Postal Service had violated the Rehabilitation Act, noting that several other clerks in the office answered the telephone, and stating that this function could be reassigned to others who could hear. Given the applicant's qualifications to perform the rest of the job, the judge ruled that the Postal Service was required to promote her.

The ADA does not require an employer to give a preference to an individual with a disability; it requires the employer to make a reasonable accommodation for the individual, assuming that he or she is "qualified." Given the lengthy findings in the statute with respect to discrimination suffered by people with disabilities, it is likely that the concept will be interpreted expansively.

III
UNDEH HARDSHIP DEFINED

The ADA requires the employer to provide reasonable accommodation for a qualified individual with a disability "unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." The law defines "undue hardship" in this manner:

(A) In General.—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be Considered.—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this [Act];

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons

61. Id. at 449.
62. Id. at 453.
63. Id. at 454.
64. Id. at 455.
65. The law requires that the employer accommodate the employee, rather than permitting the employer to attempt to change the employee. This issue has arisen in cases involving obesity. See, e.g., Cook v. Rhode Island, Dept. of Mental Health, Retardation and Hospitals, 783 F. Supp. 1569, 1576 (D.R.I. 1992) (stating that, where an employer told a former employee to lose weight as a condition of rehiring, reasonable accommodation means changing the job, not the person).
employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

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

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 68

There is no monetary cap on the cost of the accommodation. Prior to the Act’s passage, efforts by some legislators to impose a cap (such as a percentage of the employee’s annual wage, as is the case in some state civil rights laws) were defeated. 69 Thus, both the cost of the accommodation and the employer’s ability to bear that cost must be evaluated. 70

The regulations repeat the statutory definition of undue hardship, adding little by way of clarification. 71 The Interpretive Guidance accompanying section 1630.2(p) gives an example of a potential undue hardship, and then states that either the financial resources of the entire company or of a local facility will be used to determine the employer’s ability to pay for the accommodation. 72 The Guidance also notes that employers should take into account whether employees or external sources may be willing to offset a portion of the accommodation’s cost (if the cost is an undue hardship for the employer). 73

The regulations provide little guidance as to when an employer will be required to provide assistants, interpreters or attendants to accommo-
date a worker with a disability. The regulations state that "[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may . . . be a reasonable accommodation." The regulations do not distinguish between the occasional need for an assistant and an assistant who is required on a full-time basis. The employer's ability to bear the cost of such an assistant, and the quality of performance, with accommodation, of the worker with a disability likely will be significant elements of analysis when this issue arises.

The ADA's inclusion of interpreters, readers, or other assistants as a potential reasonable accommodation has been cited as a potentially serious financial burden for employers. Case law under the Rehabilitation Act and similar state laws is inconsistent on this issue. However, several criteria for evaluating the reasonableness of requiring an employer to provide readers or interpreters have emerged from the opinions. In Nelson v. Thornburgh, a federal judge required the State of Pennsylvania's Department of Public Welfare to hire readers for three blind income maintenance workers. The court compared the cost of hiring the readers, approximately $6,600, with the agency's $300 million administrative budget and concluded that this accommodation was not an undue hardship. However, where a worker requested that a family member be permitted to provide assistance, even though that assistance would be unpaid, the Iowa Supreme Court ruled that the employer's refusal was reasonable. In Halsey v. Coca-Cola Bottling Co., a delivery truck driver who became visually impaired asked the company to permit his wife to drive the delivery truck so that he could continue to make deliveries. The employer argued that the additional insurance liability for a driver that it did not select and over whom it had little control posed an undue financial hardship. The court agreed without examining the cost of the additional insurance coverage. Under the ADA, the employer would bear a heavier burden of demonstrating that the additional cost or potential legal liability posed a "significant expense."

Given the drafters' determination that undue hardship be determined on a case-by-case basis, and the very general nature of the regu-
INTERPRETING THE ADA

1993]

215

lations, judges and juries will have substantial leeway to develop their own interpretations of undue hardship. What is a “significant” expense? The statute appears to preclude the argument that an individual department of a business did not have sufficient funds in its budget to pay for a needed accommodation. The fact-finder must look to the facility as a whole, and perhaps beyond to the parent organization’s resources.82

It is likely that employers will argue that diminished profits are an undue hardship; however, the United States Supreme Court has been hostile to arguments that non-discrimination is too expensive for a company.83 Given that most accommodations made prior to the ADA were low-cost or cost-free,84 it is likely that undue hardship issues brought to trial will focus on accommodations involving long-term recurring costs (for example, long-term therapy for workers with mental or emotional disabilities, or interpreters or readers for workers with hearing or visual impairments). The vagueness of both the statute and the regulations will very likely result in wide variation in the definition of “significant.”

The ADA’s express definition of undue hardship is a clear departure from the standard applied under the Rehabilitation Act. Under the earlier law, courts applied a lower standard, developed in the context of religious discrimination. In Trans World Airlines v. Hardison,85 the Supreme Court ruled that an employer need not incur more than de minimus cost; need not violate the terms of a collective bargaining agreement; and need not reassign workers, incur overtime costs or in other ways suffer inconvenience or expense in order to accommodate a worker’s religious beliefs.86 Although this doctrine was developed in the context of Title VII, many courts adopted this standard to evaluate the “reasonableness” of an accommodation requested by a worker or applicant with a disability under the Rehabilitation Act.87 For example, under both the Rehabilitation Act and similar state laws, courts rou-

---

82. See supra text accompanying notes 68-70.
83. See, e.g., International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1207-09 (1991) (employer concern for cost of possible negligence claims on behalf of children of female workers exposed to lead during pregnancy did not justify barring women capable of childbearing from jobs involving lead exposure).
84. Collignon, supra note 8.
86. Id. at 84.
87. See, e.g., Carter v. Tisch, 822 F.2d 465, 467-68 (4th Cir. 1987) (holding that reasonable accommodation did not include reassigning the plaintiff to a new position, where to do so would contravene a collective bargaining agreement); see also Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985) (finding that plaintiff was not entitled to reassignment and that an “employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement”); Daubert v. United States Postal Serv., 733 F.2d 1367, 1370 (10th Cir. 1984) (holding that the employer could rely on the collective bargaining agreement in discharging plaintiff).
tinely ruled that an employer need not violate the seniority provisions of a collective bargaining agreement in order to accommodate a worker or applicant's request for transfer to a light duty job.\textsuperscript{88} Moreover, the framers of the ADA made it very clear that the Hardison standard is inappropriate for evaluating whether a particular accommodation creates an undue hardship for the employer.\textsuperscript{89} The House Education and Labor Committee's report accompanying the ADA asserted:

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in \textit{TWA v. Hardison}, 432 U.S. 63 (1977) are not applicable to this legislation. In Hardison, the Supreme Court concluded that under Title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a \textit{de minimus} cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in Hardison.\textsuperscript{90} Given this explicit rejection of Supreme Court precedent, judges interpreting the ADA will be forced to develop a new standard for determining whether a particular accommodation poses an undue hardship.

The ADA is intended to require employers (and, in litigation, a judge or jury) to determine, given a particular set of circumstances, whether a requested accommodation poses an undue hardship. While the ADA strives to define undue hardship clearly, universal bright-line rules cannot be adopted. Whether a particular accommodation poses an undue hardship must be evaluated on a case-by-case basis. However, some considerations that a court might use, and that an employer might find helpful, follow:

1. Can no-cost or low-cost accommodations be made (reassigning work, restructuring the job, modifying the worker's schedule)\textsuperscript{91} in lieu of costly accommodations?
2. Are tax credits available for accommodations that the employer must purchase? Is the accommodation of a nature that public funds, such as

\textsuperscript{88} For further discussion of this issue, see infra text accompanying notes 110-29.
\textsuperscript{90} Id.
\textsuperscript{91} See, e.g., Carter v. Casa Ctr., 849 F.2d 1048 (7th Cir. 1988) (holding that the refusal of a nursing home to permit its director of nursing, who suffered from multiple sclerosis, to work part time for a few months before returning to full-time work violated the Rehabilitation Act); see also Davis v. Frank, 711 F. Supp. 447, 454-55 (N.D. Ill. 1989) (holding that transfer of telephone answering duties was a reasonable accommodation for a deaf clerk, and that failure to make such an accommodation violated the Rehabilitation Act). \textit{But see} Davis v. Meese, 692 F. Supp. 505, 520 (E.D. Pa. 1988) (finding FBI policy that excludes persons with diabetes from special agent position did not violate Rehabilitation Act because job could not be restructured to avoid situations in which persons with diabetes could pose a safety threat to other agents, the public and suspects), \textit{aff'd}, 865 F.2d 592 (3d Cir. 1989).
those from a state vocational rehabilitation agency, would cover all or part of its cost? If so, the tax savings or portion subsidized by public funds should be deducted from the cost of the accommodation.  

3. Is the accommodation one that other workers could or do use? For example, does an individual hired to assist the worker with a disability, or a piece of equipment provided to the worker with a disability, also help other workers? If so, its cost must be spread out over those workers, not attributed only to the worker with disabilities.

4. Is the increased cost of employing the individual with a disability actual, rather than hypothetical or speculative? For example, is the employer assuming that the cost of medical or workers' compensation benefits will increase because of stereotypes about the disability, or has a thorough medical evaluation been conducted which documents that the accommodation will involve substantial expense?

5. Does the cost of the accommodation appear substantially to exceed the benefit accrued (for example, hiring a second employee to perform the functions that the individual with a disability cannot perform)?

6. Has the employer given the worker with a disability the option of paying a portion of the cost of the accommodation? This option might be particularly appropriate if the nature of the accommodation is such that the employee could use it in places other than the work site.

An employer can also demonstrate undue hardship by showing that no accommodation will enable a worker with a particular disability to effectively perform the essential functions of a given position. In such cases, the employer may defend itself against a charge of failure to accommodate by arguing that, because no accommodation is possible, the employee does not meet the definition of "qualified individual with a disability." The interdependence of the three concepts of qualified indi-

92. 29 C.F.R. § 1630.2(p)(2) (Appendix: Interpretive Guidance).


94. See, e.g., Cain v. Hyatt, 734 F. Supp. 671, 681-84 (E.D. Pa. 1990) (holding that a law firm's decision to demote and then discharge a lawyer with AIDS on the basis of a heightened risk of future disability and the presumed costs of medical treatment violated the Pennsylvania non-discrimination law).

95. See, e.g., Nelson v. Thornburgh, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (holding that the Pennsylvania welfare department must provide part-time readers for blind workers), aff'd, 732 F.2d 146 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1988); see also Arneson v. Sullivan, 946 F.2d 90, 92-93 (8th Cir. 1991) (holding that the Social Security Administration had violated the Rehabilitation Act by refusing to provide a quiet work space and a reader for a claims representative with apraxia). But see Chiari v. League City, 920 F.2d 311, 318-19 (5th Cir. 1991) (holding that city's refusal to provide assistant to construction engineer with Parkinson's disease who could not physically inspect construction sites was reasonable, and that it was financially precluded from creating a different job for the engineer).


97. 42 U.S.C.A. § 12111(8). See, e.g., Chiari, 920 F.2d at 319 (construction inspector with Parkinson's disease who could not climb or crawl around construction sites was not "otherwise qualified" under the Rehabilitation Act because of the high probability of injury to himself and others, and the employer's inability to restructure the job to eliminate its physical requirements); see also Gilbert v. Frank, 949 F.2d 637, 644 (2d Cir. 1991) (holding that applicant for mail distribution clerk's position who had polycystic kidney disease and who could not lift the 70-pound mail sacks
individual with a disability, reasonable accommodation and undue hardship makes them difficult to categorize neatly. Although the determination of whether an individual is "qualified" is the threshold issue for ADA coverage (in addition to whether the individual has a disability that meets the ADA's definition), the definition of "qualified" includes persons who can perform the essential functions of the position only if provided with reasonable accommodation.9 This means that courts may require employers to first determine whether there is a reasonable accommodation that permits the individual to perform the essential functions of the job. If the person cannot perform the job even with a reasonable accommodation, then the individual is not "qualified" under the Act. Given the circularity and overlap of these statutory definitions, courts could require employers to perform the accommodation analysis for any individual with a disability who may, after the analysis is complete, be found not "qualified."

The concept of "essential functions" of the position is critical to this analysis, and adds to the complexity of the analysis. Although the employer has the right to establish a position's essential functions,99 they must be developed in good faith. In Treadwell v. Alexander,100 a case litigated under the Rehabilitation Act, the court determined that an applicant for a park ranger job who had a serious heart condition could not be accommodated because most of his responsibilities would have to be shifted to the small number of other park rangers.101 A similar outcome occurred in Dexler v. Tisch.102 There, an applicant who had achondroplastic dwarfism argued that the Rehabilitation Act required the Post Office to either change to an assembly-line operation, in order to accommodate the applicant's inability to reach certain portions of the equipment, or allow him to stand on a stool. The judge ruled that the first proposal was excessively costly, and that using the stool would reduce the employee's efficiency.103 Both proposals were determined to be an undue hardship.104 Although the ADA's definition of undue hardship would probably not require major changes in the way that mail is sorted, it could be difficult for the Postal Service to argue under the ADA that

98. 42 U.S.C.A. § 12111(8).
99. "For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential . . . ." Id.
100. 707 F.2d 473 (11th Cir. 1983).
101. Id. at 478. For criticism of the court's failure to analyze which functions were actually essential, see Murphy, supra note 18, at 1629.
103. Id. at 1428.
104. Id. at 1429.
minor decreases in an employee's productivity or efficiency (here, moving a stool several times an hour) constituted a "significant expense."

The clear implication of the ADA's statutory and regulatory language with regard to both reasonable accommodation and undue hardship is that an employer will violate the ADA by rejecting a worker with a disability, or a proposed accommodation, without first conducting an analysis to determine whether the proposed accommodation is reasonable and whether it really presents an undue hardship. Where the standard for undue hardship will be set remains to be seen. The statutory definition and the regulations require the courts to assess the employer's ability to bear the cost of the accommodation; the rejection of the prior *de minimus* standard often used in cases litigated under the Rehabilitation Act suggests that an approach similar to that taken in *Nelson v. Thornburgh* is appropriate. In that case, the court compared the cost of providing part-time readers for blind welfare workers to the total administrative budget of the welfare agency, and found that the "additional dollar burden is a minute fraction of the . . . budget[,]" adding that "[w]hen one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation—a cost which seems likely to diminish, as technology advances and proliferates—seems, by comparison, quite small."  

The law and regulations impose a procedural requirement upon the employer; the combined effect of the statutory and regulatory language and the report of the House Education and Labor Committee may convince judges to instruct juries that a failure to consider possible accommodations is a *per se* violation of the Act.

**A. Reassignment and Undue Hardship**

Although most courts interpreting the Rehabilitation Act and similar state laws have ruled that they included no duty to reassign a worker with a disability, the ADA explicitly includes "reassignment to a va-

---

105. For a discussion of this standard, see supra text accompanying notes 85-90.


107. Id. at 382 (footnote omitted).

cant position" as an example of a reasonable accommodation. Thus, the issue facing employers under the ADA is not whether reassignment is required, but under what circumstances reassignment will pose an undue hardship.

Since the law protects only qualified persons, the most likely conflict that will arise when reassignment is considered is when another worker has some claim to the vacant position. This is most likely to occur in a unionized workplace where a collective bargaining agreement specifies that certain jobs will be filled on the basis of seniority or some other criterion that does not permit the employer to exercise discretion in assigning a worker to a position.

These situations arise when, in defending its refusal to accommodate a worker with a disability who has requested reassignment to a "light duty" position, the employer has cited the provisions of a collective bargaining agreement limiting reassignment to the most senior worker qualified for the position or reserving light duty jobs for employees with work-related injuries. For example, in Daubert v. United States Postal Service, the collective bargaining agreement prohibited the Postal Service from reassigning a mail handler whose disability prevented her from lifting heavy mail bags to a light duty job because she had less than five years of seniority (a contractual requirement for bidding on light duty jobs). The Tenth Circuit Court of Appeals noted that the employer's contractual obligation to its employees and their union under the agreement "clearly articulates a legitimate business reason" for the employee's discharge. In similar cases, federal appellate courts, relying on the deferential Hardison standard which the ADA has now rejected, refused to require that employers violate collective bargaining agreement provi-

Feb. 27, 1986) (reassignment is an appropriate accommodation and not precluded by the Rehabilitation Act or its regulations).


111. See, e.g., Blisset v. Chicago, 1990 U.S. Dist. LEXIS 5132, *19-21 (N.D. Ill. 1990) (female police sergeant with "tennis elbow" was not entitled to reassignment to light duty job, because collective bargaining agreement reserved such jobs for officers with injuries sustained while on duty).

112. 733 F.2d 1367 (10th Cir. 1984).

113. Id. at 1369-70.

114. Id. at 1370.
sions by reassigning workers to positions for which they were qualified.115

Stricter language in the ADA and clear language in its legislative history should persuade judges that the collective bargaining agreement is not an absolute defense to a refusal to reassign a worker with a disability. The House Report clearly rejects the Hardison standard and also states that the collective agreement "may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job."116 The Report also states that the employer and the union may have a duty to "ensure[e] that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."117

An example of such language is suggested in Rhone v. United States Department of Army.118 In criticizing the Army for not considering reassignment of a twenty-four year worker who had developed sarcoidosis, the court noted language in the collective bargaining agreement covering both parties.119 The judge wrote that "the collective bargaining agreement recognizes management's right to assign and reassign employees and provides that the policies of management and the union shall be 'in strictest adherence to both the letter and the spirit' of applicable equal employment opportunity laws and regulations."120

This is a difficult issue for both employers and unions, because unions may face both duty of fair representation lawsuits if they agree to abrogate contractual provisions,121 and ADA lawsuits if they do not,

115. See, e.g., Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985) (holding that the employer had no duty to reassign a mail sorter with crossed eyes to a position to which, under the collective bargaining agreement's seniority provisions, he was not entitled); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987) (holding that the employer had no duty to reassign a custodian with asthma to a light duty position which the collective bargaining agreement reserved for more senior workers). In a similar case, a trial judge decided to read Title VII's protection for bona fide seniority systems (42 U.S.C.A. § 2000e-2(h)) into the Rehabilitation Act. Hurst v. United States Postal Serv., 653 F. Supp. 259, 262 (N.D. Ga. 1986) (asserting that "failure to impute the Title VII exemption granted to bona fide seniority systems into the Rehabilitation Act would . . . expand the reach of the Rehabilitation Act beyond that of Title VII, which Congress did not intend"). The ADA does not contain Title VII's seniority protection language, and given the clear intent of Congress to remove barriers to the employment of qualified persons with disabilities, the approach taken in Hurst is not persuasive.


119. Id. at 746.

120. Id.

given that unions also are subject to the ADA.\textsuperscript{122} Employers who decide to implement an accommodation that violates the terms of a collective bargaining agreement may face unfair labor practice charges before the National Labor Relations Board\textsuperscript{123} or breach of contract claims in state court. Similarly, discussing a proposed accommodation with a worker without involving the union may expose the employer to charges of “direct dealing” with the worker, another violation of the National Labor Relations Act.\textsuperscript{124} The former general counsel for the National Labor Relations Board indicated that the National Labor Relations Act and the Americans with Disabilities Act are “directly opposed” on these issues; the NLRB and EEOC, which respectively are responsible for administering those acts, do not agree on the resolution of this problem.\textsuperscript{125}

Given the clash of federal laws and the disagreement between the agencies that enforce them, a wise course of action would be for the parties to negotiate language allowing unions to waive seniority preferences where assignment to a covered position is determined to be the appropriate accommodation for a less senior worker with a disability. In fact, given the language of the House Report, if a contract negotiated after the date that the ADA became effective\textsuperscript{126} contains seniority preferences for certain jobs, and fails to include language that would permit the suspension of such preferences in order to accommodate a qualified worker with a disability, such an omission could be viewed as a \textit{per se} violation of the ADA. The Interpretive Guidance accompanying the ADA regulations implies that the worker with a disability should be included in the determination of the accommodation.\textsuperscript{127} If union representatives also are included in this discussion, employers should be able to avoid charges of “direct dealing”. Whether the employer wishes to formalize the union’s involvement in this process through contract language or merely decides to informally include the union in the discussion, such strategies should both reduce union opposition to accommodations that conflict with sen-

\begin{itemize}
\item \textsuperscript{122} Section 101(2) of the ADA defines “covered entity” (the organizations subject to the ADA) as “an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C.A. § 12111(2).
\item \textsuperscript{123} Section 8(a)(5) of the National Labor Relations Act prohibits employers from refusing to bargain with the labor organization about terms and conditions of employment. 29 U.S.C.A. § 158(a)(5) (West 1973).
\item \textsuperscript{124} Section 9(a) of the National Labor Relations Act prohibits the employer from dealing directly with employees who are represented by a labor organization certified as the exclusive representative of those employees. 29 U.S.C.A. § 159(a) (West 1973).
\item \textsuperscript{125} Disabilities Act’s Conflicts Cause Problems, 140 LAB. REL. REP. (BNA) 513 (August 24, 1992).
\item \textsuperscript{126} The ADA became effective for organizations with 25 or more employees on July 26, 1992; for those with 15-24 employees the Act becomes effective on July 26, 1994. 42 U.S.C.A. § 12111(5).
\item \textsuperscript{127} 29 C.F.R. § 1630.9(d) (Appendix: Interpretive Guidance).
\end{itemize}
iority preferences and reduce the employer's liability under federal labor law.

The explicit inclusion in the statute of reassignment as an accommodation, the rejection of the Hardison standard, and the reference to collective bargaining agreements as only one factor in making the undue hardship determination suggest that courts should reject Rehabilitation Act precedent when a contract's seniority provisions are raised as a defense. Although one commentator has suggested that courts should "balance[e] the rights of the disabled employee seeking accommodation against the expectational interests of the employees whose collectively bargained rights are jeopardized," this is an incorrect approach. Nowhere in the House Report or regulations is there a suggestion that the need for accommodation be balanced against the expectations of co-workers. Instead, the standard that courts (and juries) must apply is whether breach of the agreement is an undue hardship for the employer, not the co-workers. Given the strong suggestion that agreements negotiated after the ADA's effective date recognize the employer's and the union's duty of accommodation, fact-finders should have little sympathy for an argument that collective interests outweigh the interest of a qualified worker with a disability in remaining employed.

B. Employee Morale as Undue Hardship

In litigation under the Rehabilitation Act and similar state laws, employers have argued that co-workers will resent the "special treatment" given to a worker with a disability. Based on precedent under the Rehabilitation Act and similar state laws, and on the Interpretive Guidance of the ADA regulations, however, neither of these issues constitutes an undue hardship.

The United States Postal Service advanced a morale argument in Davis v. Frank. It asserted that it could not accommodate a deaf applicant for a clerk's position by excusing her from answering the telephone because it would "lower the morale" of the other clerks. The judge rejected that defense, noting that "the possibility of lowered morale does not rise to the level of undue hardship." And, in Jenks v. AVCO Corp., a Pennsylvania appellate court rejected an employer's contention that giving a partially paralyzed applicant a hydraulic cart to per-

131. Id. at 455.
form his job would cause disruptive morale problems among coworkers. The court ruled that coworkers had no right to the same accommodation, absent a similar need, and that concerns that the coworkers or their union would object did not rise to the level of undue hardship. Similarly, employer concern about "reverse discrimination" claims by non-disabled workers who resent the accommodation made for a coworker was found by a Wisconsin court not to constitute an undue hardship.

In a case decided under New Jersey law, Jansen v. Food Circus Supermarkets, Inc., the co-workers of a meatcutter with epilepsy were afraid to work with him because they incorrectly assumed that he was dangerous. The court found that the unreasonable fears of coworkers are not an appropriate defense to a refusal to accommodate.

The Interpretive Guidance to the ADA regulations leaves little doubt as to the ability of an employer to cite low morale as a form of undue hardship. The Guidance states:

[T]he employer would not be able to show undue hardship if the disruption to its employees were the result of those employees' fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Nor would the employer be able to demonstrate undue hardship by showing that the provision of the accommodation has a negative impact on the morale of its other employees but not on the ability of these employees to perform their jobs.

Given this clear statement and the case law, it appears that an employer's claim of undue hardship—based on co-worker resentment for having to assume some of the tasks that the worker with a disability could not perform—would be unavailing.

C. The "Safety Defense"

Employer speculation about potential safety problems or concern about the risk of future injury has been used to deny employment to qualified workers with disabilities. In some situations, employers have feared that the work itself would expose the individual, co-workers, customers or the general public to a higher risk of injury. In other situa-

133. Id. at 917.
134. Id.
137. Id. at 687.
138. 29 C.F.R. § 1630.15(d) (Appendix: Interpretive Guidance).
139. See, e.g., Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682 (N.J. 1988); see also Wood v. School Dist. of Omaha, 985 F.2d 437, 439-40 (8th Cir. 1993) (reversing summary judgment for defendant school district which had argued that permitting individuals with diabetes to drive a school bus was per se unsafe); Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) (find-
tions, employers have feared that the work would exacerbate a pre-existing condition, and thus posed an undue hardship.140 Furthermore, some employers are concerned about increased worker’s compensation costs or increased costs of employee medical benefits or disability benefits.141 Based on the EEOC regulations interpreting the ADA, as well as cases brought under the Rehabilitation Act and similar state laws, none of these asserted defenses is permissible.

The regulations state that an employer must demonstrate a direct threat to the safety of the individual or to others.142 "Direct threat" is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."143 A slightly increased risk will not be viewed as an undue hardship.144 The regulations require the employer to make an individualized determination based on the applicant or worker’s "present ability to safely perform the essential functions of the job."145 The determination must be made on the basis of "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."146

The regulations adopt the approach used in several cases brought under the Rehabilitation Act, in which employers raised a safety defense. The United States Supreme Court addressed this issue in School Bd. of Nassau County v. Arline.147 Gene Arline was a school teacher with tuberculosis, whom the school district fired after several relapses. The Supreme Court ruled that, despite the fact that tuberculosis was a communicable disease, Arline was still covered by the Rehabilitation Act and the school district was required to determine whether a reasonable accommodation could be identified. For example, because Arline was not contagious most of the time, the court suggested that, when her tuberculous state regulation that precluded deaf individual from driving school bus was irrational; individualized determination regarding safety was required). Strathie is cited with approval in the Interpretive Guidance to the ADA regulations. 29 C.F.R. § 1630.2(r) (Appendix: Interpretive Guidance).

140. See, e.g., Mantolete v. Bolger, 767 F.2d 1416, 1422-23 (9th Cir. 1985) (refusal to hire based on speculation about potential for injury, rather than on evaluation of applicant’s medical and work history violated Rehabilitation Act); see also Savage v. Department of Navy, 1990 U.S. Dist. LEXIS 5786, at *6-7 (E.D. Pa. May 11, 1990) (denying summary judgment for defendant, which had argued that shipyard worker with asbestosis could not be accommodated in a way that would reduce risk of additional injury).


142. 29 C.F.R. § 1630.2(r).

143. Id.

144. Id.

145. Id.

146. Id.

losis did become active, she could be reassigned to a position not involving contact with children.

The Court listed four factors that a court (and presumably the employer) should consider in determining whether an individual with a contagious disease should be permitted to remain in the workplace.

a) the nature of the risk (how the disease is transmitted),
b) the duration of the risk (how long is the carrier infectious),
c) the severity of the risk (what is the potential harm to third parties), and
d) the probabilities that the disease will be transmitted and will cause varying degrees of harm.\(^{148}\)

The result in *Arlene* requires an individualized determination of whether, in fact, an employee can be accommodated without undue hardship.\(^ {149}\) An employer’s automatic exclusion of an individual based on the nature of a particular disability violates the Rehabilitation Act.\(^ {150}\) The ADA regulations follow this approach as well.\(^ {151}\)

The Ninth Circuit reached the same conclusion in *Chalk v. United States District Court*.\(^ {152}\) The court ruled that the school district had unlawfully transferred Mr. Chalk, a teacher of hearing-impaired students, out of the classroom when it discovered that he had been diagnosed as having AIDS.\(^ {153}\) Reasoning that Chalk’s disease was not contagious given the nature of his job, the court ordered the school district to return Chalk to his classroom.\(^ {154}\) The court observed that his illness had not interfered with his ability to teach.\(^ {155}\)

Similarly, in *Mantolete v. Bolger*,\(^ {156}\) the Ninth Circuit reversed a district court’s holding in favor of a decision by the Postal Service to prohibit a woman with epilepsy from working with a letter-sorting machine. The Postal Service made the decision without an individualized inquiry into her work history, her medical history, and her present ability to perform the job.\(^ {157}\) The court noted that the woman had performed safely and efficiently on machinery far more complicated and more dangerous than the Postal Service’s letter sorter.\(^ {158}\) Also, her epilepsy was controlled with medication.\(^ {159}\) The *Mantolete* court described the em-

\(^{148}\) *Id.* at 288.

\(^{149}\) *Id.* at 284-88.

\(^{150}\) *Id.*

\(^{151}\) 29 C.F.R. § 1630 (Appendix: Interpretive Guidance - Background) (determination of whether an individual is qualified must be done on a case-by-case basis).

\(^{152}\) 840 F.2d 701 (9th Cir. 1988).

\(^{153}\) *Id.* at 703, 712.

\(^{154}\) *Id.* at 712.

\(^{155}\) *Id.* at 710.

\(^{156}\) 767 F.2d 1416 (9th Cir. 1985).

\(^{157}\) *Id.* at 1418.

\(^{158}\) *Id.* at 1419.

\(^{159}\) *Id.* at 1420.
ployer's obligation as follows:

[A]n employer has a duty . . . to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job safely. The application of this standard requires a strong factual foundation in order to establish that an applicant's [disability] precludes safe employment. After marshaling the facts, the employer must make a decision as to the reasonableness of accommodation . . . . If the requisite accommodations are not reasonable or if no accommodation can be made to protect against a reasonable probability of substantial injury, then an employer will, of course, not violate [the law] . . . a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination.160

In contrast, several courts have upheld the safety defense where employers have made the required individualized determination and concluded that the individual could not be accommodated. For example, in Barth v. Gelb,161 an insulin-dependent diabetic engineer working for the Voice of America requested a foreign service position. The State Department had obtained a comprehensive medical assessment of the plaintiff's condition,162 and argued that its system of rotating employees would require the plaintiff to live in remote locations where medical treatment facilities were inadequate.163 The court noted that the plaintiff's medical condition was worsening, and ruled that the State Department need not change its staffing policies to accommodate the plaintiff.164

The New Jersey Supreme Court also has held that New Jersey law requires an individualized inquiry in order to establish a "safety defense." In Jansen v. Food Circus Supermarkets, Inc.,165 the court held that a grocery store's discharge of a meat cutter with epilepsy was unreasonable.166 The plaintiff had worked for eight years as a meat cutter at Food Circus without incident.167 While cutting meat in 1980, he had a single mild seizure resulting in a momentary cessation of his work. He was not injured, nor were any of his co-workers.168 The company, pressured by Jansen's co-workers who incorrectly believed that his epilepsy caused "homicidal tendencies," suspended Jansen and sent him to two

160. Id. at 1423 (emphasis added).
162. Id. at 832.
163. Id. at 834-36.
164. See also Gardner v. Morris, 752 F.2d 1271, 1281-84 (8th Cir. 1985) (determining that the Army Corps of Engineers was not required to transfer a manic-depressive civil engineering technician to Saudi Arabia because medical attention he needed was not available without unreasonable accommodation).
165. 541 A.2d 682 (N.J. 1988).
166. Id. at 690.
167. Id. at 684.
168. Id.
Both doctors recommended against reinstating Jansen because they could not state with certainty that he was not a safety risk. Jansen’s own physician, however, increased Jansen’s anti-seizure medication and certified that he could safely perform meat cutting. Two other physicians agreed, but Food Circus decided to rely on its own physicians’ advice and discharged Jansen.

The New Jersey Supreme Court ruled that the discharge violated New Jersey’s anti-discrimination law because Food Circus did not prove that Jansen’s epilepsy “reasonably preclude[d] the performance of the particular employment.” According to the court:

In deciding whether the nature and extent of an employee’s handicap reasonably precludes job performance, an employer may consider whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees . . . . That decision requires the employer to conclude with a reasonable degree of certainty that the handicap will probably cause such an injury . . . . The appropriate test is not whether the employee suffers from epilepsy or whether he or she may experience a seizure on the job, but whether the continued employment of the employee in his or her present position poses a reasonable probability of substantial harm . . . . Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular handicap would create a hazard to the safety or health of such individual, other employees, clients or customers. A ‘hazard’ to the handicapped person is a materially enhanced risk of serious harm.

The court found that the possibility that Jansen could suffer another seizure did not mean per se that he posed a safety hazard, and that such an assumption was itself discriminatory, because it rested on beliefs about all individuals with epilepsy, rather than on facts about Jansen and his individual medical history and condition. The company had not provided objective evidence of a safety hazard, but had succumbed to speculation and stereotypes, according to the court.

*Jansen* is instructive because the employer probably believed that it had made an individualized determination about his fitness. The company had Jansen examined by two doctors, both of whom determined

169. *Id.* at 685.
170. *Id.* at 685-86.
171. *Id.* at 685.
172. *Id.* at 686.
173. *Id.* at 684.
174. *Id.* at 687-88 (citations omitted).
175. *Id.* at 689.
176. *Id.*; see also *Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986) (holding against the employer under state nondiscrimination law where a seizure-free employee was discharged after a routine examination based on generalized conclusions about persons with epilepsy).
that his seizures likely would recur. But this determination was insufficient to satisfy the employer's obligation. The problem, according to the New Jersey Supreme Court, was that the doctors did not find that Jansen's seizures would pose a safety hazard, nor what the nature of that hazard might be. 177 Given the language of the regulations and the teachings of Arline, 178 courts applying the ADA very likely will require employers to provide evidence of specific safety hazards.

According to judicial interpretations of the Rehabilitation Act and of similar state laws, an employer probably will be required to perform an individualized inquiry using the employee's work history and medical records and the advice of medical experts. This will be true even if the individual's disability appears serious and the safety hazard evident. The ADA regulations require employers to consider four factors when determining whether an employee poses a direct threat to the safety of herself or others:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm. 179

The interpretive guidance accompanying these regulations adds:

Such considerations must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally. . . . Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability. 180

In addition, the House Report implies that the employer must consider reasonable accommodations to reduce the risk to an acceptable level. 181 Furthermore, employer concerns about the effect of potential events—such as encountering a demanding supervisor or the need to evacuate the building in case of an emergency—on the safety of the individual with a disability or of others are not relevant according to the EEOC. 182

The "direct threat" language of the regulations and the clarity of the

177. Jansen, 541 A.2d at 689.
178. See supra notes 147-50 and accompanying text.
179. 29 C.F.R. § 1630.2(r).
180. Id. (Appendix: Interpretive Guidance). Evidence from a recent Gallup Poll suggests that employers' safety concerns may be exaggerated. When a sample of 400 employers was asked to rate the safety of workers with disabilities, 55 percent responded that workers with disabilities performed as safely or more safely than nondisabled workers. Gallup Organization, Baseline Study to Determine Business' Attitudes, Awareness, and Reaction to the Americans with Disabilities Act 56 (October 1992).
182. 29 C.F.R. § 1630.2(r) (Appendix: Interpretive Guidance).
Interpretive Guidance regarding employers' procedural duty to make individualized determinations about the safety issue will make it very difficult for employers to make a successful safety defense in any but the most extreme cases. Thus, because of the limitations of this exception, employers who wish to avoid what they may perceive as the higher cost of employing individuals with disabilities such as diabetes or epilepsy will find it difficult to disguise such concern as a concern for safety.  

D. Misconduct by Workers with Disabilities

The ADA protects individuals with mental as well as physical disabilities. However, neither the Act, the regulations, nor the legislative history provide much guidance regarding the accommodation of individuals with mental disabilities. The issue may be a difficult one for employers and courts to address, given the potential for workers with psychiatric or mental disabilities to allege that any misconduct is a manifestation of such disabilities.

Similar arguments have been used in cases decided under the Rehabilitation Act. In these cases, the courts rejected the argument that misconduct must be accommodated, even where the misconduct is a manifestation of the worker's disability. But employee misconduct does not exempt the employer from determining whether accommodation is reasonable before deciding to discharge or otherwise discipline the worker. Where the misconduct is serious and an employer can demonstrate that it would be an undue hardship to require the employer to tolerate such misconduct, courts have permitted the employer to take action against the employee, despite the disability.

---

183. See id.
184. According to a recent study, more than one in four adults in the United States suffers from some form of a mental disorder. Daniel Goleman, Mental Disorders Common But Few Get Treatment, Study Finds, N.Y. TIMES, March 17, 1993, at C13. The examples given in the Interpretive Guidance accompanying the regulations on reasonable accommodation, with one exception, use physical disabilities exclusively. 29 C.F.R. § 1630.2(o) (Appendix: Interpretive Guidance) (unpaid leave for medical treatment, page turner for employee with no hands, reserved parking spaces, guide dogs).
185. For analysis of the ADA's coverage of mental disabilities and recommended employer practices, see Margaret H. Edwards, The ADA and the Employment of Individuals With Mental Disabilities, 18 EMPL. REL. L.J. 347 (1992-3).
187. The ADA excludes various conditions from the definition of disability, but is silent on whether an employee with a disability who engages in misconduct loses the protections of the law. 42 U.S.C.A. § 12211.
188. See Adams v. Alderson, 723 F. Supp. 1531, 1531-32 (D.D.C. 1989)(finding that an employee unable to refrain from physical violence can be discharged); see also Allen, 1992 U.S. Dist. LEXIS 1008, at *9 (finding that the law did not require employer to accommodate rude and unprofessional employee).
Interpreting the ADA

of the ADA on the issue of misconduct by workers with disabilities, Rehabilitation Act precedent may provide useful guidance.

1. Disruptive Behavior in the Workplace

Several courts have been called upon to ascertain whether discharges of workers with psychiatric disabilities that allegedly caused workplace disruptions violated the Rehabilitation Act. For example, in Adams v. Alderson, a computer programmer with an adjustment disorder and a compulsive personality disorder assaulted his supervisor and destroyed office equipment. Despite the worker’s request that he be accommodated by reassigning him to a different supervisor, the court ruled for the employer, noting that “[a]n agency is entitled to assign personnel as the needs of its mission dictate. It is not obliged to indulge a propensity for violence—even if engendered by a ‘handicapping’ mental illness—to the point of transferring potential assailants and assailees solely to keep peace in the workplace.”

A worker whose personality disorder rendered her rude, disruptive and insubordinate also was denied relief. The court held that:

the agency could not make a “reasonable accommodation” to plaintiff’s condition (or attitude), for it would have been impossible to create a work environment in which plaintiff would be immune from criticism, supervision or authority, or to guarantee that her superiors would not impose constraints that she would not find unreasonable.

In a third case, a worker with psychiatric problems who was abusive to the employer’s doctor was discharged. The court upheld the employer’s decision, stating that no appropriate accommodation was possible.

Although judges interpreting the Rehabilitation Act have been overwhelmingly sympathetic to employer arguments that disruptive behavior cannot be accommodated, their rulings have been based primarily on “personal notions of justice and common sense” rather than on agency guidelines, and the behavior in these cases was extreme. Cases in which employees with mental disabilities are unpleasant to co-workers or exhibit mildly aberrant behavior will be harder to decide, and will very likely turn on the nature of that employee’s job, the amount of customer contact required of her position, and whether the employee is potentially

189. See supra note 187.
190. Id. at 1532.
191. Id. at 1532.
193. Id.
195. Id. at 442.
196. Edwards, supra note 185, at 372.
dangerous to herself or to others.\textsuperscript{197} Employers who discharge or refuse to hire an individual with a mental disability will need to specify not only the essential functions of the position, but the behaviors necessary for successful performance.\textsuperscript{198} Despite the fact that Rehabilitation Act precedent may be persuasive in cases of employee misconduct, the procedural requirements imposed by the ADA may, if not followed carefully, result in losses for employers.

2. \textit{Off-Duty Misconduct}

In cases litigated under the Rehabilitation Act, most off-duty misconduct resulting in discharge has involved excessive alcohol consumption or drug use.\textsuperscript{199} Because the plaintiffs have alleged that the misconduct was linked to their disability, courts have examined the relationship between the nature of the misconduct and the worker’s continued fitness to perform the job. The relationship has been relatively easy to establish if the employee is a law enforcement agent or occupies a position of public trust (such as a schoolteacher, holder of public office or judge). Even where law enforcement officers’ off-duty misconduct is the result of a disability, courts have agreed with employers who asserted that the misconduct, apart from the underlying disability, justified the discharge.

In \textit{Butler v. Thornburgh,}\textsuperscript{200} an intoxicated FBI agent engaged in several assaults while off-duty, and damaged both a government vehicle and the wall he hit.\textsuperscript{201} The court upheld his discharge, stating that the misconduct demonstrated that the employee could not perform his work safely.\textsuperscript{202} In a similar case, a criminal investigator for the Bureau of Alcohol, Tobacco and Firearms was fired after he was charged with vehicular homicide resulting from driving while intoxicated.\textsuperscript{203} Nor have off-duty police officers who were arrested for possession of narcotics found recourse under the Rehabilitation Act.\textsuperscript{204}

\begin{footnotes}
\item[197] The regulations’ “direct threat” requirements would govern this issue. 29 C.F.R. § 1630.2(r). The employer must “isolate the specific behavior that would cause the direct threat. . . . Objective, factual evidence must be relied upon rather than subjective perceptions, irrational fears or stereotypes.” D. Todd Arney, \textit{Note, Survey of the Americans with Disabilities Act, Title I: With the Final Regulations In, Are the Criticisms Out?}, 31 \textit{WASHBURN L.J.} 522, 539 (1992).
\item[198] Edwards, supra note 185, at 371.
\item[200] 900 F.2d 871.
\item[201] \textit{Id.} at 872.
\item[202] \textit{Id.} at 876.
\item[203] Wilber, 780 F. Supp. at 838-40.
\end{footnotes}
Judges also have refused to require employers to accommodate off-duty misconduct for non-law enforcement employees if the misconduct is serious. For example, the discharge of a labor relations specialist whose kleptomania and anxiety disorder resulted in several arrests was upheld. The judge refused to require the employer to restructure the job to eliminate the elements (primarily travel) that triggered the employee’s attacks and noted that the worker had lost the trust of his coworkers. Similarly, a postal worker was discharged for an off-duty assault with intent to kill, which he claimed was the result of alcoholism and depression. There the judge ruled:

The [law] . . . does not prohibit an employer from discharging an employee for improper off-duty conduct when the reason for the discharge is the conduct itself, and not any handicap to which the conduct may be related.

If the offense is a “victimless” one, however, the courts may not be as sympathetic to the employer. For example, a federal trial court ordered the Immigration and Naturalization Service to reinstate an attorney with an excellent performance record who had been discharged after he was arrested in his home for cocaine possession. The plaintiff had requested a leave of absence to seek rehabilitation, which was denied because his supervisor required him to attend a scheduled training program. The judge noted that the rehabilitation was successful, the criminal charges had been dropped and plaintiff’s prior drug use would not interfere with his job responsibilities.

Given the lack of attention to misconduct in the statute, regulations, or legislative history, it is reasonable to expect courts to look to Rehabilitation Act precedent in these cases for guidance.

3. Excessive Absences and Tardiness

Poor attendance may result from a variety of disabilities, but mental disabilities and alcoholism often result in attendance problems. The Interpretive Guidance to the ADA’s regulations states that reasonable accommodation includes unpaid leave for necessary treatment, but the regulations and legislative history are silent with regard to unexcused absences or lengthy absences that interfere with an employer’s ability to conduct its business.

Although most workers with disabilities have similar or better at-
tendance than nondisabled individuals, the courts have been asked to determine under the Rehabilitation Act whether an employer can legitimately discharge a worker with a disability for excessive absences or tardiness. In these cases, employers who demonstrated that the absences disrupted the flow of work or required other employees to pick up the absent employee's work (in other words, that the absence unreasonably burdened the employer) have prevailed.

In Guice-Mills v. Derwinski, a former head nurse at a Veterans Administration hospital could not arrive at work on time because her disability—depression and stress—made getting up in the morning very difficult. The hospital refused to change her shift because it said her supervisory responsibilities required her to be there when the shift began. The plaintiff had refused the hospital's accommodation offer of demotion to floor nurse, in which it could have offered her a later work schedule. The court ruled that the hospital had satisfied its obligation under the Rehabilitation Act.

In another case related to attendance, a bank discharged a supervisor who was absent frequently in cold weather because of the weather's effect on her asthma. The employer had offered to give her flexible work hours, access to breathing equipment and two hours per month of medical leave (in addition to her sick leave). The plaintiff said she wanted to work eight months per year, and that the nature of her disability mandated an annual leave of absence during the winter months. The court ruled that regular attendance was an essential function of a supervisory job, and that the requested accommodation was a new position, which the bank did not have to create.

In a similar case, the Postal Service discharged a legal secretary

213. Collignon, supra note 8, at 208. In the 1992 Gallup survey, 19% of the employers reported that attendance of disabled workers was better than that of their other employees, and 42% reported that attendance rates were the same for both groups. Gallup, supra note 180.


216. Id. at 191.

217. Id. at 193.

218. Id. at 195.

219. Id. at 249.


221. Id. at 202.

222. Id. at 204.

223. Id. at 206. This result appears to be consistent with the ADA, which requires only that the employer consider "reassignment to a[n existing] vacant position," not the creation of a new one. 42 U.S.C.A. § 12111(9).
whose emotional problems caused her to be absent frequently.\textsuperscript{224} The court refused to accept the employee’s argument that the Postal Service should have hired a temporary employee to perform her work when she was absent.\textsuperscript{225} The Postal Service had also offered the worker reassignment to a lower grade (and lower stress) job, which she had refused.\textsuperscript{226} The court ruled that such an offer was a good-faith reasonable accommodation.\textsuperscript{227}

Individuals with alcoholism frequently have attendance problems, and judicial review of the employer’s response in these situations has been less deferential.\textsuperscript{228} But the main body of precedent under the Rehabilitation Act regarding employee misconduct suggests that judges consider toleration of such misconduct to be an undue hardship for the employer. Assuming that employers follow the ADA’s procedural requirements with respect to determining whether the individual is qualified and evaluating whether accommodation is reasonable, Rehabilitation Act precedent should be persuasive.

4. \textbf{Summary}

Given Congressional rejection of the \textit{Hardison} standard and the requirement that the employer prove that the expense or difficulty is “significant,” it is likely that judges interpreting the ADA will apply higher standards to an employer’s undue hardship defense than were applied under the Rehabilitation Act and similar state laws. Even if the safety of the worker, coworkers or the public is a potential issue, the “direct threat” language of the regulations does not appear to afford trial judges much leeway, especially if the employer’s evidence appears to be based upon speculation rather than fact. For the determination of whether hardship is undue, Rehabilitation Act precedent may offer little guidance, except in cases where employee misconduct is alleged to be grounds for discharge.

\section*{IV \textbf{INTERPRETING THE ACCOMMODATION REQUIREMENTS}}

The entanglement of “qualified,” “reasonable accommodation” and “undue hardship” may appear confusing, but the statute, regulations and legislative history suggest that the process has a logical progression. An employer should establish essential functions for a position before an in-

\textsuperscript{225} Id. at 263-64.
\textsuperscript{226} Id. at 262, 264.
\textsuperscript{227} Id. at 264.
\textsuperscript{228} For a discussion of the interplay between alcoholism and attendance, see infra text accompanying notes 301-07.
individual is considered for that position. The employer is required to balance the ADA’s protection of the employee’s privacy with the employer’s need to understand the employee’s limitation, in order that an appropriate accommodation may be designed. At that point, the accommodation analysis begins.

The accommodation process really begins before the employer has identified an applicant or current employee with a disability that requires accommodation. The ADA permits the use of job descriptions as evidence of the essential functions if those job descriptions were developed before the job was advertised or before candidates for the job were interviewed. Thus, the statute encourages pre-hiring development of those descriptions. In addition, blanket statements such as “all incumbents are required to perform all functions of the position” would not provide a defense to a refusal to accommodate and, in fact, could be used as evidence that the employer intentionally was violating the ADA.

In most cases decided under the Rehabilitation Act and similar laws in which workers could not perform some of a job’s physical requirements, judges were deferential to employer arguments that since the worker could not do the job, she was not qualified for the law’s protection. For example, in Anderson v. Department of Navy, the Navy asserted that it could not accommodate an apprentice electrician because her sickle cell anemia prevented her from climbing. The court accepted the argument without requiring the employer to demonstrate alternatives that it had considered and rejected as unduly burdensome. Similarly, in Dancy v. Kline, the employer refused to reassign to a light duty job a security guard who could not carry a gun or lift heavy objects. The employer argued that law enforcement jobs could not be restructured to eliminate certain physical requirements, and the court

229. “[I]f an employer has prepared a written [job] description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C.A. § 12111(8).
230. The statute permits post-offer medical examinations only if all entering employees are subject to the examination and provided that the information is kept confidential. Supervisors may be told only of the individual’s restrictions and the necessary accommodations. 42 U.S.C.A. § 12112(d)(3).
232. Such a statement suggests that no consideration would be given to whether one or more functions could be reassigned, and does not distinguish between essential and nonessential functions. This is contrary to the ADA’s requirement that an employer attempt to accommodate a qualified individual with a disability. 42 U.S.C.A. § 12112(b)(5)(A).
234. Id. at *1-3.
235. Id. at *10-12.
237. Id. at 382.
agreed.\textsuperscript{238} A similar result occurred in \textit{Simon v. St. Louis County},\textsuperscript{239} where the court determined that the police department's refusal to accommodate a police officer with paraplegy did not violate the Rehabilitation Act, because he could not perform a forcible arrest.\textsuperscript{240}

Other courts, however, have been less willing to defer to employer arguments that all physical requirements of a job must be performed. In \textit{Harrison v. Marsh},\textsuperscript{241} a typist who found it painful to type continually was reassigned to a job that required more typing. The court ruled that there were many other jobs for which she was qualified which required less typing, and ordered the employer to reassign her.\textsuperscript{242} Similarly, a court in \textit{Henry v. Menorah Medical Ctr.}\textsuperscript{243} reversed summary judgment in favor of a hospital which had refused to transfer to a clerical job a nurse who could not lift patients. The court noted that the hospital had a past practice of accommodating other medical staff in this manner.\textsuperscript{244}

The lower standard for undue hardship and the fact that reassignment was not included in Rehabilitation Act regulations probably explain much of the judicial deference to employer arguments that all physical requirements are essential functions. Although the ADA does not outlaw all physical requirements for a job, and it also does not suggest that they are inappropriate, it does require that physical criteria be closely related to the essential functions of the job. The House Report accompanying the ADA observes:

Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential functions of the job in question. . . . Moreover, even if the criterion is legitimate, the employer must determine whether a reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business.\textsuperscript{245}

Given this language, cases under the ADA will be resolved on the basis of the amount of time that is devoted to the physical portion of the job, its centrality to the position, and whether it can be reassigned to a co-worker without undue hardship to the employer.

The Interpretive Guidance accompanying the ADA regulations

\begin{thebibliography}{99}
\bibitem{238} \textit{Id.} at 383, 385.
\bibitem{239} 735 F.2d 1082 (8th Cir. 1984).
\bibitem{240} \textit{Id.} at 1084-85.
\bibitem{241} 691 F. Supp. 1223 (W.D. Mo. 1988).
\bibitem{242} \textit{Id.} at 1232.
\bibitem{244} \textit{Id.}
\end{thebibliography}
states that employers need provide reasonable accommodations only for
disabilities of which they are aware.\textsuperscript{246} If the employee or applicant indicates that she will need some accommodation to perform the essential functions, then the employer must involve that person in a discussion of what type of accommodation would enable her to perform the essential functions of her job.\textsuperscript{247} If the applicant indicates that she cannot perform one or more of the functions of her job, even with accommodation, then the employer must determine, assuming that the applicant is otherwise qualified for her position, whether the function is an essential one.\textsuperscript{248} If the function that the individual with a disability cannot perform \emph{is} essential, the individual may not meet the definition of "qualified individual with a disability."\textsuperscript{249} If the function is not essential, then the employer must determine whether it is reasonable to reassign that function to another worker.

The ADA prohibits the exclusion of applicants with a disability if their disability limits their ability to pass a test or some other screening device required of all applicants, unless the test is "shown to be job-related for the position in question and is consistent with business necessity."\textsuperscript{250} Although the Rehabilitation Act does not contain similar language, its regulations provide that testing must be modified to accommodate an individual's disability.\textsuperscript{251} For example, in \textit{Stutts v. Freeman},\textsuperscript{252} an applicant with dyslexia could not pass a written test to qualify for a job involving driving heavy equipment, yet he was otherwise qualified to perform the job.\textsuperscript{253} The court ruled that the employer's refusal to modify the test in order to minimize the impact of the individual's dyslexia was unreasonable.\textsuperscript{254} On the other hand, another court upheld an employer's decision to exclude an applicant with dyslexia from consideration for a firefighting position, saying that his exclusion was reasonable because the \textit{job itself} required the individual to be able to read complicated material quickly in the event of an emergency.\textsuperscript{255} Both the Rehabilitation Act and the ADA require employers to ensure that their screening devices really identify necessary skills and abilities, not traits (such as being able to see or hear) that the employer thinks are desirable for its employees, whether or not they are essential. Even if the test or

\textsuperscript{246} 29 C.F.R. § 1630.9 (Appendix: Interpretive Guidance).
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} 42 U.S.C.A. § 12111(8).
\textsuperscript{250} 42 U.S.C.A. § 12112(b)(6).
\textsuperscript{251} 29 C.F.R. § 1613.705.
\textsuperscript{252} 694 F.2d 666 (11th Cir. 1983).
\textsuperscript{253} Id. at 668.
\textsuperscript{254} Id. at 669.
screening device was created especially for the position, the employer still must demonstrate that it measures the applicant’s ability to perform the essential functions of the job.\textsuperscript{256} The Interpretive Guidance to the ADA regulations specifies how an employer should attempt an accommodation:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.\textsuperscript{257}

The regulations make it clear that the law imposes an \textit{affirmative obligation} on the employer to undertake this analysis.\textsuperscript{258} Even if the accommodation that the employee requests appears impractical to the employer, an analysis of alternatives that are not unduly burdensome must be undertaken.\textsuperscript{259} Courts called upon to determine whether employers complied with the requirement of the Rehabilitation Act and similar state laws mandating accommodation have made it clear that there is no excuse for an employer’s refusal to \textit{consider} an accommodation.\textsuperscript{260}

This procedural requirement will apply whenever any qualified individual with a disability seeks accommodation, even if the nature of the disability appears to preclude successful performance of the job or appears to pose a potential safety hazard. Employers who rejected employ-

\textsuperscript{256} See, e.g., Pandazides v. Virginia Bd. of Educ., 946 F.2d 345 (4th Cir. 1991) (a special education teacher with learning disabilities, who had been evaluated as an excellent teacher of special education, failed the National Teachers Examination; the court remanded the case and ordered the trial judge to determine whether the examination measured essential functions or whether the plaintiff could perform the essential functions, suggesting that waiver of the test would be a reasonable accommodation).

\textsuperscript{257} 29 C.F.R. § 1630.9 (Appendix: Interpretive Guidance).

\textsuperscript{258} The Interpretive Guidance states that “the employer must make a reasonable effort to determine the appropriate accommodation.” \textit{Id}.

\textsuperscript{259} \textit{Id}.

\textsuperscript{260} See, e.g., Arneson v. Sullivan, 946 F.2d 90, 92 (8th Cir. 1991) (criticizing an employer’s failure to consider providing an employee suffering from a neurological disorder with the distraction-free environment necessary for him to adequately complete his work); see also Ackerman v. Western Elec. Co., 860 F.2d 1514 (9th Cir. 1988) (determining that employer’s refusal to consider reassignment of minor duties that employee with disability could not perform violated California nondiscrimination law).
ees' requested accommodations out-of-hand, without analyzing whether those accommodations were reasonable or considering the possibility of alternate accommodations, have not prevailed in cases brought under the Rehabilitation Act. For example, in *Langon v. Department of Health and Human Services*, 261 HHS had rejected the request of a computer programmer with multiple sclerosis to work at home. 262 The court rejected the agency's motion for summary judgment, noting that it had analyzed neither the cost of the proposed accommodation nor whether it would have been effective. 263 Similarly, the decision of the Social Security Administration to discharge a worker with apraxia (difficulty in concentrating and bringing ideas together) rather than find him a private office resulted in reinstatement of the worker in *Arneson v. Sullivan*. 264 Employer policies that excluded individuals with particular disabilities without an individualized assessment of whether an accommodation could be made also have been unsuccessful. 265

The ADA imposes the same accommodation requirement when a current employee acquires a disability (whether or not it resulted from a work-related injury) and no longer can perform his or her current job. 266 Because the ADA's reasonable accommodation provision includes reassignment, it imposes a duty upon employers to consider that avenue. 267 That duty is an affirmative one, meaning that it is up to the employer, not the worker, to identify available positions for which the worker is qualified. The Interpretive Guidance accompanying the regulations discusses reassignment as a possible accommodation, and states that if the employer knows that an equivalent position for which the individual is qualified will become vacant, the employer should reassign the individual to the position when it becomes available. 268 Given the employer's access to information about current and prospective vacancies, of which the employee may not be aware, the employer's obligation in this regard is reasonable. A case litigated under Washington's nondiscrimination law provides an example of the employer's duty to identify appropriate op-

262. Id. at 674-9.
263. Id. at 678.
264. 946 F.2d 90 (8th Cir. 1991).
265. See, e.g., Mantolette v. Bolger, 767 F.2d 1416, 1422-23 (9th Cir. 1985) (holding that the Postal Service's refusal to hire a person with epilepsy must be based on an individualized assessment of the applicant's work and medical history); Commonwealth v. Tinsley, 564 A.2d 286, 288 (Pa. Commw. 1989) (stating that the inquiry of the employer must be directed at the individual applicant and at the effects of her disability upon her job performance); see also Wood v. Omaha Sch. Dist., 985 F.2d 437, 439-40 (8th Cir. 1993) (remanding to trial court to determine whether blanket exclusion of persons with diabetes from positions as school bus drivers was justified under the ADA).
266. The statutory definition does not specify when or where the disability must have been acquired. 42 U.S.C.A. § 12102(2).
267. See supra text accompanying notes 108-29 for analysis of reassignment as a reasonable accommodation.
268. 29 C.F.R. § 1630.2(o) (Appendix: Interpretive Guidance).
opportunities for reassignment. In Dean v. Municipality of Metropolitan Seattle-Metro, the Washington Supreme Court ruled against a municipal bus company that refused to reassign a bus driver who had lost sight in one eye and was no longer qualified for his position. When the driver asked about other available opportunities, he either was not told about open positions or was immediately rejected for positions for which he was qualified. The court said: "Metro personnel made themselves available to Dean but took no affirmative steps to help him find another position. This was required of them as a 'reasonable accommodation.'" According to the court, a plaintiff makes a prima facie case of discrimination when he proves the existence of a disability, his qualification for vacant positions, and his employer's failure to take affirmative measures to determine whether he is qualified for such positions and to make known any such opportunities.

Federal courts interpreting the Rehabilitation Act also have required employers to identify potential positions for reassignment and to consider reassignment seriously. Given the ADA's inclusion of reassignment as an example of reasonable accommodation and the clarity of the Interpretive Guidance to the regulations on this issue, it is very likely that judges will impose this affirmative duty on employers.

If a worker is not productive despite an accommodation, judicial precedent under the Rehabilitation Act suggests that the ADA will be interpreted to require the employer to determine whether the accommodation needs to be changed. Prior cases have held that the employer's duty to accommodate does not necessarily end with its first attempt at accommodation; the employer must determine whether the problem is with the accommodation or with the worker or, perhaps, with coworkers. The duty to accommodate thus does not end once the accommodation has been made. In order to avoid liability under the ADA for failure to accommodate, the employer should monitor the effectiveness of the accommodation. A court recently addressed this issue under the Rehabilitation Act. In Reynolds v. Dole, a federal trial judge wrote:

269. 708 P.2d 393 (Wash. 1985).
270. Id. at 394.
271. Id. at 395.
272. Id. at 400.
273. Id.
274. See, e.g., Harrison v. Marsh, 691 F. Supp. 1223, 1232 (W.D. Mo. 1988) (determining that employer must reassign typist with limited arm motion to position involving less typing); see also Henry v. Menorah Medical Ctr., 1991 U.S. Dist. LEXIS 3686, at *6-7 (W.D. Mo. Mar. 18, 1991) (denying summary judgment in favor of hospital that refused to reassign nurse with arm injury to secretarial position).
275. See, e.g., James v. Frank, 772 F. Supp. 984, 992 (S.D. Ohio 1991) (holding that the problem was the employer’s failure to provide a chair for an amputee).
276. 57 Fair Empl. Prac. Cas. (BNA) 1848 (N.D. Ca. Aug. 1, 1990), aff’d, 985 F.2d 470 (9th Cir. 1993).
[A]s part of its duty of reasonable accommodation, a[n] ... employer must do the following: ... make a reasonable inquiry regarding the employee's work history and medical history and independently assess whether the employee's [disability] is negatively impacting on his or her job performance and what possible measures the employer can undertake to improve the employee's job performance, short of any action that would impose an undue hardship on the operation of the employer's program.277

On the other hand, the employer is not obligated to spend large amounts of time or money if it becomes clear that the employee simply cannot do the job, either because of the employee's disability or because of personal factors.278 If the employee refuses to try to do the job, demands accommodations that are unduly burdensome or unnecessary, or is absent excessively, the employer is entitled to discharge the employee.279

An issue that neither the law, regulations, nor legislative history address is at what level the accommodation must enable the worker to perform. Does an accommodation that enables a worker to achieve a minimally acceptable level of performance satisfy the law? Would an accommodated worker who alleges that a mediocre performance rating was due to an inadequate accommodation rather than to personal factors have a colorable ADA claim? If so, does that make the employer's duty one of guaranteeing either an accommodation that will result in above-average performance (assuming the worker is capable of such performance), or at least a performance rating that is above average?

One commentator asserts that “the governing principle in determining an appropriate reasonable accommodation is whether it provides the person with the disability an opportunity to attain the same level of achievement as a person with comparable ability and without a disability.”280 Given the fact that the definition of “qualified” includes the concept of accommodation,281 it appears that an accommodation must enable the worker to perform her job at an acceptable level. If persons with disabilities are to receive effective accommodations, as the regulations require, the issue of the level of accommodation and its effect on the

277. Id.
278. If no reasonable accommodation can be found that will enable the employee to perform the essential functions of the job, the employee is not a “qualified individual with a disability.” 42 U.S.C.A. § 12111(8).
280. Mayerson, supra note 17, at 516.
281. A "qualified individual with a disability" is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.A. § 12111(8).
individual’s performance will require close scrutiny by the EEOC and the courts.

The determination of reasonableness will vary among employers, and will be conducted on a case-by-case basis for each qualified applicant or employee with a disability. The employer’s analysis may consider the modification of equipment, building modifications, personal aids or devices, personal assistants, or the modification of job tasks or work schedules. Thorough documentation of the employer’s analysis and good faith efforts will be critical to successful defenses of ADA claims.

V

Alcoholism and Drug Abuse

The ADA treats abusers of illegal drugs differently from abusers of alcohol. The ADA protects individuals with alcoholism, even if their abuse is current. But the law specifically excludes from the definition of “qualified individual with a disability” “any employee or applicant who is currently engaging in the illegal use of drugs.” However, the law expressly includes under the definition of “qualified individual with a disability” one who:

1. has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
2. is participating in a supervised rehabilitation program and is no longer engaging in such use; or
3. is erroneously regarded as engaging in such use, but is not engaging in such use.

The law does permit employers to adopt drug testing policies and to test rehabilitated former users of illegal drugs. Because the ADA also protects individuals who either have a record of impairment or who are regarded as impaired, a recovering alcoholic or abuser of illegal drugs would be protected, so long as the individual did not resume the abuse.

The law specifically permits an employer to hold employees who abuse alcohol or drugs to the same qualification and performance standards as other employees, even if that employee’s performance problems
are related to the drug or alcohol abuse. \textsuperscript{289} Employers also may forbid the use of drugs or alcohol at work, \textsuperscript{290} and may follow all applicable federal regulations regarding the use of alcohol and/or drugs. \textsuperscript{291} But an employer may not refuse to hire or discharge an individual solely on the basis of current or previous alcoholism or the former abuse of other controlled substances. Employers are required to undertake the same analytical process for an employee with alcoholism that they do for an employee with any other type of disability covered by the ADA. \textsuperscript{292} Can the person perform the essential functions of the job; what accommodation would be appropriate; is that accommodation an undue hardship for the employer?

The regulations and accompanying Interpretive Guidance paraphrase the statutory language of the ADA and provide no additional standards for evaluating the degree of protection to be afforded persons with alcoholism or recovering drug abusers. \textsuperscript{293} Thus, the ADA's procedural requirements (determining whether the individual is qualified, assessing whether accommodation is reasonable and determining whether a given accommodation poses an undue hardship) do not distinguish between persons with alcoholism and recovering drug abusers and individuals with other types of disabilities.

The ADA language excluding persons currently abusing drugs is identical to that of the Rehabilitation Act, \textsuperscript{294} but the ADA provides broader coverage for persons with alcoholism than is provided by the Rehabilitation Act. The Rehabilitation Act excludes from the definition of "qualified individual" "any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others." \textsuperscript{295} The ADA contains no such language. For this reason, and because most cases involving persons with alcohol were litigated against federal employers, \textsuperscript{296} Rehabilitation Act precedent will not be directly applicable to litigation involving persons with alcoholism under the ADA.

\textsuperscript{289} Id. at § 12114(c)(4).
\textsuperscript{290} Id. at § 12114(c)(1).
\textsuperscript{291} Id. at § 12114(c)(5).
\textsuperscript{292} 29 C.F.R. § 1630.16(b) (Appendix: Interpretive Guidance).
\textsuperscript{293} 29 C.F.R. § 1630 and Appendix: Interpretive Guidance.
\textsuperscript{294} 29 U.S.C.A. § 706(8)(C)(ii).
\textsuperscript{295} Id. at § 706(8)(C)(v).
\textsuperscript{296} Section 501 of the Rehabilitation Act requires the federal government to practice affirmative action with respect to employees with disabilities. 29 U.S.C.A. § 791(b). Furthermore, the Office of Personnel Management has developed specific policies which federal agencies must follow when dealing with employees with alcoholism. For an elaboration of these policies, see infra text accompanying notes 309-13.
A. Alcoholism

Given the ADA's silence on alcoholism, it is not clear whether reasonable accommodation would invariably require rehabilitation or detoxification, or whether workplace accommodations (such as a few hours a week of leave time to attend counselling sessions) would be deemed sufficient. In cases brought against federal agencies by employees with alcoholism, most judges have viewed in-patient rehabilitation as a necessary and reasonable accommodation. \(^{297}\) Since alcoholism is pervasive among American workers, \(^{298}\) the issue of when a person with alcoholism is protected by the ADA, and whether her employer must provide or allow rehabilitation, raises important social and financial implications.

Employers who have treated persons with alcoholism more harshly than they have individuals with other types of disabilities have been found to have violated the Rehabilitation Act. \(^{299}\) However, in cases where the employer convinced the court that the proposed rehabilitation would not be effective, or that the employee had consistently resisted rehabilitation attempts in the past, courts have found for the employer. \(^{300}\) In other words, employers who could demonstrate that they attempted to accommodate the employee and that the failure of the accommodation could be attributed squarely to the employee have prevailed. Procedural compliance with Rehabilitation Act and federal regulations was viewed as critical in these cases, and that standard also will be applied to cases brought under the ADA.

Employees with alcoholism frequently experience attendance problems. \(^{301}\) Their employers may insist that they come to work, and

\(^{297}\) See, e.g., Burchell v. Department of Army, 679 F. Supp. 1393, 1401 (D.S.C. 1988) (holding that the discharge of an employee with alcoholism, without first determining if the disability could be reasonably accommodated without undue hardship, violated the Rehabilitation Act), aff'd in part and rev'd in part sub nom. Rogers v. Lehman, 869 F.2d 253 (4th Cir. 1989); see also Callicotte v. Carlucci, 698 F. Supp. 944, 949 (D.D.C. 1988) (holding that provision of a single in-patient rehabilitation leave was an insufficient accommodation because relapse is a characteristic of the disease).

\(^{298}\) See, e.g., Walker v. Weinberger, 600 F. Supp. 757, 762 (D.D.C. 1985) (concluding that pre-treatment violations were improperly compiled to produce an aggregate disciplinary record warranting more severe punishment).

\(^{300}\) See, e.g., Crewe v. United States Office of Personnel Mgmt., 834 F.2d 140, 141 (8th Cir. 1987) (noting several unsuccessful treatment attempts and an uncooperative attitude by the employee); see also LeMere v. Burnley, 683 F. Supp. 275, 277, 279 (D.D.C. 1988) (noting that the plaintiff refused to seek treatment; the plaintiff stated that it was "ridiculous" for her to pursue further treatment for alcoholism).

\(^{301}\) See, e.g., Ferguson v. United States Dep't of Commerce, 680 F. Supp. 1514, 1518 (M.D. Fla.) (holding that toleration of absences and erratic behavior is not reasonable accommodation; the employer must follow accommodation procedure and give the employee a "firm choice" of treatment or disciplinary action), vacated and withdrawn, 694 F. Supp. 1541 (M.D. Fla. 1988) (all matters between the parties were resolved amicably).
can make "regular attendance" an essential function of their positions.\(^{302}\)

The ADA also states that employers can hold persons with alcoholism to the same performance standards that are applied to other workers.\(^{303}\) If an employee's excessive absences are the result of alcoholism, however, courts interpreting the Rehabilitation Act have required employers to attempt rehabilitation of the employee before discharge. In *Walker v. Weinberger,*\(^{304}\) for example, the Navy Yard dismissed a recovering alcoholic for excessive absences.\(^{305}\) A federal trial judge refused to permit the employer to "count" the employee's pre-rehabilitation absences and stated that:

reasonable accommodation of an alcoholic employee requires forgiveness of his past alcohol-induced misconduct . . . use of pre-treatment records conceded to be attributable to alcohol abuse for disciplinary purposes is inconsistent with the legislative perception of alcoholism as a disease, and behavioral problems a part of the symptomatology rather than the product of volitional acts of dissipation.\(^{306}\)

Nevertheless, *Walker* may have limited applicability to a similar case brought under the ADA. The law provides that employers may hold persons with alcoholism to the same performance standards "even if any unsatisfactory performance or behavior is related to the drug abuse or alcoholism of such employee."\(^{307}\) Thus, an employee's argument that his absences were related to alcoholism would not require his employer to disregard those absences; however, the employer still would be required to determine whether the employee could be accommodated, what accommodation would be reasonable and whether the accommodation posed an undue hardship.

If an employee advises the employer that he or she has alcoholism, the ADA requires the employer to ascertain if the worker is a "qualified individual with a disability" and then to attempt to accommodate the worker. First, the employer must determine whether the disability has interfered with the individual's job performance. If it has not, then the employer must determine with the employee what kind of accommodation is appropriate. Does the individual need in-patient treatment, or just time off during the week to attend meetings of Alcoholics Anonymous or to confer with a counselor? Can the individual continue to work while being treated, or does the individual need a leave of absence? Consulting with the employee's doctor, counselor or other professional who is famil-


\(^{303}\) 42 U.S.C.A. § 12114(c)(4).


\(^{305}\) *Id.* at 759-60.

\(^{306}\) *Id.* at 762.

\(^{307}\) 42 U.S.C.A. § 12114(c)(4).
iar with the worker's medical and psychological situation has been viewed by some courts as a sign of a good faith attempt to accommodate an employee with alcoholism. Discharge or discipline of an employee whose performance has been acceptable, without an attempt to accommodate, likely will be viewed as a violation of the law.

Given the fact that alcoholism may not be a "visible" disability, the employer may become aware that an individual has alcoholism only when that individual's work performance becomes unacceptable. The Office of Personnel Management has developed a special system for dealing with a poorly-performing alcoholic federal employee. Although private sector employers are not bound by these guidelines, the guidelines provide a useful tool for dealing with such individuals. Furthermore, courts interpreting the employer's duty to employees with alcoholism under the ADA may view the guidelines as providing welcome assistance in evaluating whether the employer used an appropriate process to deal with the employee, given the silence of the ADA's regulations and the legislative history on this matter. The federal guidelines state that the employer should

[conduct an interview with the employee focusing on poor work performance and inform the employee of available counseling services if poor performance is caused by any personal or health problem. If the employee [subsequently] refuses help, and performance continues to be unsatisfactory, provide a firm choice between accepting [company] assistance through counseling or professional diagnosis of his or her problem, and cooperation in treatment if indicated, or accepting consequences provided for unsatisfactory performance.]

The Handbook suggests that the employer consult with medical experts and send the employee for a fitness-for-duty examination. If the experts indicate that treatment or rehabilitation is needed, the employee should be offered that opportunity. If the employee is found to be fit for work, supervisors and managers should not accuse the individual of abusing alcohol, but should focus on the performance problem(s) and require the employee to adhere to performance, attendance and behavior

---

312. Id. at 133.
313. Id. at 132.
Employers may believe that sending an employee with alcoholism to rehabilitation once is a sufficiently reasonable accommodation. They also may believe that if an employee resumes the alcohol abuse, immediate discharge is permitted. But judges interpreting the Rehabilitation Act have not accepted this view. Even in cases where an employer provided several attempts at rehabilitation before discharging an employee, judges interpreting the Rehabilitation Act have required that, when faced with an employee with alcoholism whose rehabilitation was not successful, employers again determine whether further rehabilitation is a reasonable accommodation. A federal judge described the duty of a federal agency in this regard under the Rehabilitation Act:

Since it is recognized that relapse is predictable in treatment of alcoholics, an agency is not justified in automatically giving up on an employee who enters treatment but who subsequently relapses. In such a case, the agency may follow through with discipline short of removal. However, the agency is obligated before removing the employee from its work force to evaluate whether keeping the employee presents an undue hardship...

One commentator argues for a narrow interpretation of the accommodation requirement for employees with alcoholism, primarily because of the high cost of accommodation, the impact of absences and lowered productivity of employees with alcoholism, and the potential for lower coworker morale. This argument is not convincing, however. While high costs may represent undue hardships, the Interpretive Guidance to the regulations explicitly states that coworker morale does not. Because the ADA does not distinguish alcoholism from other covered disabilities, it is unlikely that employers will be able to convince judges that...
the accommodation requirements should be interpreted more narrowly for this disability than for others.

B. Drug Abuse

It appears that, since the ADA clearly does not protect a current abuser of illegal drugs, an employer could discharge the worker for using or being under the influence of illegal drugs on the job. The law specifically permits employers to hold employees who abuse alcohol or drugs to the same qualification and performance standards as other employees, even if the abusers’ performance problems are related to the drug or alcohol abuse.\(^\text{320}\) Employers also may forbid the use of drugs or alcohol at work,\(^\text{321}\) and may follow all applicable federal regulations regarding the use of alcohol and/or drugs.\(^\text{322}\) Recovering drug abusers and persons who erroneously are regarded as currently abusing drugs are protected by the ADA,\(^\text{323}\) as they are under the Rehabilitation Act.\(^\text{324}\)

Very little Rehabilitation Act precedent exists regarding employees who alleged that they were discharged for prior drug use. In one case involving a controlled substance, a lawyer for the Immigration and Naturalization Service who was discharged after being arrested at home for cocaine possession prevailed.\(^\text{325}\) The court noted that his work performance was excellent, that he had successfully completed rehabilitation, and that the small number of drug-related cases that the plaintiff would handle could be reassigned to other staff attorneys.\(^\text{326}\)

Virtually all Rehabilitation Act precedent related to accommodating alcoholism involves federal agencies. There is very little precedent concerning protections for persons who erroneously are regarded as drug abusers or who are recovering drug abusers. Although courts may find precedent helpful when considering cases involving alcoholism, there is little guidance for courts when prior or perceived drug abuse is involved. Furthermore, the regulations and legislative history provide virtually no guidance on either of these issues. For these reasons, the EEOC and the courts will be required to create their own standards for determining the scope of protection under the ADA for persons with alcoholism or persons who have, or who are regarded as having, abused drugs.

\(^{320}\) 42 U.S.C.A. § 12114(c)(4).

\(^{321}\) Id. at § 12114(c)(1).

\(^{322}\) Id. at § 12114(c)(5).

\(^{323}\) Id. at § 12114(b).


\(^{325}\) Nisperos v. Buck, 720 F. Supp. 1424, 1432 (N.D. Cal. 1989), aff’d, 936 F.2d 579 (9th Cir. 1991).

\(^{326}\) Id. at 1433.
VI
CONCLUSION

Although the Americans with Disabilities Act provides a stronger and clearer definition of "reasonable accommodation" than did the Rehabilitation Act, the boundaries of this duty remain to be drawn. Precise boundaries are not likely because the law requires a factual determination, which will differ for every case. Nevertheless, litigation under the Rehabilitation Act and similar state nondiscrimination laws suggests that judges, and now juries, will hold employers to a high standard.

First, an employer who simply refuses to consider accommodating a "qualified" individual with a disability may face a summary judgment award for the plaintiff for violating its procedural duty under the ADA. Secondly, an employer who fails to include the individual with a disability in the analysis of whether accommodation is possible will have violated the intent of the ADA regulations, another potential procedural violation. And thirdly, the employer's undue hardship defense will have to have a strong factual basis and be free of speculation or generalization about the nature of the individual's disability or the demands of a particular occupation or task.

Although employers' procedural duties are defined with reasonable clarity, their substantive duties are far from clear. The regulations are vague and offer only general guidance, using examples that make the employer's duty obvious. They do not address the difficult issues of mental disability and, in particular, alcoholism. They cite with approval a few Rehabilitation Act cases, but give little indication of the standards that will be applied when Rehabilitation Act precedent is inappropriate or inapplicable. As a result of this uncertainty, there very likely will be great variance in the way that judges and juries interpret the ADA's requirements.

Given the language of the ADA, its thorough and forcefully-written legislative history, and prior judicial interpretation of the Rehabilitation Act, upon which the new law is based, the Americans with Disabilities Act creates for most American employers a new duty of flexibility and adaptability when considering hiring or retaining an individual with a disability. The body of Rehabilitation Act and state nondiscrimination law precedent, some of which was cited in the Act's legislative history, clearly will influence judges as they struggle with the need to shape ADA jurisprudence; however, the ADA goes beyond the Rehabilitation Act in its accommodation requirements, and judges very likely will view prior case law as a floor of protection upon which to build new precedent.

327. 29 C.F.R. § 1630.9 (Appendix: Interpretive Guidance).