NOTE

The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans With Disabilities Act

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When examining disparate treatment employment discrimination claims, federal courts have remained steadfast in their adherence to the burden shifting framework developed under Title VII of the Civil Rights Act of 1964 as interpreted by the U.S. Supreme Court in McDonnell-Douglas, Corp. v. Green, Texas Dept. of Community Affairs v. Burdine, and St. Mary's Honor Center v. Hicks. This framework is designed to enable the factfinder to ascertain whether the employer-defendant took adverse action against the employee-plaintiff based on one of the prohibited factors in the statute (e.g., race, color, religion, sex, or national origin), or whether the employer took such action for some reason wholly unrelated to these factors. A plurality of the Court recognized in Price-Waterhouse v. Hopkins, however, that this framework is inapplicable in cases where the evidence shows clearly that the employer relied, at least in part, on one of Title VII's prohibited factors in its decision to take adverse action against the employee.

Since the enactment of Title I of the Americans with Disabilities Act (ADA), the question the courts must ask now is, "is employment discrimination on the basis of disability as defined in Title I of the ADA the same as

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discrimination under Title VII?” The author’s answer is, “sometimes.” This paper reexamines the Court's opinions in each of the above cases, followed by a discussion of Circuit Courts of Appeals decisions construing the ADA. The author argues that in cases where the plaintiff asserts that the employer failed to reasonably accommodate the employee’s disability, a different scheme is necessary. As the plurality recognized in Price-Waterhouse, different circumstances necessitate different methods of proof. ADA reasonable accommodation cases are different from Title VII indirect proof; disparate treatment cases, and should be treated accordingly by the courts. This Article explains the “Reasonable Accommodation Difference,” how the courts should treat it, and why.

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I

INTRODUCTION

Title I of the Americans with Disabilities Act (ADA)\(^1\) prohibits discrimination “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.”\(^2\) A

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2. 42 U.S.C. § 12112(a); see also Michael Faillace, Title I of the Americans with Disabilities Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Case Law Under the ADA, and Practical Recommendations, 527 PLI/Lit 481, 553-54 (1995); Linda Wong,
"qualified individual with a disability" is one with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. A plaintiff may establish a claim of disability discrimination by presenting direct evidence of discrimination or by presenting indirect proof of discrimination.

The question has arisen under Title I whether the indirect proof scheme developed under Title VII of the Civil Rights Act of 1964 is applicable in the context of disability-based discrimination. In Title VII cases where a plaintiff has only circumstantial evidence upon which to rely, the indirect proof scheme was created to establish a means by which a plaintiff, in the absence of some explanation by the employer, can show discrimination. In Texas Department of Community Affairs v. Burdine, the Supreme Court explained the reason for the burden shifting framework that developed in indirect proof, disparate treatment cases: "In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." The plaintiff's prima facie case serves to create a presumption that, in the absence of any other reason, the employer's decision was based on an impermissible


5. 42 U.S.C. §§ 2000e-2000e-17 (1994). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Because Title I of the Americans with Disabilities Act also addresses employment discrimination, some similarities exist between the two statutes. See infra Part III. However, the point of this paper is to describe the reasons why in certain kinds of ADA employment cases, it is wholly inappropriate for courts to simply apply the standards developed under Title VII to claims brought under Title I of the ADA. See infra Parts V and VI.


9. Id. at 255 n.8.
Once the plaintiff puts forward such evidence, the employer must offer some legitimate nondiscriminatory reason for taking the adverse employment action against the plaintiff. If the employer is unable to do so, a strong suspicion is raised that the employer discriminated against the plaintiff.

In *Price Waterhouse v. Hopkins*,\(^1\) a plurality of the Supreme Court recognized that the indirect evidence burden shifting framework does not serve its purpose when the plaintiff has evidence which directly shows that the employer actually relied on one of the impermissible factors under Title VII. In these cases, because the plaintiff can prove that the employer based its decision at least in part on one of the factors prohibited by Title VII, the plurality determined that it would be insufficient to allow the employer to simply assert another nondiscriminatory reason for its action.

Part I of this Article reviews the method of indirect proof as it has developed in Title VII cases under *McDonnell Douglas Corp. v. Green*,\(^3\) *Texas Department of Community Affairs v. Burdine*,\(^4\) and *St. Mary's Honor Center v. Hicks*.\(^5\) In Part II, the mixed-motives proof scheme developed under *Price Waterhouse v. Hopkins*\(^6\) will be discussed and compared to the indirect proof framework. Part III provides an examination of recent Circuit Court of Appeals decisions which have addressed the question of the applicability and utility of the indirect proof framework in the context of disability discrimination under the ADA. This discussion focuses on the usefulness of the framework when the solitary issue to be determined is whether the employer made its adverse employment decision either because of the employee's disability or because of a reason wholly unrelated to disability.\(^7\) Part IV presents a brief discussion of the differences between discrimination based on the Title VII factors and discrimination based on disability. Part V analyzes recent decisions under the ADA by the Circuit Courts of Appeals where the issue to be determined involves a consideration by the employer of the plaintiff's disability in determining the plaintiff's ability to perform the job in question. These cases involve assertions by the plaintiff that the employer failed to reasonably accommodate the plaintiff and assertions by the employer that the plaintiff was not a member

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10. These factors under Title VII are race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1).

11. *See infra* Part I.B. for a discussion of *Burdine*.


17. The cases discussed throughout this paper which address this solitary issue will be referred to as presenting an "either/or dichotomy." The employer *either* based its decision on a factor prohibited by law *or* the employer had a legitimate reason for its decision which is wholly unrelated to the unlawful factor.
of the ADA's protected class (i.e. although the employer acknowledged that the plaintiff was a person with a disability, the employer took adverse action against the plaintiff because in the employer's judgment, the disability made the plaintiff unqualified for the job). Finally, in Part VI, the discussion concludes that in cases where the issue to be determined is whether the employer failed to make a reasonable accommodation, the McDonnell Douglas/Burdine/Hicks formula should not be applied, and a proof scheme similar to that developed by the plurality in Price Waterhouse is appropriate.

II

TITLE VII: MCDONNELL DOUGLAS/BURDINE/HICKS
REVISITED—INDIRECT PROOF OF DISCRIMINATION

A. McDonnell Douglas

In McDonnell Douglas Corp. v. Green, the Supreme Court set forth the order and allocation of proof in Title VII employment discrimination cases based on disparate treatment. The Court held that the plaintiff at trial carries the initial burden of proving a prima facie case. The prima facie showing requires the plaintiff to demonstrate the following: (1) The plaintiff is a member of the protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the employer rejected the plaintiff; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons possessing the plaintiff's qualifications. The Court recognized that different factual circumstances would necessitate differing formulations of this prima facie case.

Once the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's adverse decision. If the employer meets this burden, the plaintiff must be given a full and fair opportunity to show that the employer's proffered reason was merely a pretext for its decision. Evidence of pretext may include a showing that persons not of the plaintiff's protected class were treated differently, as well as evidence of the employer's policy and practice with respect to members of the plaintiff's protected class, including evidence of statistical disparities.

19. Id. at 792.
20. Id. at 792-93.
21. Id. at 802 n.13.
22. Id. at 802.
23. Id. at 804.
24. Id.
B. Burdine

In Texas Department of Community Affairs v. Burdine,\textsuperscript{25} the Court had occasion to revisit the burden on the employer once the plaintiff established a prima facie case under McDonnell Douglas.\textsuperscript{26} The Court noted that the ultimate burden of proving that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff.\textsuperscript{27} The Court recognized that the plaintiff's prima facie case burden is not onerous and is designed to eliminate the most common nondiscriminatory reasons for rejecting the plaintiff.\textsuperscript{28} The prima facie case serves as a vehicle for the plaintiff to indirectly show that discrimination occurred, because once the prima facie case is made, if the employer provides no reason for its adverse employment decision, the discriminatory reason is presumed.\textsuperscript{29} The burden placed on the employer, then, is a burden of production. The employer must come forward with some evidence that its adverse decision was based on some reason unrelated to the impermissible factor.\textsuperscript{30} The employer does not have the burden of persuasion in its articulation of a legitimate, nondiscriminatory reason.

This framework is designed to raise a genuine issue of fact as to whether the employer unlawfully discriminated against the employee.\textsuperscript{31} The plaintiff's prima facie case creates a rebuttable presumption that the employer discriminated, a presumption that is rebutted when the employer asserts a legitimate nondiscriminatory reason for its decision. If the employer meets this burden, the plaintiff is given a full and fair opportunity to establish pretext.\textsuperscript{32} The standards the Court placed on the employer's burden are as follows: 1) the employer's reason must be clearly set forth through admissible evidence; and 2) it must be legally sufficient to justify judgment for the defendant.\textsuperscript{33} The plaintiff has the opportunity to show that the employer's reason was pretext, and this burden merges with the plaintiff's ultimate burden of proving that the plaintiff was a victim of intentional discrimination.\textsuperscript{34} The Court suggested two ways this can be achieved. The plaintiff can either directly persuade the trier of fact that a discriminatory reason more likely motivated the employer or indirectly show that the employer's proffered explanation is pretextual, or in the words of the Court, "unworthy of credence."\textsuperscript{35}

\textsuperscript{26.} Id. at 252.
\textsuperscript{27.} Id. at 253.
\textsuperscript{28.} Id. at 253-54.
\textsuperscript{29.} Id. at 254.
\textsuperscript{30.} Id.
\textsuperscript{31.} Id.
\textsuperscript{32.} Id. at 255-56.
\textsuperscript{33.} Id. at 255.
\textsuperscript{34.} Id. at 256.
\textsuperscript{35.} Id.
This case presented the Court with a unique evidentiary concern. The Fifth Circuit had concluded that shifting solely the burden of production to employers would give employers the opportunity and the incentive to manufacture fictitious, but legitimate reasons for their decisions, creating an undue burden on the plaintiff. The Supreme Court disagreed, suggesting that the “clear and reasonably specific” conditions placed upon employers’ proffered explanations would suffice to give the plaintiff a full and fair opportunity to show pretext. Also, the Court opined that the employer will have an incentive to persuade the trier of fact that its decision was lawful and factually supported. Finally, the Court intimated that the combination of liberal federal discovery rules and a Title VII plaintiff’s ease of access to the EEOC’s files would ease the burden for the plaintiff in proving pretext.

The result of Burdine is the following: If the trier of fact believes that the plaintiff's evidence shows that the discriminatory reason is more likely than the employer's asserted reason, or if the trier of fact believes the plaintiff's evidence shows the employer's reason was pretext, a finding of discrimination is warranted.

C. Hicks

1. The Majority

In St. Mary's Honor Center v. Hicks, the Supreme Court again found itself setting guidelines for proof allocations in Title VII actions. In a five-to-four decision, the second method of indirect proof outlined in Burdine was undermined. The issue was whether “the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.” The Court reiterated the burden shifting framework of McDonnell Douglas and Burdine, noting that once the employer articulates a legitimate nondiscriminatory reason for its adverse employment decision, the

36. Id. at 257-58 (citing Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977)).
37. Id. at 258.
38. Id.
39. Id.
42. Hicks, 509 U.S. at 504 (emphasis added).
presumption raised by the plaintiff’s prima facie case is rebutted. Describing the plaintiff’s burden, the Court held that the plaintiff must prove “that the proffered reason was not the true reason for the employment decision, and that race was.” With the addition of these four words, the Court greatly added to what the plaintiff is required to prove without citing any authority for such an additional burden.

Following a bench trial, the District Court found that the reasons offered by the employer for the plaintiff’s demotion and discharge in this case were not the real reasons. In other words, the employer’s reasons were “unworthy of credence” under Burdine. However, because it determined that the plaintiff had failed to establish by a preponderance of the evidence that race was the real reason for the employer’s action, the District Court ruled for the employer. The Court of Appeals reversed, determining that once the plaintiff proved that all of the employer’s reasons for demoting and discharging the plaintiff were pretextual, the plaintiff was entitled to judgment as a matter of law.

The Supreme Court rejected the Court of Appeals’ reasoning. In discussing the meaning of the burden of production, the Court concluded that this burden involves no credibility assessment. The Court, applying the Federal Rules of Civil Procedure regarding Judgments As A Matter of Law, reasoned that if the employer fails to meet its burden of production, a factual issue remains for the trier of fact and judgment as a matter of law is inappropriate. The Court explained that the presumption created by the plaintiff’s prima facie case does not shift the burden of persuasion to the employer. Instead, once the employer puts forth its reason, the trier of fact, if it disbelieves that reason, may find for the plaintiff if it believes the evidence of the plaintiff’s prima facie case has proven by a preponderance of the evidence that intentional discrimination occurred. But disbelief of the employer’s reason does not alone compel judgment for the plaintiff as a matter of law. Therefore, the trier of fact must not only disbelieve the employer’s asserted reason for its adverse action against the plaintiff, but must also believe that it is more likely than not that intentional discrimina-

43. Id. at 508 (emphasis added) (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 256 (1988)). The Court explained that the plaintiff, in order to meet this enhanced burden, has the opportunity to demonstrate this through presentation of his own case and through cross-examination of the defendant’s witnesses. See id. at 507-8.

44. See id. at 508. See supra note 41 for commentary explaining the changes created by Hicks.

45. Id. Hicks, 509 U.S. at 508.

46. Id.

47. Id.

48. Id. at 509.

49. The Court clarified this by saying, “but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case.” Id. at 508.

50. Id.

51. Id. at 510 (citing Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

52. Id. at 511.
tion was the reason for the adverse action. In effect, the plaintiff must not only disprove the reasons asserted by the employer (the indirect proof method permitted under Burdine), but also "all other reasons suggested, no matter how vaguely, in the record." This approach to the burdens of proof in employment discrimination has come to be known as the "pretext-plus" method.

2. The Dissent

The four dissenters in Hicks found the majority's approach destructive of the very purpose of the McDonnell Douglas/Burdine framework—"sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." The dissent thought it contradictory to the purpose of the framework to allow the trier of fact to "roam the record" and possibly find some other reason for the adverse employment action once the plaintiff had proven the employer's asserted reason was pretextual, particularly since the plaintiff had no fair opportunity to disprove any reason other than that asserted by the employer.

The dissent also argued that the majority's approach will prevent the plaintiff from having the ability to frame the factual issue with sufficient clarity so as to have a full and fair opportunity to demonstrate pretext. Shifting the burden of production to the employer gives the employer the opportunity to determine what factual issues will be litigated at trial, which then binds the employer as well as the plaintiff. Furthermore, the requirements that the employer's articulated reason be "clear and reasonably specific" and that the employer's reasons must be set forth "through the introduction of admissible evidence" have little meaning if the trier of fact is permitted to find another reason not articulated by the employer for its adverse employment decision. The dissent also pointed to a footnote in Burdine which directed that "[a]n articulation not admitted into evidence will not suffice."

According to the dissent, the issue in Hicks was whether the factual inquiry is narrowed by the McDonnell Douglas/Burdine framework to the

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53. Id. at 523.
54. This term was used by Justice Souter in his dissenting opinion in this case. Id. at 535-36 (Souter, J., dissenting) (citing Lancot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991)). See supra note 41 for articles discussing "pretext-plus.”
55. Hicks, 509 U.S. at 515 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 255 n.8).
56. Id.
57. Id. at 529.
58. Id.
59. Id. (quoting Burdine, 450 U.S. at 258).
60. Id. at 530.
61. Id. (internal quotations omitted) (quoting Burdine, 450 U.S. at 255 n.9).
question of pretext. They noted that the employer's options in a Title VII case include either attacking the elements of the plaintiff's prima facie case or presenting a nondiscriminatory reason for its actions. If the employer chooses the former approach, the trier of fact will decide at the end of the trial whether the plaintiff has proven his prima facie case. But if the employer takes the latter approach, the only question for the trier of fact will be the issue of pretext. The majority's approach of not granting judgment as a matter of law to a plaintiff who proves that the employer's reasons are pretextual will have the following adverse effects on plaintiffs: (1) it will deny the plaintiff the full and fair opportunity to demonstrate pretext as required by Burdine; (2) it will result in summary judgment for the employer in every case where the plaintiff's evidence is only that which is sufficient to prove a prima facie case and to show that the employer's reasons were pretext, and (3) it will be "unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in Court."  

III  
TITLE VII: Price-Waterhouse Revisited—Mixed Motives  
A. Background  
In Price Waterhouse v. Hopkins, the Supreme Court analyzed employment discrimination under Title VII when the plaintiff proves that the employer, at least in part, relied on an impermissible factor in making its adverse employment decision. In this case, the plaintiff offered direct evidence of a discriminatory motive for her employer's failure to promote her.

62. Id. at 529 n.2.  
63. Id. at 523 n.9 (citing Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)).  
64. Id. at 534.  
65. Id. at 535-36.  
66. Id. at 533. For commentary addressing the dissent's concerns, see supra note 41. For an in depth recent analysis of the current state of Title VII disparate treatment employment discrimination law, see William R. Corbett, The "Fall" of Summers, The Rise of "Pretext-Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks, 30 GA. L. REV. 305 (1996).

67. 490 U.S. 228 (1989).

68. Ann Hopkins was proposed for partnership at the Price Waterhouse accounting firm where she had worked as a senior manager. When Price Waterhouse held her partnership up for reconsideration for one year and then refused to re-propose her for partnership, Hopkins filed suit under Title VII alleging sex discrimination. Hopkins' evidence of discrimination included the following: (1) Partners made partnership decisions relying on comments concerning the candidate submitted by each of the partners; (2) only 7 of 662 partners were women and Hopkins was the only woman candidate of 88 candidates that year; (3) Hopkins' qualifications excelled in several areas as documented in her recommendation for partnership and in comments made by clients; (4) one partner referred to her as "macho;" another suggested that she "overcompensated for being a woman;" a third advised her to take "a course at charm school;" (5) several partners criticized her use of profanity, and one partner suggested that those partners objected to her swearing only "because it's a lady using foul language;" another explained
In contrast to this evidence showing discrimination, there also was evidence showing that the employer had a nondiscriminatory reason for denying the promotion. The District Court determined that the employer’s reason provided a legitimate basis upon which it could refuse to consider the plaintiff for partnership. But the judge held that the employer had unlawfully discriminated against the plaintiff on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping. Finally, the judge held that the employer had not carried its burden of proving, by clear and convincing evidence, that it would have reached the same decision in the absence of the impermissible factor and, therefore, could not avoid equitable relief. The Court of Appeals affirmed, but held that the employer could avoid all liability if it proved by clear and convincing evidence that it would have made the same decision regardless of the impermissible factor.

B. The Plurality Opinion

Before the Supreme Court, the employer argued that the burden of proof was on the plaintiff to show that the employer would have made a different decision had it not discriminated. The plaintiff argued that once a plaintiff shows that the employer took the impermissible factor into consideration, the employer’s proof that it would have made the same decision anyway only limits equitable relief, not the employer’s liability.

In a plurality opinion, the Supreme Court examined the language of Title VII and concluded that Congress intended to make the impermissible factors listed in Title VII irrelevant to employment decisions. Specifically, the opinion determined that in light of the “because of” language in the statute the critical inquiry is whether gender was a factor in the employment decision and whether Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.

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69. Id. at 234-35. The evidence showed that the plaintiff had difficulties with her interpersonal skills which had caused problems with co-workers and had been the basis of reprimands prior to her consideration for partnership.
70. Id. at 236.
71. Id. at 237.
72. Id.
73. Id.
74. Id. at 237-238.
75. Id. at 238.
76. Id. at 239-40.
77. Id. at 241.
The plurality held that Title VII requires the plaintiff to prove that the employer relied on the impermissible factor in coming to its employment decision.\(^7\)

The plurality held that an employer shall not be liable if it can prove that, even if it had not taken the impermissible factor into account, it would have come to the same decision regarding that employee.\(^8\) In "mixed-motives" cases, therefore, once the plaintiff makes a showing that the impermissible factor was a motivating factor in the employment decision,\(^9\) the burden of persuasion (not just production) shifts to the employer to prove that it would have made the same decision regardless of that factor.\(^10\)

The plurality drew a distinction between the role of burdens of proof in this mixed-motive context and the burden shifting method developed in pretext cases.\(^11\) The plurality deemed the employer's burden, that it would have made the adverse decision had it not considered the impermissible factor, an affirmative defense.\(^12\) As the plurality put it, "[t]he plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."\(^13\)

The employer argued that it did not bear any burden of proof until the plaintiff had shown substantial evidence that the employer's explanation for failing to promote the plaintiff was not the "true reason" for its action.\(^14\) The plurality rejected this argument because of the illogic in attempting to fit a case where the employer clearly relied on the impermissible factor into the pretext framework whose very purpose is to ascertain the "true reason" for the employer's decision.\(^15\) The plurality explained that the premise of the inquiry developed under *Burdine* is to determine which factors, the legitimate or the illegitimate, led to the decision, and that asking a plaintiff to fit a case where the employer relied on both legitimate and illegitimate factors would require the plaintiff to pretend that the decision stemmed from one source.\(^16\) The plurality concluded that the *Burdine* evidentiary scheme's usefulness in determining that either the employer made its decision based on the impermissible factor or it relied on a legitimate reason simply has no application in cases where the employer relies on both.\(^17\)

\(^{78}\) *Id.* at 241-42.

\(^{79}\) *Id.* at 242.

\(^{80}\) *Id.* at 244-45. See also Civil Rights Act of 1991 amending 42 U.S.C § 2000e-2(m) ("[a]ny unlawful employment practice is established when the [plaintiff] demonstrates that [the impermissible factor] was a motivating factor for an employment practice, even though other factors also motivated the practice") (emphasis added).

\(^{81}\) *Price Waterhouse*, 490 U.S. at 244-45.

\(^{82}\) *Id.*, at 245-46.

\(^{83}\) *Id.* at 246.

\(^{84}\) *Id.*

\(^{85}\) *Id.*

\(^{86}\) *Id.* at 246-47.

\(^{87}\) *Id.* at 247.

\(^{88}\) *Id.*
The plurality then addressed the concern raised by the dissent that this method of proof would be impossibly confusing because a plaintiff would simply allege both pretext and mixed motives in the alternative, would develop the case through discovery, and then would choose which theory on which to proceed. If the plaintiff failed to satisfy the trier of fact that it is more likely than not that an impermissible factor played a part in the employment decision, then the plaintiff could prevail only after proving, under the Burdine method, that the employer's stated reason for its decision was pretextual.

The plurality identified several cases under Title VII in which the Supreme Court determined that the burden of proof shifts to the employer precisely because the employer has relied on an impermissible factor to justify its employment decision. For example, when an employer has asserted that gender is a "bona fide occupational qualification," the Court has assumed that it is the employer who must show why it must use gender as a criterion in employment. Similarly, the Court has also placed the burden on the employer to show that the actual disparity in pay under the Equal Pay Act is the result of a factor other than sex. Finally, the plurality noted that some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, the employer has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy.

The plurality concluded that in those cases where an employer has allowed an impermissible factor to affect its decision making process, the employer should justify the basis for its decision. In such cases, the employee has not been and should not be required to prove a negative—that the employee would not have been subject to the adverse decision had the employee not been a member of the protected group.

The plurality then analyzed the application of this method of burden allocation in other cases involving impermissible factors unrelated to sex.

89. Id. at 247 n.12.
90. Id.
91. A "bona fide occupational qualification" or "BFOQ" is an affirmative defense to a sex discrimination claim brought under Title VII. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1996); 29 C.F.R. § 1604.2(a)(2) ("Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress").
95. Id. (citing Hayes v. Shelby Memorial Hospital, 726 F.2d 1543, 1548 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1187 (4th Cir. 1982)).
96. Id.
97. Id.
When a school teacher alleged that he was fired for engaging in constitutionally protected speech, and the employer claimed his firing was based on inadequate performance, the Court held that once the plaintiff had shown that his constitutionally protected speech was a motivating factor in the adverse treatment of him by his employer, the employer was obligated to prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. In this case, the Court concluded that the plaintiff had shown that the illegitimate factor was a but-for cause of the employment decision. A final example showed that when a union employee demonstrated that his employer’s decision against him was based in part on a hostility toward unions, the employer then had the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the impermissible motive. Quoting from NLRB v. Transportation Management, the plurality emphasized that “‘[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.”

The plurality went on to discuss that when the plaintiff shows that the employer relied upon sex stereotyping, this evidence is sufficient for the plaintiff to have met her burden. Once the plaintiff meets this burden, the employer must show something more than a legitimate and sufficient reason for its action, if that reason did not motivate the employer. Rather, the employer must prove that the legitimate factor, standing alone, would have induced the employer to make the same decision.

Next, the plurality defined “motivating factor.” The plurality carefully explained that if the employer were asked at the moment the adverse employment decision was made what its reasons were for the decision (and if the employer responded truthfully), one of the reasons would be that the employee belonged to the protected class. The plurality noted that proving that decisions were based on “sex stereotyping” is a legally sufficient grounds to bring a Title VII claim, if the proof shows that those stereotypes

98. Id. at 249 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977)).
100. Id. (citing NLRB v. Transportation Management, 462 U.S. 393, 403 (1983)).
103. Id. at 250-52.
104. Id. at 252.
105. Id. at 250.
were actually relied upon by the employer. The plurality explained that stray remarks alone are insufficient proof, but where, as here, actual reliance for the decision is placed on the stereotyping remarks, plaintiff has met her burden of proof.

Examining the Federal Rules of Civil Procedure and precedent, the plurality determined that the lower courts had erred in requiring the employer to show by clear and convincing evidence that it would have made the same decision absent the impermissible factor. Instead, the preponderance of the evidence standard is appropriate. The plurality resolved the remaining evidentiary concerns and factual challenges raised by the employer in favor of the plaintiff and remanded the case.

IV

THE ADA: WHEN THE EMPLOYER’S Asserted REASON IS NOT DISABILITY-RELATED

Courts deciding cases brought under the employment provisions of the ADA frequently use the burden shifting framework established and developed by the Supreme Court in *McDonnell Douglas, Burdine, and Hicks.* The Third, Fourth, Fifth, Seventh, and Eighth Circuits have expressly held that the *McDonnell Douglas/Burdine/Hicks* approach is appropriate in ADA cases where there is no direct evidence of discrimination on the basis of the plaintiff’s disability. In the majority of the cases decided by these courts, the applicability of the framework was discussed in light of a motion for summary judgment. In this context, the issue for the Court becomes

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106. *Id.* at 250-51.
107. *Id.*
108. *Id.* at 252-53.
109. *Id.* at 255-58.

111. For a discussion of the complexity of summary judgment motions in ADA cases from the plaintiff’s perspective, see Lucinda A. Castellano, *Surviving Summary in the ADA Employment Case—Part I, 24 Colo. Law. 1301 (1995) [hereinafter Castellano, Part I] (describing the difficulties that plain-
whether the plaintiff has created a genuine issue of material fact as to each element of the prima facie case, and whether the plaintiff has demonstrated sufficient evidence of a triable issue regarding whether the employer's proffered reason was pretextual.112

A. Ennis—The Fourth Circuit

1. The Case

In Ennis v. National Association of Business and Educational Radio, Inc.,113 the Fourth Circuit applied the McDonnell Douglas/Burdine/Hicks proof scheme to a Title I claim under the ADA. The ADA plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence.114 If the plaintiff succeeds, the burden shifts to the defendant to articulate some "legitimate, nondiscriminatory explanation which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action."115 If the defendant meets this burden of production, the presumption created by the prima facie case "drops out of the picture," and the plaintiff bears the ultimate burden of proving that she has been the victim of intentional discrimination.116

The Ennis court determined that the framework was appropriate,117 noting that the McDonnell Douglas/Burdine/Hicks framework has often been applied in cases decided under the Rehabilitation Act of 1973,118 and that cases under the ADA are to be adjudicated in a manner consistent with that act.119 The court then discussed the application of the framework to discharge cases brought under the ADA. Noting also that the framework is designed to be flexible depending on the factual circumstances of the

112. See, e.g., discussion infra Part III.A.
113. 53 F.3d 55 (4th Cir. 1995).
114. See id. at 58.
115. Id.
116. Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-509 (1993) (holding that prima facie case plus disbelief of employer's asserted justification for employment action is not necessarily sufficient to establish violation; summary judgment appropriate unless plaintiff presents adequate evidence that employer unlawfully discriminated); see also supra note 53 and accompanying text.
117. See id. at 58. This was the extent of the Court's reasoning as to why McDonnell Douglas burden shifting should apply. Commentators have taken contradictory views. See, e.g., supra note 6.
118. 29 U.S.C. § 794 (1994). The Rehabilitation Act of 1973, often called the "precursor" to the ADA, prohibits discrimination on the basis of disability by programs or entities which receive federal funding.
119. Ennis, 53 F.3d at 58; see also 29 C.F.R. § 1630.1 (1995).
case, the court outlined what the plaintiff must prove to make a prima facie case as follows: (1) The plaintiff was in the protected class; (2) plaintiff was discharged; (3) at the time of the discharge, plaintiff was performing the job at a level that met her employer's legitimate expectations; and (4) plaintiff's discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

The court pointed out that in employment discrimination cases based on factors other than disability, the formulation of the fourth prong differs somewhat. In cases involving discharge based on Title VII factors or age, the fourth prong requires a showing that the plaintiff was replaced by a person who is not a member of the protected class.

The court gave two reasons for altering this fourth prong in disability discrimination cases. First, in contrast to cases where race, gender, or age is at issue, in cases based on disability discrimination, it will be nearly impossible to show whether the employee who replaced the plaintiff was inside or outside of the protected class. Second, the court surmised that this would lead to a vast number of ADA claims being dismissed because many of the replacement employees would fall within the Act's broad coverage of membership in the protected class. The court concluded that this reformulation allows the plaintiff to prove by some other affirmative evidence that disability was a determining factor in the employer's decision.

Before applying the framework to the facts, the court cited the oft quoted language from Burdine that plaintiff's burden in proving a prima facie case is "not onerous." Ennis claimed that her employer fired her in violation of the ADA because of her known association with an individual with a disability (namely her adopted son who had been infected with HIV). The court assumed without deciding that the son's HIV infection constituted a disability under the Act and determined that the plaintiff had brought forward sufficient evidence to create a genuine issue of material fact as to whether her employer had knowledge of her son's disability.

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120. Ennis, 53 F.3d at 58 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).
121. Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).
122. Id. at 59.
123. Id. at 58 n.2.
124. Id. at 58. This is one of the reasons Knych gives in arguing that the McDonnell Douglas/Burdine/Hicks framework should not be applied at all. See Knych, supra note 6, at 1516-17.
125. Id. at 58-59.
126. Id. at 59.
127. Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).
128. Id. at 57; 42 U.S.C. § 12112(b)(4) (under the ADA, the term "discriminate" includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association").
129. Ennis, 53 F.3d at 56.
130. Id. at 61.
The court determined, however, that Ennis failed to show that she was performing her job at a level that would comport with her employer's legitimate expectations, the third element of the prima facie case.\textsuperscript{131} The court held that the evidence proffered by the employer regarding her inadequate job performance\textsuperscript{132} was so substantial and persuasive that no reasonable jury could find by a preponderance of the evidence that she was performing her job adequately.\textsuperscript{133} The court also concluded that the plaintiff had not met the fourth prong of a prima facie case, that is, she had failed to offer evidence from which the trier of fact could reasonably infer that her termination was based on an impermissible factor.\textsuperscript{134} The court found no causal connection between the plaintiff's termination and her son's HIV status.\textsuperscript{135} Ennis offered as evidence a letter that had been sent out to employees concerning the filing of insurance claims and suggested that this proved that Ennis' employer might have known that she was adopting a son with HIV.\textsuperscript{136} The court viewed the evidence as requiring the trier of fact to build one inference upon another—connecting the letter to knowledge of Ennis' son's HIV status, to wanting to prevent expensive claims, to firing Ennis as a result.\textsuperscript{137} In the court's view, this connection was far too conjectural to defeat the motion for summary judgment.\textsuperscript{138}

2. Analysis

Although this case presents the unusual situation of an employee's relationship to a person in the protected class, rather than an employee who is herself in that class, it nonetheless exemplifies the Fourth Circuit's treatment of the McDonnell Douglas/Burdine/Hicks framework's applicability to claims under Title I of the ADA. Because the court assumed that Ennis' relationship to her son placed her in the ADA's protected class, the questions left to resolve involved the third and fourth elements of the prima facie case. This case fits neatly into the methodology developed under McDonnell Douglas, Burdine and Hicks, because, as with discrimination claims brought based on race and gender, the court passed over the first element—class membership—without discussion.\textsuperscript{139} Once Ennis proved

\begin{itemize}
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. at 61-62.
  \item \textsuperscript{133} Id. at 62.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} As will be explained, infra Part IV, proving membership in the protected class is often an enormous obstacle for a plaintiff bringing a claim under the ADA. See Richardson, supra note 3, and Castellano, Part II, supra note 111 (describing the problems plaintiffs must overcome in proving membership in protected class). Castellano observes that the ADA plaintiff must exercise caution in proving that she is disabled enough to fit the statutory definition of "an individual with a disability," but not too disabled so as to preclude herself from fitting the statutory definition of a "qualified" individual with a
\end{itemize}
that she was a member of the protected class, she was then required to put forward evidence that she was qualified (meaning here that she was performing up to her employer's legitimate expectations) and evidence giving rise to an inference of discriminatory treatment.\textsuperscript{140}

Instead of explicitly asserting a nondiscriminatory reason for firing Ennis, Ennis' employer argued the first option discussed in the dissent in \textit{Hicks}\textsuperscript{141} of attacking the elements of Ennis' prima facie case. This summary judgment strategy requires showing a lack of evidence raising a genuine issue of material fact as to an element of the prima facie case.\textsuperscript{142} Where, as here, the element in question is the plaintiff's qualifications, the employer's defense can be seen either as an attack on the prima facie case or as a legitimate nondiscriminatory reason for its action. The evidence the employer put forward to rebut Ennis' prima facie case is the same evidence it would use to bolster its legitimate nondiscriminatory reason defense. Viewed either way, the plaintiff's burden was to raise an issue of material fact as to an inference of discrimination, which the court found completely lacking in this case.\textsuperscript{143}

The evidence was overwhelming that Ennis' work was far below legitimate business expectations. Even though the court granted summary judgment for the employer based on Ennis' failure to make out a prima facie case, this case nonetheless exemplifies how in ADA Title I actions, when the employer produces some evidence which shows a reason for its action that is completely unrelated to disability, this will be sufficient to shift the burden back to the plaintiff to demonstrate that the reason is pretextual. In form, this case parallels employment discrimination claims brought under Title VII: Either the employer based its adverse decision upon the protected characteristic, or the employer based its decision on some factor totally unrelated to that protected characteristic. The plaintiff bore the burden of persuasion by a preponderance of the evidence.\textsuperscript{144}

disability. Castellano, Part II, supra note 111, at 1788. This dilemma becomes crucial for plaintiffs who develop or aggravate an impairment while on the job and who must deal with conflicting legal standards and contradictory statutory definitions of "disability" under the Social Security and Workers' Compensation systems as well as the ADA. See also \textit{The Americans with Disabilities Act: Great Progress, Greater Potential}, 109 Harv. L. Rev. 1602, 1609 (1996) (discussing the complexity of whether the claimant is "disabled"); Richard H. Nakamura, \textit{Pride and Prejudice in the Workplace}, 43 Fed. Law. 22, 24-25 (1996) (describing the conflict in the meaning of the word "disability," and the "too disabled/not disabled enough" dichotomy).

\textsuperscript{140} See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981) (reiterating prima face case requirements under \textit{McDonnell Douglas}).

\textsuperscript{141} See supra Part I.C.2.


\textsuperscript{143} See \textit{Ennis}, 53 F.3d at 62.

\textsuperscript{144} See id. at 58.
B. Newman—The Third Circuit

1. The Case

The Third Circuit in Newman v. GHS Osteopathic, Inc., Parkview Hospital Division similarly concluded that the McDonnell Douglas/Burdine/Hicks framework applies to claims brought under Title I of the ADA. Because the court held that the failure to adduce any evidence of pretext was fatal to the plaintiff's prima facie case of discrimination under the ADA, the court affirmed the judgment as a matter of law for the employer. The court declared that in the context of employment discrimination, the purpose of Title VII and the ADA are identical. The court discerned that purpose to be prohibiting employment discrimination against members of the protected class. After noting that the remedies provisions of the ADA direct that Title VII remedies be used, the court concluded that the methods and manner of proof used under one of these statutes should be used under all.

The plaintiff Newman was a physical therapy aide in Parkview Hospital's rehabilitation department who had a disability which caused periods of drowsiness. Contrary to company policy, Newman had been combining his lunch and break times together to allow time to combat the effects of this drowsiness. The company had, nevertheless, allowed Newman and other employees to combine their lunch time and breaks. When new management began running the department, it chose to enforce the policy. Newman protested. Soon thereafter, Parkview began layoffs, and

145. 60 F.3d 153 (3d Cir. 1995).
146. Id. at 158.
147. Id. at 157.
149. Newman, 60 F.3d at 157. Although the court is undeniably correct that the purpose of each of these statutes is to prohibit employment discrimination, the court failed to recognize that the acts which constitute "discrimination" are defined very differently under each of these statutes. See infra Part IV.B.
150. Id. at 157 (citing 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment").
151. Id. at 157. But see infra Part IV (discussing the very concrete differences between the harms that Title VII addresses and those that Title I of the ADA addresses).
152. Newman, 60 F.3d at 154. Newman's condition was a form of nocturnal epilepsy. He was required to take medication which caused the drowsiness.
153. Id.
154. Id.
155. Id.
156. Id. The Human Resources Director informed Newman that he would need medical documentation in order to be exempt from the policy. Newman obtained an evaluation from a Parkview doctor
the position Newman held was eliminated.\textsuperscript{157} Newman and six other employees were subsequently laid off.\textsuperscript{158}

Newman filed a complaint under the ADA.\textsuperscript{159} After a bench trial,\textsuperscript{160} the District Court found that Parkview’s decision to reduce its force was motivated by legitimate economic reasons arising from its deteriorating financial situation, and that the new management harbored no animosity toward Newman.\textsuperscript{161} Accordingly, the court entered judgment in Parkview’s favor.\textsuperscript{162}

On appeal, Newman alleged that the District Court had placed the wrong burden of proof on him. The court recognized, and the parties on appeal conceded, the applicability of the \textit{McDonnell Douglas/Burdine/Hicks} framework in ADA cases.\textsuperscript{163} The court described the burdens of production and proof as follows: (1) The plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination;\textsuperscript{164} (2) if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee’s rejection;\textsuperscript{165} (3) should the defendant meet this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.\textsuperscript{166} However, the court noted that under \textit{Hicks}, the trier of fact is not required to find intentional discrimination simply because it does not believe the employer’s explanation.\textsuperscript{167}

\begin{footnotes}
\textsuperscript{157} Id. The Executive Director of Operations consulted the Human Resources Manager to determine which full-time nonprofessional position should be eliminated. The Human Resources Manager recommended that the full-time physical therapy aide position should be eliminated. Newman was the only employee who held this position.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id. at 154. In the short history of the ADA, this is rare. The majority of ADA cases reviewed by the Circuit Courts of Appeals are decided by summary judgment. \textit{See generally} Castellano, Parts I and II, \textit{supra} note 111 (giving reasons why the ADA plaintiff faces great obstacles in surviving summary judgment).

\textsuperscript{161} Newman, 60 F.3d at 155. The court found that the Human Resources Manager only reluctantly recommended that Newman’s position be eliminated.

\textsuperscript{162} Id.

\textsuperscript{163} Id. at 156-57.

\textsuperscript{164} Id. at 156-57 n.3.

\textsuperscript{165} Id. (citing \textit{McDonnell Douglas}, 411 U.S. 792, 802 (1973)).

\textsuperscript{166} Id. (citing \textit{Texas Dep’t of Community Affairs v. Burdine}, 450 U.S. 248, 252-53 (1981); \textit{McDonnell Douglas}, 411 U.S. at 804).

\textsuperscript{167} \textit{See id.} In discussing \textit{Hicks} and its application to the trial stage, the court explained that the only relevant question for the trier of fact is whether the plaintiff has proven intentional discrimination. The plaintiff can do this by “proving that the employer’s proffered reasons for the adverse employment decision are pretexts for discrimination.” \textit{Id.}
Newman argued that Parkview's reason for laying him off was pretextual. He offered as evidence the following: (1) The new management was irritated with his medical need to combine the breaks;168 (2) the new manager "became belligerent" with him when he continued his break consolidation;169 (3) "he was told he could take a part-time position as a physical therapy aide without benefits but that he would have to bump his friend out of the position;" and (4) "soon after his one-year right to recall had expired, a part-time aide was given a full-time position."170 The court did not find Newman's evidence sufficient to establish pretext.171

The court then addressed the issue of what standard of causation applies. The District Court had interpreted Title VII precedent as requiring a plaintiff in pretext cases to show that the improper reason was the sole cause of the adverse employment decision.172 However, the Court of Appeals concluded that the District Court had used the wrong standard. Under Miller v. CIGNA Corp.,173 a plaintiff in a pretext case need only prove that the illicit factor "played a role in the employer's decision making process and that it had a determinative effect on the outcome of that process."174 The court determined, however, that application of the wrong causation test was harmless error because of the District Court's finding that Newman's disability played no role in Parkview's decision.175 Quoting the District Court, the Third Circuit Court of Appeals concluded, "[t]he plaintiff's epilepsy was not the sole cause, was not a determinative cause, and played no role whatsoever in the defendant's decision to terminate plaintiff's position or to lay off the plaintiff."176

2. Analysis

In this case, as in Ennis, the employer put forward a reason for its action that was wholly unrelated to the plaintiff's disability. Because Newman had no direct evidence that the employer's decision was based on a

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168. Id. at 154.
169. Id.
170. Id. at 155 n.2.
171. Id. Specifically, the court found that "Newman did not take the part-time position because he did not want to cause his friend to be laid off." Id. The court also determined that the creation of the new full-time position was explained by the fact that Parkview had hired a new independent contractor to supply professional positions to the rehabilitation department and that the new contractor's "aggressive marketing practices" caused an increased volume of patients in the Rehabilitation Department. Id.
172. See id. at 158.
173. 47 F.3d 586, 598 (3d Cir. 1995) (en banc).
175. Newman, 60 F.3d at 158.
176. Id.
consideration of his disability, the McDonnell Douglas/Burdine/Hicks proof scheme provided a method for Newman to bring his claim. In a case such as this, the application of the McDonnell Douglas/Burdine/Hicks framework serves the same function and purpose that it does in the context of race or gender discrimination under Title VII. Once the employer asserted a nondiscriminatory reason for Newman’s termination, the fact issue arose. The trier of fact assessed the credibility of the witnesses and determined that Newman’s reason for the termination was less probable than the employer’s reason. The effect of applying the framework in this situation is comparable to its effect in Title VII cases.

C. Daigle—The Fifth Circuit

1. The Case

The Fifth Circuit in Daigle v. Liberty Life Insurance Co. reached a conclusion much like the court’s decision in Newman. The employer, Lib-
erty, required all managers to read and memorize recruitment talks that were to be used in bringing new agents in for employment. The plaintiff Daigle claimed that he was unable to comply with this company requirement because of a learning disability, and that Liberty fired him because of that disability. Liberty claimed that it discharged Daigle because he verbally and physically abused agents in his district office, and because he was not honest with employees or company officials. Further, Liberty asserted that Daigle had successfully completed the required training, and therefore whatever learning disability he had had no effect on Liberty's decision to fire him.

The case was tried before a jury, and evidence was presented on both sides. The jury granted its verdict in favor of Liberty, finding that Daigle had failed to prove that he was fired because of his disability, and that he failed to prove that Liberty's reason was pretextual. Applying the McDonnell Douglas/Burdine/Hicks framework, the Court of Appeals outlined the plaintiff's prima facie proof requirements as follows: (1) The plaintiff has a disability; (2) the plaintiff was qualified for the job; (3) the plaintiff was subject to an adverse employment action; and (4) the plaintiff was replaced by a non-disabled person or was treated less favorably than non-disabled employees. Quoting Burdine, the court required that the employer articulate a "legitimate, nondiscriminatory reason" in order to meet its burden of production. Quoting Hicks, the court reiterated that the employer need not prove its proffered reason, but must bring forward some evidence to support it, "which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." Once the employer has done so, the plaintiff carries the burden of persuasion on the fact question of the employer's intent.

The court found sufficient evidence in the record to support the jury's finding that Daigle failed to prove by a preponderance of the evidence that Liberty's reason for terminating him was pretextual.

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180. Id. at 395. The plaintiff, Daigle, had worked as a district Manager for a life insurance company which was subsequently taken over by Liberty Life Insurance Company.
181. Id.
182. Id.
183. Id. at 395-96.
184. Id. at 396.
185. Id.
186. Id. The court did not address the distinction noted by the Ennis court that this fourth element may require reformulation when the case involves discrimination on the basis of disability.
187. Id.
188. Id.
189. See id.
190. Id. at 397.
2. Analysis

Here, as in Newman, the either/or dichotomy which manifests itself in the McDonnell Douglas/Burdine/Hicks framework is exemplified in the context of disability discrimination. The framework enables the plaintiff to bring forth its version of the firing, and the employer has the opportunity to present its alternative reason. This creates the issue of fact to be determined: Was disability the reason or not? The plaintiff has the burden of persuasion to show that disability was the reason. The purpose of the burden shifting framework noted in Burdine—to sharpen the inquiry into the elusive factual question of intentional discrimination—works in exactly the same way in this ADA case as it does in cases brought under Title VII.

D. Price—The Eighth Circuit

1. The Case

In Price v. S-B Power Tool, the plaintiff Price alleged that her employer terminated her because she had epilepsy. Her employer claimed she was fired for poor attendance. In the twelve months prior to her dismissal, Price’s absentee rating was in excess of company policy, and she received a series of warnings. Price continued to miss work despite these warnings. She finally was told that she would be fired if she did not reduce her absentee rating to comply with company policy. Although Price was instructed to call in to arrange for a leave of absence, she failed to do so, missed work, and was terminated. At trial, Price conceded that several of her absences were unrelated to her epilepsy.

The District Court granted summary judgment in favor of the employer, because Price failed to adduce sufficient evidence of a prima facie case and failed to raise a genuine issue of material fact as to pretext. Price appealed.

Discussing the McDonnell Douglas/Burdine/Hicks framework, the Court of Appeals noted that to survive a defendant’s motion for summary

191. See supra note 17.
192. 75 F.3d 362 (8th Cir. 1996).
193. Id. at 363.
194. Id. at 363-64. Price had attendance problems throughout her employment. She was fired after failing to report to work after having received two written warnings concerning her absences. Her employer made her aware at the time of the termination that the reason was her excessive absences. The company allowed leaves of absence for a variety of purposes including medical leave of which Price regularly availed herself. The employer never denied Price leave and even encouraged Price to use leave as needed. None of Price’s medical leave was counted against her absentee rate. The employer’s policy regarding warnings for absenteeism was that discharge was permissible after an initial warning.
195. Id. at 364.
196. Id.
197. Id.
198. Id.
199. Id. at 363.
judgment, a plaintiff must establish the ability to prove a prima facie case. If established, and absent any explanation by the employer, a rebuttable presumption of discrimination is created. The burden of production then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to prove that the defendant’s proffered reason is pretextual and that intentional discrimination was the true reason for the defendant’s actions.

The court set forth the prima facie requirements as follows: the plaintiff must show “[1] that she is a disabled person within the meaning of the ADA; [2] that she is qualified to perform the essential functions of the job (either with or without reasonable accommodation); and [3] that she has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.” This inference may be raised by evidence that the plaintiff was replaced by or treated less favorably than similarly situated employees who are not in plaintiff’s protected class. The court agreed with the Ennis court that other types of evidence may create an inference of discrimination when it is not clear whether another employee is a member of the protected class.

The court held that Price did not meet her prima facie case. The court found no evidence that she was terminated on the basis of her disability because non-disabled employees were not treated any differently. Viewing the evidence in the light most favorable to Price, the court found that she was fired due to excessive absenteeism.

The court also found alternative grounds for awarding summary judgment to the employer. Based on Hicks, the court found the employer had come forward with a legitimate, nondiscriminatory reason for firing Price, and Price failed to produce any evidence of pretext. Price offered as evidence of pretext the following: (1) her employer had mentioned that

200. Id. at 365.
201. Id. (citing Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).
202. Id.
203. Id. (citing St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993)).
204. The court applied a slightly different form of the prima facie case requirements set forth in the Eighth Circuit’s decision in Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995). Also discussed infra Part V.
205. Price, 75 F.3d at 365.
206. Id.
207. Id. at 365 n.5.
208. Id. at 365.
209. Id. The evidence provided by Price showed that two non-disabled employees with similar attendance problems were also given oral and written warnings after which they both quit voluntarily.
210. Id. The court found that Price was fired for being absent from work after receiving warnings according to policy and for not calling in after being specifically instructed to do so. The court also found that Price was not absent because of her epilepsy, and that her epilepsy did not have any impact on her ability to call in.
211. Id.
Price's leaves of absence created some burden on the company;\textsuperscript{212} (2) the company's attitude toward her epilepsy changed after new ownership took over;\textsuperscript{213} and (3) Price's final two absences should have been converted to excused absences.\textsuperscript{214} The court did not find this evidence sufficient to demonstrate pretext.\textsuperscript{215}

2. Analysis

In Price, as in Daigle and Newman, when the employer asserts a legitimate reason unrelated to disability, the McDonnell Douglas/Burdine/Hicks framework provides a mechanism for determining whether intentional discrimination occurred. Had Price adduced evidence of a connection between her absenteeism and her epilepsy, and evidence that she requested accommodation for this, application of the framework would have been inappropriate.\textsuperscript{216} However, this case demonstrates again that when the question to be determined is whether the employer fired the employee on the basis of disability or for some other legitimate reason, the McDonnell Douglas/Burdine/Hicks framework is applicable. As is true in all indirect proof cases, when the employer's asserted reason for taking the adverse action is applied equally to all employees, whether in the protected class or not, ADA plaintiffs will have difficulty proving a causal connection between this action and the impermissible factor.\textsuperscript{217}

\textsuperscript{212} Id. at 366.
\textsuperscript{213} Id. Price argued that prior to the ownership change, she had been accommodated by not being fired for her excessive absences, and that her later firing was actually a refusal to accommodate. Id.
\textsuperscript{214} Id. Price provided a doctor's note for these absences that verified she was having stomach problems.
\textsuperscript{215} Id. The court found Price's evidence speculative because the employer allowed and encouraged her to take leaves of absence which would not have counted as absences. The court also found that Price had received numerous warnings, that she never asked for an accommodation, and that the new owner did not have any influence on the decision to terminate. The court noted that Price did not dispute that she had been specifically instructed to call her supervisor if she would be absent nor did she dispute that the doctor's note was provided five days after her termination. Id.
\textsuperscript{216} See discussion infra Part VI (addressing an employer's failure to make reasonable accommodation). The same holds true if Price had proved to the court's satisfaction that her former employer was in fact accommodating her disability by permitting her absenteeism in the past. When the plaintiff asks for a reasonable accommodation and the employer refuses or claims that reasonable accommodation is possible, a different proof scheme is necessary.
\textsuperscript{217} Compare Price, 75 F.3d at 364, with Johnson v. Legal Services of Arkansas, Inc., 813 F.2d 893, 896 (8th Cir. 1987) (under Rehabilitation Act of 1973, inference of discrimination may be raised by evidence that a plaintiff was replaced by or treated less favorably than similarly situated employees who are not in the plaintiff's protected class) and Boner v. Board. of Comm'r's, 674 F.2d 693, 696 (8th Cir. 1988) (under Title VII, plaintiff must establish that his discharge and the retention of another employee of a different race were done under similar circumstances).
E. DeLuca—The Seventh Circuit

1. The Case

In DeLuca v. Winer Industries, Inc., the Seventh Circuit Court of Appeals applied the McDonnell Douglas/Burdine/Hicks framework in a case where the employer’s proffered reason for terminating the plaintiff was a reduction in the workforce. The plaintiff DeLuca argued that he was fired after the employer found out he had multiple sclerosis (MS).

DeLuca offered the following as evidence that he was fired because of his disability: (1) his employer made several inquiries about DeLuca’s condition; (2) he had difficulty getting samples of merchandise from his employer to show customers; and (3) even though samples were available, his employer refused to give him samples after his December diagnosis, which was the critical sales period for that year. The Sears catalog operations ended in January, 1993, and Winer terminated DeLuca in February.

Winer’s proffered reasons for terminating DeLuca were the following: (1) the problems securing samples were industry- and company-wide; (2) DeLuca failed to close any sales after becoming a full-time salesperson in October, 1992; (3) DeLuca had not vigorously pursued sales outside of the Sears catalog account and would not do so in the future; (4) Winer sought to reduce expenses and personnel because sales were down; and (5) Winer had not hired a replacement for DeLuca and his former supervisor had taken over his remaining accounts.

DeLuca brought suit claiming that Winer made it impossible for him to make sales and fired him because of his disability. The District Court

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218. 53 F.3d 793 (7th Cir. 1995).
219. Id. at 795. DeLuca had worked as an independent salesman since 1990, successfully selling his employer’s children’s clothing line to the Sears catalog. In 1992, Sears discontinued the catalog, and DeLuca negotiated with the Winer management to hire him as a full-time salesperson, which they did, citing DeLuca’s previous successful sales record. Soon after this, DeLuca began experiencing numbness in his face which he discussed with his supervisor and other management. In December of 1992, he was diagnosed with MS. Id.
220. Id. DeLuca’s supervisor called him at the hospital to tell him that he was not yet covered by the company’s insurance. The supervisor also told him he had “to fight it [the disease],” referred him to another person suffering from the disease, and expressed concern over how his symptoms would affect DeLuca as a salesman. Id.
221. Id. at 795-96.
222. Id. at 796.
223. Id. Winer had fired eleven salespersons due to poor sales performance between 1990 and 1993. In addition, Winer had discontinued the clothing line that DeLuca was selling and fired several salespersons connected with that line, including one employee prior to DeLuca’s termination. Id. at 796.
224. Id. at 796.
225. Id. DeLuca advanced a theory that Winer’s treatment created a hostile working environment. For recent general treatment of the subject of hostile working environment, see Susan K. Grebeldinger, The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call For Greater Judicial Discretion in Awarding Front Pay, 1996 U. ILL. L. REV. 319 (1996); Frank S. Ravitch, Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework From Tort Law for Addressing Knowing Harassment of Hypersensitive Employ-
granted summary judgment for Winer, holding that DeLuca had not ad-
duced sufficient direct evidence that Winer fired him because of his MS.226
The District Court also held that DeLuca failed to make out a prima facie
case under the McDonnell Douglas/Burdine/Hicks burden shifting frame-
work.227 Alternatively, the court held that DeLuca’s evidence failed to
show that Winer’s reasons for terminating him were pretextual.228

After determining that the question of direct evidence of discrimina-
tion was not properly before it,229 the Court of Appeals applied the McDo-
nell Douglas/Burdine/Hicks framework as adapted for reduction-in-force
cases.230 The court held that the plaintiff must prove that “(1) he is a member
of a protected class; (2) his work performance met the employer’s legit-
imate job expectations; (3) his employment was terminated; and, because
[the employer] was conducting a general reduction-in-force, (4) employees
not in the protected class were treated more favorably.”231

The court further held that: (1) “Once a plaintiff establishes all four
elements, the burden shifts to the defendant to articulate a legitimate, non-
discriminatory reason for firing the plaintiff”; and (2) “[i]f the defendant
meets this burden, the plaintiff must then prove that the employer’s stated
reason is merely a pretext for discriminatory action . . .”232 The court reit-
erated the principle from Hicks that the plaintiff bears the ultimate burden
of persuading the trier of fact that the defendant intentionally
discriminated.233

226. DeLuca, 53 F.3d at 796.
227. Id. The District Court determined that DeLuca had created a genuine issue of material fact
regarding whether he had met Winer’s legitimate job expectations, but the District Court determined
DeLuca had not shown, with the exception of his own affidavit which the court found was not based on
personal knowledge, that he had been treated less favorably than other similarly situated non-disabled
employees.
228. Id.
229. Before addressing the framework, the Court of Appeals discussed the summary judgment stan-
dard of review. The Seventh Circuit standard for employment cases requires reviewing summary judg-
ment motions with (what the court called) “added rigor.” Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035,
1038 (7th Cir. 1993) (claim brought under the ADEA) (holding that the Court of Appeals may affirm
the decision of the lower court only if the defendant would have been entitled to a directed verdict had the
case gone to trial on the record as it stood before the District Court). The DeLuca court reiterated that
the plaintiff can prove discrimination by direct evidence or by circumstantial evidence. However, the
court found for the following reasons the issue of direct evidence was not properly before it: (1) DeLuca
had not challenged that there was insufficient direct evidence in his opening brief; and (2) DeLuca’s
counsel admitted at oral argument that there was no direct evidence that Winer fired DeLuca because of
his MS. Id. at 797.
230. DeLuca, 53 F.3d at 797.
231. Id.
232. Id. at 797 (citing Sarsha, 3 F.3d at 1039). The court explained that the plaintiff can show this
either “directly with evidence that [the employer] was more likely than not motivated by a discrimina-
tory reason, or indirectly by evidence that the employer’s explanation is not credible.” Id.
233. Id. at 797-98 (citing St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993)).
The court agreed with the lower court’s finding that there existed a genuine issue of material fact regarding whether or not DeLuca met Winer’s legitimate job expectations. Nevertheless, the court found DeLuca failed to raise a genuine issue of material fact as to the fourth element of his prima facie case - whether Winer treated DeLuca less favorably than non-disabled employees. DeLuca argued on appeal that his less favorable treatment was based on Winer’s preventing him from having samples so that he could make sales. The court rejected this argument because DeLuca failed to present any evidence showing either that certain salespeople did receive samples during the relevant time period or that other salespeople had not endured the same difficulties prior to their terminations. The court concluded that DeLuca’s failure to raise a factual issue as to this element of his prima facie case made it unnecessary to determine whether Winer’s reason was pretextual and the court, therefore, affirmed summary judgment for Winer.

2. Analysis

Perhaps this case would have progressed differently had the plaintiff not abandoned the claim that direct evidence of discrimination existed. The conversations DeLuca had with Winer management do suggest a connection between his MS and Winer’s decision to terminate him. The remarks made by Winer’s management personnel, however, more likely fit into the category of “stray remarks,” precluding this from being a mixed-motives case under the Price Waterhouse doctrine.

In addition, DeLuca was presented with a seemingly insurmountable obstacle in the path of his proof because the court required comparison evidence in order to meet the fourth element of the prima facie case. DeLuca, in effect, was required to prove a negative - that other non-disabled salespersons did not receive samples during the same time period that DeLuca occupied the new sales position. On the other hand, DeLuca’s evidence showed that he was not given the samples that he needed to produce sales, and because the loss of the Sears catalog account was anticipated by Winer, Winer knew that DeLuca’s sales would drop.

234. Id. at 798. The court noted that even though DeLuca had made no sales, Winer had not brought forward any evidence of what the expectations were for the time period that DeLuca occupied the new sales position. On the other hand, DeLuca’s evidence showed that he was not given the samples that he needed to produce sales, and because the loss of the Sears catalog account was anticipated by Winer, Winer knew that DeLuca’s sales would drop. Id.

235. Id. The District Court ruled against DeLuca on this element, based on its finding that Winer had fired many non-disabled salespersons during the same time period. Id.

236. Id. The court instructed that DeLuca could have presented this evidence through his own testimony or affidavit, if based on personal knowledge, through answers to deposition questions posed to the Vice President of Sales, or through affidavits of other salespeople. Because DeLuca’s affidavit focused solely on the difficulties he had while working as a salesperson and did not show what, if any, difficulties other salespersons had encountered, DeLuca’s evidence failed to create a reasonable inference that he was treated less favorably than non-disabled salespersons. Id. (citing Rand v. CF Indus., Inc., 42 F.3d 1139, 1146 (7th Cir. 1994)).

237. Id.

238. See supra note 229.

239. See supra note 220.

240. See supra text accompanying note 207.
salespersons did not have the same difficulties that DeLuca encountered receiving samples. Had this court adopted the "circumstances raising an inference of discrimination" element that was used in *Ennis*, DeLuca could have used the timing of his discharge and the statements made by his supervisors as evidence to bolster this inference. However, the court adopted the fourth element of a prima facie case most commonly used for reduction-in-force cases under Title VII. In such cases, the clearest comparison that can be drawn to show an inference of discrimination is between the plaintiff and all other similarly situated employees not in the same protected class. DeLuca's failure to produce this evidence would have had the same result in a case brought under Title VII.

F. Summary of ADA Indirect Proof Cases

Each of the cases discussed in Part III represents an application of the framework developed in *McDonnell Douglas*, *Burdine*, and *Hicks* that closely resembles its use in the Title VII context. Both the plaintiff and the defendant assert their respective different reasons for the adverse employment action which (assuming the plaintiff makes a sufficient prima facie case) creates an issue of fact. As in all civil cases, the plaintiff bears the burden of proof on the factual questions related to proving the plaintiff's claim. The courts' application of the framework in each case provided both sides with an opportunity to present evidence that would tend to prove or disprove that the reason the employer terminated the plaintiff was based on intentional discrimination. These cases demonstrate an application under the ADA of the either/or dichotomy which, the Supreme Court articulated, was the function of the *McDonnell Douglas/Burdine/Hicks* framework.

These cases exemplify when it is necessary "to sharpen the inquiry into the elusive factual question" of whether the employer intentionally discriminated against the plaintiff because of the plaintiff's disability or acted for some other legitimate reason. In each of these cases, the courts found that the decision made by the employer did not tie any aspect of the plaintiff's disability to the ability to perform the job. No question is raised in any of these cases as to whether the plaintiff is, in fact, a member of the protected class, or whether the employer made its adverse decision based on the reality or a perception that the plaintiff's disability affected the plaintiff's ability to do the job. Under these limited circumstances—where the question is whether the disability of the employee was the reason for the

241. See supra notes 121-26 and accompanying text.
242. See supra note 217 for cases which demonstrate how this comparison evidence is used in a case brought under the Rehabilitation Act of 1973 and a case brought under Title VII.
243. See explanation supra note 17.
244. See supra notes 7-11 and accompanying text.
adverse action, or whether another explanation completely unrelated to the
disability of the employee was the reason—disability as an impermissible
factor equates with Title VII factors such as race and gender, and the burden
shifting framework established under *McDonnell Douglas* and developed
under *Burdine* and *Hicks* is appropriate. Either disability was the reason or
disability was not the reason. However, as will be explained below, the
issues in many (if not most) cases under Title I of the ADA are not so
limited. Discrimination against individuals with disabilities is often differ-
ten from discrimination against members of the classes protected under Ti-
tle VII, and what is required of both the plaintiff and the employer by the
ADA differs greatly from what is required by Title VII. The remainder of
this discussion will demonstrate that in those cases brought under the ADA
where the issue is anything other than the either/or dichotomy for which
*McDonnell Douglas/Burdine/Hicks* burden shifting was designed, the
framework should not be applied, and a different approach should be used.

V
DIFFERENCES BETWEEN DISCRIMINATION BASED ON TITLE VII
FACTORS AND DISCRIMINATION AGAINST PERSONS
WITH DISABILITIES

A. Difficulty In Proving Protected Class Membership Under the ADA
Versus Assumed Class Membership Under Title VII

Frequently a plaintiff bringing an ADA Title I claim in a court apply-
ing the *McDonnell Douglas/Burdine/Hicks* or other burden shifting
frameworks fails to survive summary judgment due to an inability to bring
forward sufficient evidence of the first element of the prima facie case—
membership in the protected class.\(^{246}\) Under the ADA, this requires that the
plaintiff prove that she is a “qualified individual with a disability.”\(^{247}\) The
ADA defines this as “an individual with a disability who, with or without
reasonable accommodation, can perform the essential functions of the em-
ployment position that such individual holds or desires.”\(^{248}\) The ADA de-
fines the term “disability” with respect to an individual as a “physical or
mental impairment that substantially limits one or more of the major life
activities of such individual;” a “record of such an impairment;” or “[b]eing

\(^{246}\) See, e.g., Milton v. Scrivner, Inc., 53 F.3d 1118, 1123 (10th Cir. 1995); Myers v. Hose, 50
F.3d 278, 283 (4th Cir. 1995); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538 (N.D. Ala.
1995); Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963, 970
(E.D.N.C.1994) (all holding that plaintiff was not a “qualified individual with a disability”); see also
plaintiff failed to prove he was individual with a disability within meaning of ADA). See generally
Castellano Parts I & II supra note 111.


\(^{248}\) 42 U.S.C. § 12111(8).
regarded as having such an impairment.” 249 Not only has the question of whether the plaintiff is a member of the protected class (i.e. a “qualified individual with a disability”) been an issue for litigation, but all of the terms included in this definition have been issues for the courts as well. 250 It is important to understand that if the employer successfully challenges this element of the plaintiff’s prima facie case—membership in the protected class—no further inquiry into discriminatory motives needs to be made, and the employer will win as a matter of law. 251

In contrast, class membership is a given under Title VII. A plaintiff asserting discrimination based on sex, for example, need not prove (in the sense of bringing forward evidence to substantiate the claim) that she is a woman. Attacks made on the plaintiff’s prima facie case under Title VII will not involve disputes over the race, gender, national origin, or religion of the plaintiff. Under the ADA, whether the plaintiff is a member of the protected class may well be the only contested issue. 252

Furthermore, even though under both Title VII and the ADA, the plaintiff must prove that she is qualified, the meaning of “qualified” under the ADA involves a consideration of the plaintiff’s disability. 253 Under Title VII, it is assumed that the prohibited factors will never have an effect on the plaintiff’s qualifications for the job. Taking these factors into account is precisely what is meant by “discrimination” in Title VII cases. 254

249. 29 C.F.R. § 1630.2(g)(1)-(3) (1995). For further commentary on the elusive terminology found in Title I, see Wayne L. Anderson & Mary Lizabeth Roth, Deciphering the Americans with Disabilities Act, 51 J. Mo. B. 142 (1995).

250. See, e.g., Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) (whether employee who failed to establish that high blood pressure or effects of his medication substantially limited a major life activity is an “individual with a disability”); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726-27 (5th Cir. 1995) (whether evidence that arm impairment which made picking up certain objects and turning ignition key difficult constitutes substantial limitation on a major life activity); Bolton, 36 F.3d at 942 (whether plaintiff who fails to bring evidence of EEOC’s suggested factors for determining “substantial limitation in the major life activity of working” is an “individual with a disability”); Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) (whether plaintiff who fails to bring evidence of EEOC’s suggested factors for determining “substantial limitation in the major life activity of working” is an “individual with a disability”); and Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23-24 (1st Cir. 1993) (whether obesity constitutes an impairment).

251. See, e.g., Bolton, 36 F.3d at 944.

252. See, e.g., Bolton v. Scrivner, Inc., 386 F. Supp. 783 (W.D. Okla. 1993) (whether permanent partial impairment of both feet constitutes disability) and Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hospitals, 783 F. Supp. 1569 (D.R.I. 1992) (whether obesity might be a disability because of the physical restrictions imposed); see also Castellano, Part I, supra note 111 for general discussion of cases determining whether plaintiff is a “person with a disability.”

253. See supra text accompanying notes 247-49; see also supra Richardson, note 3.

254. Section 703(a)(1) of the Civil Rights Act of 1964 provides: “It shall be an unlawful employment practice for an employer... to fail to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin...” 42 U.S.C. § 2000e-2(a)(1). Treating an employee differently with regard to the listed practices by taking into account that employee’s race, color, etc. is precisely what Title VII makes unlawful.
As a result, Title VII has no comparable case law addressing the issue of failure to prove class membership. A plaintiff does not have to expend extravagant resources accumulating evidence that she is, for example, Hispanic, or a woman, or a member of the Catholic church. This aspect of the ADA changes the focus of the employer’s defenses dramatically and has caused a significant amount of litigation to occur addressing the issue of whether the plaintiff is an “individual with a disability” or a “qualified individual with a disability.” It is arguable whether this litigation has demystified or further obscured the issue of what it means to be “a qualified individual with a disability.”

The issue of whether the plaintiff is a qualified individual with a disability arises in situations where the plaintiff clearly can prove that the employer engaged in the adverse employment action precisely because of some impairment-related inability to perform a job function. These cases involve admitted intentional discrimination, but do not create liability for the employer because the employee was unable to meet the several component parts of the definition of “qualified individual with a disability.” No “sharpening of the inquiry” is necessary in cases where the employer’s only reason for taking the adverse action against an employee is tied directly to the employee’s impairment-related inability to perform some aspect of the job. When this occurs, the employer admits that the plaintiff’s disability was a factor in the employer’s adverse decision. Routinely in these cases, the plaintiff will not survive summary judgment, because although the plaintiff’s condition is sufficiently disabling to permit the plaintiff’s em-

255. See supra note 247.
256. Compare Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994), cert. denied 115 S.Ct. 1104 (1995) (employee who sustained a nine percent permanent partial disability to his right foot and a twenty-nine percent permanent partial disability to his left foot with pain, numbness, and limited ability to lift weight rendering him unfit to return to work, who had certification from doctor stating, “[b]y any stretch of the imagination, [Bolton] was not ready to return to any kind of employment as he presented himself to me,” and could not “return to any work where he has to stand up on a concrete floor all day,” held not substantially limited in a major life activity), with Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1534-36. (N.D. Ala. 1995) (inability to lift 25 pounds and difficulty bending, sitting, standing, or lifting more than five pounds without pain, constitutes substantial limitation in several major life activities). See also The Americans With Disabilities Act: Great Progress, Greater Potential, supra note 139, at 1616 (arguing generally that because the ADA employs general standards, instead of clearly defined rules, this has created the following effects: (1) it has impaired relationships between employers and employees, because the parties must resolve their dispute in court; and (2) it has created inconsistent and therefore unfair judgments). The article’s author argues that quantitative standards for “reasonable accommodation” and “undue hardship” will provide the solution for these unwanted effects. Id. Perhaps these standards can be quantified in some objective way, but a clearer definition of “disability,” with all of its lesser included sub-definitions, would likely cut too narrowly and would exclude some who are, in fact, individuals with disabilities.
257. See, e.g., White v. York Int’l Corp, 45 F.3d 357, 359 (10th Cir. 1995); Bolton, 36 F.3d at 942-44.
ployer to fire her, the plaintiff's condition is not sufficiently disabling to achieve coverage under the ADA.\textsuperscript{258}

The complexity surrounding whether or not the plaintiff in a Title I case is a member of the protected class has been addressed by several commentators.\textsuperscript{259} Most are in agreement that the ADA Title I plaintiff is confronted with unprecedented and seemingly insurmountable proof barriers as a result of this complexity.\textsuperscript{260} The inconsistency of opinion among the courts that have wrestled with these issues combined with the ADA plaintiffs' proof barriers should give courts deciding these cases pause before readily applying the framework developed under \textit{McDonnell Douglas}, \textit{Burdine}, and \textit{Hicks}, which was designed to apply to discrimination claims that do not encompass these peculiarities.

\textbf{B. Differences in the Definition of “Discrimination”}

Other significant differences exist between the ordinary Title VII case and discrimination based on disability under Title I of the ADA. Discrimination is defined differently in the two statutes. The ADA definition prohibits employers from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\textsuperscript{261} Under Title VII, the employer shall not “fail or refuse to hire or discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”\textsuperscript{262} What is significant about the difference in wording is that under the ADA, the threshold question always involves a determination of whether the plaintiff fits the protected class definition. Under Title VII, by contrast, the threshold question is whether discrimination has occurred. Under the ADA, plaintiff’s status can be determinative; under Title VII, the employer's action is the basis for the claim. It is partly because of the difference in these definitions that the ADA plaintiff endures several obstacles in simply establishing a prima facie case of discrimination, obstacles which are not shared by the Title VII plaintiff.\textsuperscript{263}

\textsuperscript{258} See, e.g., Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), cert. denied, 115 S.Ct 1104 (1995); see also supra note 139 (commentary addressing “too disabled/not disabled enough” dilemma for ADA plaintiffs).

\textsuperscript{259} See, e.g., Richardson, supra note 3; see also Castellano, Part II, supra note 111.

\textsuperscript{260} See generally Castellano, Part I, supra note 111.

\textsuperscript{261} 42 U.S.C. § 12112(a) (1995).


\textsuperscript{263} See, e.g., Richardson, supra note 3, and Castellano, Part II, supra note 111.
C. Differences in the Impermissible Factors

Under Title VII, the factors under consideration (e.g. race, gender, national origin, etc.) are applied universally. The characteristics that are listed under Title VII arguably apply to everyone. For example, discrimination on the basis of sex applies to women as well as to men. This is not so in the context of disability discrimination (although any person can become a member of the class at any time). No recognizable cause of action exists for discrimination against a person who does not have a disability. A non-disabled person cannot claim discrimination under the ADA. The ADA recognizes that disability is different, and that in certain circumstances, the need to treat an individual with a disability differently from those who do not have disabilities is not only permissible, but required.

D. The Difference of "Reasonable Accommodation"

Because the ADA recognizes the difference of disability, the ADA places an affirmative duty on employers to reasonably accommodate the impairments of employees with disabilities. The duty to reasonably ac-

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265. The concept of “reasonable accommodation” pertains to that difference.

266. Title VII recognizes a very limited exception allowing the employer to take an impermissible factor into account if the factor is a bona fide occupational qualification (BFOQ). See 42 U.S.C. § 2000e-2(e).

267. Although the duty of reasonable accommodation exists under Title VII in the context of religion (see, e.g., Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978)), and therefore the concept was not developed solely for purposes of disability-based discrimination, its application under the ADA is far more expansive than under Title VII. Under Title VII, employers do have a duty to reasonably accommodate workers’ needs based on their religion. This duty, however, is less substantial by comparison. Employers do not have to accommodate for religious beliefs if it would entail more than a “de minimis cost.” See Trans World Airlines at 84. The drafters of the ADA specifically rejected this limited view of the duty to reasonably accommodate. See H.R. Rep. No. 485(II), 101st Cong., at 31-32 (1990), reprinted in 1990 U.S.C.C.A.N. 350; see also 29 C.F.R. Pt. 1630 App. § 1630.15(d) (“The concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in this part is unlike the ‘undue hardship’ defense associated with the provision of religious accommodation under Title VII of the Civil Rights Act of 1964. To demonstrate hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the ‘de minimis’ Title VII standard”). Because of this important difference, the duty to reasonably accommodate under the ADA is unique.

268. See 42 U.S.C. § 12112(b)(5). The term “discriminate” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity, or denying employment opportunities to a job applicant or employee who is an otherwise qualified individ-
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commodate employees with disabilities recognizes that different treatment often is the key to ending discrimination against individuals with disabilities, whereas different treatment on the basis of race or gender is itself the manifestation of discrimination which is prohibited under Title VII.269 Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general population.270 Furthermore, the drafters of Title VII in their interpretive memorandum declared that “[t]o discriminate is to make a distinction, to make a difference in treatment or favor.”271 Making this difference under Title VII is impermissible, but a failure to treat employees with disabilities differently may lead to liability under the ADA. Although preferential treatment of employees or applicants with disabilities is not required under the ADA,272 the duty to provide reasonable accommodation clearly requires that provisions be made for those who have disabilities, provisions that are not made for those who do not.

E. Differences When the Disability Does Matter

For all of these reasons, the McDonnell Douglas/Burdine/Hicks framework clearly does not apply in ADA cases where the employer’s reason or defense involves taking the plaintiff’s disability into account. The Newman court recognized the distinction between discrimination of this kind and discrimination claims based solely on indirect evidence. As a justification for applying the McDonnell Douglas/Burdine/Hicks framework to ADA cases, the court pointed out that the frameworks applied are used under Title VII “when there is no material difference in the question being addressed.”273 This recitation by the Newman court was a recognition that McDonnell Douglas/Burdine/Hicks burden shifting works when the issue is whether the employer’s adverse action was taken because of the plaintiff’s disability or because of some reason wholly unrelated to the plaintiff’s disability, but does not work when the plaintiff’s disability is clearly a factor in the adverse decision. In the latter cases, there is, in the words of the Newman court, “a material difference in the question being addressed.”274

269. See discussion in Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981) (explaining meaning of reasonable accommodation under the Rehabilitation Act).
272. 29 C.F.R. Pt. 1630, App. Interpretive Guidance on Title I of the Americans with Disabilities Act (“Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.”).
274. Id. at 157.
In addition, if the employee’s disability actually has an effect on the employee’s ability to do the job, the employer cannot be said to be basing its decision on an “illegitimate factor” when taking into account the employee’s disability in making employment decisions. Considering the effect of an employee’s paralysis on that employee’s ability to operate heavy machinery, for example, is not akin to considering the effect of that employee’s race on the employee’s ability to do that job. For this reason, the *Price Waterhouse* mixed-motives framework also does not lend itself straightforwardly to discrimination claims brought under the ADA under these circumstances. When the very real effects and limitations which attend a particular individual’s disability comprise the reason for the adverse employment action, it is nonsensical to attempt to separate out the legitimate from the illegitimate motives and determine whether one or both motivated the decision. Because neither of these frameworks (the indirect proof framework nor the mixed-motives framework) directly fits the case where a failure to provide reasonable accommodation is asserted, a different approach must be taken. However, as will be discussed in Part VI, the analysis of the plurality in *Price Waterhouse* suggests several reasons why the framework adopted in the mixed-motives context has applicability in reasonable accommodation cases, and Part VI explains why the *McDonnell Douglas/Burdine/Hicks* indirect proof scheme is totally inapplicable in such cases.

**F. Summary of the Differences**

Finally, the sources of discrimination against persons with disabilities are frequently different from the sources of discrimination against persons based on race, gender, national origin, and religion. As the Tenth Circuit Court of Appeals noted,

It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of [disability] could be shown. Discrimination on the basis of [disability] usually results from more invidious causative elements and occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of [persons with disabilities].

Despite the differences between the nature of discrimination against these different groups, and the difference in the language between the stat-

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275. For a discussion of this difference and an argument that because of this difference *McDonnell Douglas* burden shifting should never apply to discrimination based on disability, see Knych supra note 6, at 1533-43.

276. Pushkin v. Regents of the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981) (decided under the Rehabilitation Act of 1973). Although this author believes that active hostility, fear, insecurity, ignorance, and misplaced anger attend all forms of discrimination, I must concede that there exist some aspects of discrimination against persons with disabilities which differ from discrimination on other bases. I believe that this different form of discrimination is what the concept of “reasonable accommodation” attempts to address.
utes themselves, courts routinely attempt to apply or simply make slight modifications to these frameworks to fit all forms of employment discrimination, even after recognizing the differences in the causes and effects of discrimination in the different contexts.277

VI
THE ADA: WHEN THE EMPLOYER’S ASSERTED REASON IS
Disability-Related

A. Introduction

Perhaps in recognition of the fact that the purpose of using the *McDonnell Douglas/Burdine/Hicks* framework is to “sharpen the inquiry into the elusive factual question of intentional discrimination,”278 the Circuit Courts of Appeals have paid at least lip service to rejecting the framework in ADA employment discrimination cases. Alternatively, these courts have applied the framework in a modified form when the case involves evidence that the employer did in fact consider the employee’s disability in making the adverse employment decision. Because the ADA places the affirmative obligation on all employers to reasonably accommodate their employees or applicants with disabilities, and because the prima facie case in any ADA Title I claim requires that the plaintiff prove that she is a qualified individual with a disability, which includes having the ability to perform the essential functions of the job with or without reasonable accommodation, the allocation of the burdens of production and persuasion must be treated differently when these complex definitional issues become the fact questions requiring resolution in the particular case.

The Eighth Circuit’s decision in *Benson v. Northwest Airlines, Inc.*280 and the Tenth Circuit’s decision in *White v. York International Corp.*281 exemplify departures from the indirect proof frameworks described above. But both cases employ a method of proof which very closely resembles the burden of production shift as it has been applied under *McDonnell Douglas, Burdine, and Hicks*. The following discussion examines these two cases in terms of the manner in which the courts apply the burdens of production...
and persuasion. Part VI below suggests that in light of the Supreme Court’s analysis in *Price Waterhouse*, a different approach must be taken.

**B. Benson—The Eighth Circuit**

1. **The Case**

In *Benson*, the Eighth Circuit, though not expressly referring to the *McDonnell Douglas/Burdine/Hicks* framework, implicitly adopted the same type of burden shifting. The court demonstrated how the burden shifting framework applies and must be modified under the ADA when the discrimination alleged is a failure to reasonably accommodate the plaintiff. As discussed, the ADA defines discrimination to include not making reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability who is an applicant or employee. The ADA requires employers to make such reasonable accommodation “unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of that employer.”

The chief difference between *Benson* and the cases discussed in Part III is that in *Benson*, the employer never disputed that the employee’s disability played a role in the employer’s decision to terminate him.

Benson worked as a mechanic for Northwest Airlines and while working there, he suffered severe chest pains requiring him to be taken to the hospital. Benson was diagnosed with a rare neurological disorder which causes pain, weakness or numbness in the arm and shoulder. Benson’s employer transferred Benson to another position where it placed injured employees. One month later, Benson’s doctor sent Northwest a letter stating that Benson should no longer work in any job requiring extensive use of his left arm or repetitive motion of his left shoulder, because doing so would likely cause another relapse. The doctor expressly admonished against employing Benson as a mechanic. Benson was soon “bumped” from his newly assigned position and moved to the job of plant maintenance mechanic where he would serve as a dispatcher for other mechan-

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282. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (“[O]nce the plaintiff makes ‘a facial showing that reasonable accommodation is possible,’ the burden of production shifts to the employer to show that it is unable to accommodate the employee”) (emphasis added) (internal citations omitted).


285. See Benson, 62 F.3d at 1112.

286. *Id. at 1110.*

287. *Id.* Benson’s actual diagnosis was that he had experienced a relapse of brachial plexopathy, also known as Parsonage-Turner syndrome.

288. *Id.* Benson was transferred to the Recycling Unit where Northwest Airlines placed injured employees until they were sufficiently recovered to return to their former positions.

289. *Id.*
Benson was disqualified from this job by the department manager due to his medical limitations, was put on a ninety-day leave of absence without pay, and was instructed to find another job with Northwest that fit within his medical restrictions or face termination. Benson alleged that a foreman position in the Recycling Unit opened up, but that his manager refused to assign him to that position. He also tried unsuccessfully to obtain various engineering jobs as well. Northwest officially terminated Benson soon after.

Benson filed an ADA claim alleging that Northwest discriminated against him because of his disability and because Northwest failed to reasonably accommodate his disability. The District Court granted summary judgment for Northwest, finding that Benson was not an "otherwise qualified individual with a disability" within the meaning of the ADA because he could not perform the essential functions of the mechanic's job with or without reasonable accommodation. The District Court also determined that Benson had the burden of proving that he was qualified, and concluded that the evidence he put forward showing that he had worked in temporary positions failed to raise a genuine issue of material fact as to whether he was qualified for permanent positions. The District Court held that the record failed to create a genuine issue of fact that Benson was qualified for the foreman position in the Recycling Unit for the following reasons: (1) Benson did not prove that he had the requisite skill, experience, and other job-related requirements for that position; and (2) he failed to identify the essential functions of that position or whether he could perform them with or without reasonable accommodation. The District Court determined that the same was true of the engineering positions.

Benson argued to the Court of Appeals that (1) genuine issues of material fact precluded summary judgment, (2) the District Court wrongly placed the burden of proving what the essential functions of the jobs were on him, and (3) Northwest could accommodate his disability with little difficulty. The court held that to obtain relief under the ADA in a case involving an alleged failure to provide reasonable accommodation, the employee must

290. Id.
291. Id.
292. Id. at 1110-11.
293. Id. at 1111.
294. Id.
295. Id.
296. Id.
297. Id. The determination of qualification requires two parts: (1) whether the individual meets the necessary prerequisites for the job, such as education, experience, training, and other job related requirements; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation. See Americans with Disabilities Act, 42 U.S.C. § 12111(8) (1995); 29 C.F.R. § 1630.2(m) (1995).
298. Id. at 1111.
establish that (1) he has a disability as defined in the ADA, (2) he is qualified to perform the essential functions of the job, with or without reasonable accommodation, and (3) he has suffered adverse employment action because of his disability.\textsuperscript{299}

The court noted that, as is the case with claims alleging discrimination because of disability outside of the reasonable accommodation context, the employee at all times retains the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his disability.\textsuperscript{300} Once the employee makes "a facial showing that reasonable accommodation is possible," the court held that "the burden of production shifts to the employer to show that it is unable to accommodate the employee."\textsuperscript{301} The court stated, "If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut that showing with evidence of his individual capabilities."\textsuperscript{302} The court determined the "employee's rebuttal burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination."\textsuperscript{303}

Applying this framework, the court determined that "material issues of fact remain[ed] as to what the essential functions of the jobs [were], whether Benson [could] perform them, and if not, whether reasonable accommodation by Northwest would enable him to do so."\textsuperscript{304} The court concluded that Benson had made a facial showing that accommodation was possible and considered the two accommodations as to which Benson had raised material issues of fact. These accommodations were (1) restructuring the mechanic's job so that Benson could perform the essential functions, and (2) reassigning Benson to a position other than as a mechanic.\textsuperscript{305} The court analyzed each of these possible accommodations in light of the burdens of production and persuasion that would be required upon remand.

The court noted that job restructuring is a possible accommodation under the ADA, which allows for the reallocation of marginal job func-

\textsuperscript{299} Id. at 1112 (citing Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995)).
\textsuperscript{300} Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993); White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (applying Hicks to ADA case); see infra Part V.C. for extensive discussion of White v. York Int'l Corp.
\textsuperscript{301} Id. (internal quotations omitted) (emphasis added) (quoting Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir. 1994) (affirming judgment entered in favor of employer under Rehabilitation Act); Armeson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989) (reversing the dismissal of a claim under the Rehabilitation Act)).
\textsuperscript{302} Id. (citing Mason, 32 F.3d at 319).
\textsuperscript{303} Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
\textsuperscript{304} Id.
\textsuperscript{305} Id. The ADA lists as possible accommodations "[j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B) (1995); 29 C.F.R. § 1630.2(o)(2)(ii) (1995).
The court examined the regulations promulgated by the EEOC and determined that the critical question was whether Benson could perform the essential functions of the mechanic’s jobs. The court repeated that Benson would bear the ultimate burden of persuasion that he could perform the essential functions of the mechanic’s position. Because Northwest disputed that Benson could perform the essential functions, the court placed the burden on Northwest of putting on “some evidence” of what those essential functions were. The court noted that the employer is in a better position than the employee to discern what the essential functions of its jobs are.

Northwest argued that it should not bear the burden of proving the essential functions of the job. Northwest contended that Benson admitted he could not perform the essential functions of the mechanic’s position. The court found this argument unpersuasive for several reasons. First, the court refused to hold that the essential functions of all the mechanic’s jobs were identical. Second, Benson had made a facial showing that the essential functions of the mechanic’s job that he held when he was injured and the essential functions of the mechanic’s job to which he was later transferred (and from which he was subsequently removed) were different. Third, the court found Northwest’s sketchy description of the two jobs insufficient for purposes of determining whether those were, in fact, the essential functions. The court held that Benson had made a facial showing that some accommodation was possible, and therefore, the burden shifted to Northwest to present “some evidence” that accommodation was impossible.

306. Id. (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)).
307. Id. (citing 42 U.S.C. § 12111(8)).
308. Id.
309. Id. (citing White v. York Int’l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (emphasis added)). The court suggested that this burden may be different when the issue in the case is not whether the employer failed to provide a reasonable accommodation. This suggestion hints at the court’s uncertainty concerning the proper burden to be allocated. See id. at 1113 n.3.
310. Id. at 1113.
311. Id. One of Northwest’s bases for this argument was that the District Court had granted its motion for summary judgment on the threshold issue of whether Benson had first met his initial burden.
312. Id. To buttress this argument, Northwest pointed to the letter from Benson’s doctor saying he could not perform the mechanic’s position and Benson’s subsequent agreement with the letter demonstrated this.
313. Id. at 1114. The letter from the doctor referred only to the particular mechanic’s job that Benson held when he was injured. Id. at 1113.
314. Id. at 1113-14.
315. Id. at 1114.
316. Id. (citing Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir. 1994); Hall v. U.S. Postal Service, 857 F.2d 1073, 1080 (6th Cir. 1988)). The court held that even if Benson could not perform the essential functions of the mechanic’s position, Northwest still had the burden of showing that reasonable accommodation by reassignment to another position was not possible.
The court also addressed Benson’s assertion that a reassignment would be a reasonable accommodation. The court found that Benson had created a material issue of fact as to his ability to perform the jobs to which he may have been reassigned.317

In the final analysis, the court held that Benson had established the existence of a genuine issue of material fact as to whether he could make the necessary showing that accommodation was possible. Therefore, the District Court erred in not shifting the burden to Northwest to provide some evidence that it was unable to accommodate Benson.318

2. Analysis

The Court of Appeals in Benson made it clear that the employer bears the burden of coming forward with evidence of its inability to reasonably accommodate the plaintiff, and that the error of the trial court occurred because it did not shift this burden. However, the Court of Appeals restricted that burden to bringing forward “some evidence.”319 This standard mirrors the burden of production under the McDonnell Douglas/Burdine/Hicks framework which requires only the articulation of a legitimate, nondiscriminatory reason.

The court appears to have recognized that saddling the plaintiff with the entirety of the burdens of production and persuasion as to all issues in a reasonable accommodation case would be problematic in surviving a motion for summary judgment. But unfortunately, the court does not provide any specifics concerning what evidence both sides should present at trial to discharge their burdens.320 The court’s lack of clarity regarding what this

317. Id.
318. Id. at 1115. The court found that Northwest failed to adduce some evidence showing what the essential functions of the jobs were or which of those essential functions Benson could not perform with reasonable accommodation. Northwest also failed to show the accommodations requested by Benson would be an undue hardship.
319. The Court also neglected to describe what evidence would be required to meet this burden.
320. This failure of specific direction by the Courts of Appeals seemingly makes trying a reasonable accommodation claim hopelessly confusing. See Stephanie J. Stevenson, Disability Law, 73 Denv. U. L. Rev. 707, 720-21 (1996) (discussing the conflict in the courts regarding what evidence plaintiffs must bring in reasonable accommodations cases, particularly in light of the lack of direction from the Supreme Court. “The [Supreme] Court’s basic struggle, which continues today, is to determine which comes first, consideration of accommodation, or the determination of qualification.”). The Benson Court, at least, recognized the difficulty the plaintiff would face if he was required to show precisely how it is that he could perform the essential functions of any conceivable position to which he could be reassigned, and what specific accommodations would be necessary to enable him to perform those functions. The Court recognized that much of the information needed to make such assessments lies within the knowledge and experience of the employer, not the employee. See Castellano, Part II, supra note 111, at 1788 (arguing that “if the promise of the ADA is to be kept, courts must respect the ADA’s mandate that the employer explore reasonable accommodation prior to termination and that the employee need not be held solely responsible for establishing that reasonable accommodation is feasible.”).
The dilemma for courts in deciding what evidence plaintiffs and defendants must bring forth in order to discharge their burdens of production and persuasion in a reasonable accommodation case can be described as follows:

At one end of the scale, the plaintiff has the burden of persuasion on all issues. In that situation, the plaintiff would be required to prove by a preponderance of the evidence that - (I) she is an individual with a disability within the meaning of the Act; (II) that she is qualified, which entails proving - (A) she can perform the essential functions of the job that she is currently holding, with or without reasonable accommodation, which entails proving - (1) what the essential functions of that job are - (a) including an assessment by the plaintiff of which functions are essential and which are marginal, since the plaintiff is only required to be able to perform the essential functions; marginal functions can be reassigned to other employees or positions (see 42 U.S.C. § 12118(8); 29 C.F.R. § 1630.2(m). The problem with placing the burden of proving essential functions on the plaintiff is as follows: Employers are given discretion to determine what the essential functions of the job are. See Milton v. Scrivner, Inc, 53 F.3d 1118 (10th Cir. 1995) (holding that under the ADA an employer can change the essential functions of the job to raise production standards, even if doing so prevents existing disabled employees from performing those essential functions). Because the employer has discretion as to what the essential functions of the job are, and because the employer can change those essential functions at any time, the employer, not the employee, should have the burden of proving what the essential functions of the job are. See also Stevenson, supra note 320, at 724-27 (discussing the impact of this case). (B) precisely what the capabilities of the plaintiff are, including the specific limitations on those capabilities caused by the plaintiff’s disability; (C) precisely what accommodations could be made for the plaintiff’s disability that would enable her to perform those functions; and (D) that the accommodations which would enable her to perform those functions are “reasonable,” which the court would be required to determine outside the purview of what undue hardship means, since that concept is specifically deemed an affirmative defense under the Act. (III) The plaintiff would have to repeat this process for every position to which she might be reassigned, because reassignment to a vacant position is a reasonable accommodation as defined by the ADA’s regulations; this would entail proving all of the above as to each position to which the plaintiff might possibly be reassigned and proving that each position under consideration was, in fact, vacant at the time in question. (IV) No matter what burdens a court chooses to assign to this hypothetical plaintiff, it appears under existing doctrine that the plaintiff still carries the burden of persuasion that the employer actually discriminated against the plaintiff on the basis of disability.

Looking at this hypothetical, the court’s dilemma then becomes should the plaintiff bear the entire burden of production and persuasion as to each of these issues? If so, then what specifically must the employer show to rebut the plaintiff’s evidence, and if not, to what degree should the burden be shifted to the employer on each of the above issues. In Benson, the court explained that the employer has a burden to discharge, which requires that the employer put forth “some evidence” of its inability to reasonably accommodate the plaintiff. Id. at 1113. This might entail showing - (I) that the plaintiff is incapable of performing the essential functions of the job she holds even with accommodation (this would appear to be an easy burden since the employer has nearly full reign to determine what those functions are, or to change them at will); (II) that the plaintiff is incapable of performing the essential functions of every single job she asserts that she can perform even with accommodation; (III) that the plaintiff is incapable of performing the essential functions of the job she holds, and none of the jobs to which she suggests reassignment are vacant; (IV) that the accommodation the plaintiff seeks for the job she holds or for every other job to which she claims she could be reassigned is not reasonable; (A) The dilemma for the courts regarding this point is who bears the burden of proving “reasonableness” of the accommodation? For example, does the plaintiff bear the burden of suggesting the specific accommodations that she believes will enable her to perform the essential functions of the job she holds and each job she desires, and then bear the burden of proving the reasonableness of each accommodation by a preponderance of the evidence? Or, should the plaintiff be required merely to assert an accom-
C. White—The Tenth Circuit

1. The Case

The Tenth Circuit in White v. York International Corp. also addressed the relationship of the burdens of production and persuasion in the context of a claim alleging a failure to reasonably accommodate. The plaintiff White’s job required lifting and continuous standing. White injured his ankle in a non-work related accident. Although they were later lifted, White’s doctor initially placed medical restrictions on his ability to stand and walk. Later, White transferred to a different job which also required lifting and continuous standing. A year later, White re-injured his ankle off the job, requiring him to undergo surgery. White took medical disability leave and did not return to work until nearly a year later. Upon returning to work, White presented York with a letter from his doctor saying that he should only work as tolerated, that he was not to stand for more than four hours, and that he was not to lift more than fifteen pounds. York had White examined by an independent doctor who determined that White should not return to work because his ankle fusion was not complete. Soon after, York sent a letter to White terminating him.

York claimed it terminated White because he had been on medical disability leave for more than a year, a violation of York’s extended disability leave policy. In the termination letter, York included a statement that, due to White’s medical restrictions, there was no reasonable accommodation of which York was aware that would enable White to do his job.

(B) Also, even though the employer is in the better position to know and understand what the needs and responsibilities of the employer’s business or work place are, the plaintiff is in a better position to know what the limitations caused by the disability are. Who, then, has better knowledge of what accommodations would be effective and reasonable for purposes of assigning evidentiary burdens?

The court’s dilemma, in evidentiary terms, is to clearly direct what kind, type, and amount of evidence will be required from each side in order to discharge their respective burdens. In the absence of any Supreme Court precedent, it is impossible to predict what direction the courts will take on any of these issues, and because of the complexity of the issues and lack of clarity in the statutory and regulatory definitions, inconsistent rulings are likely to continue. As convoluted as this example admittedly appears, these questions have not been definitively answered by the courts.

322. 45 F.3d 357 (10th Cir. 1995).
323. Id. at 358-59. White had worked as a Unit Assembler for York, a manufacturer of commercial air conditioners.
324. Id. at 359.
325. Id.
326. Id. This was the Machine Operator II position.
327. Id. This surgery required the ankle to be fused.
328. Id.
329. Id. York did so by exercising its right under an employment agreement.
330. Id.
331. Id.
White filed an ADA and state law discrimination complaint alleging that he was terminated because of his disability, and York moved for summary judgment. York claimed White was not an individual with a disability within the meaning of the ADA. Alternatively, York asserted that even if White was an individual with a disability, he could not perform the essential functions of the job, no reasonable accommodation existed which would enable him to perform the essential functions, and he was terminated in accordance with a nondiscriminatory absentee policy. White’s response to the motion for summary judgment was that York’s asserted nondiscriminatory reason for his discharge (violation of the absentee policy) was pretext, and that the real reason was his disability. Additionally, White asserted that he could perform the essential functions of the job with reasonable accommodation.

The District Court rejected White’s pretext argument out of hand, noting that the termination letter clearly showed that York considered White’s disability when it decided to fire him. Unlike the situation in Benson, pretext was not an issue to be determined, because the employer’s asserted reason for the adverse employment decision clearly evinced an intention to fire White because of his disability. The District Court granted summary judgment for York, finding that even though a genuine issue of material fact existed as to whether White was an individual with a disability within the meaning of the ADA, White failed to adduce any evidence to support his assertion that with reasonable accommodation, he could perform his job. The District Court held that because White had not produced any evidence of an essential element of his claim—that he was a qualified individual with a disability—he had not made out a prima facie case.

The Court of Appeals addressed the standards for summary judgment and explained the meaning of the term “qualified individual with a disability” under the ADA. The court applied the term as it is defined in the statute, stating that the term means “an individual with a disability who,

332. Id.
333. Id.
334. Id.
335. Id. at 359 n.3.
336. It is worth considering that if York had terminated White solely because he had been absent from work beyond the allowable one year maximum and not also because York believed no reasonable accommodation was possible, York may have argued that the determination was due solely to a legitimate, nondiscriminatory reason. York might have argued its decision was based on grounds similar to those argued by the employer in Price. See supra Part III.D (violation of absenteeism policy found to be legitimate, nondiscriminatory reason). However, in Price, the Court held that the plaintiff had not shown that her absenteeism was related to her disability. In this case, it is clear that White’s time off from work was directly connected to his disability. The District Court here did not address this distinction. See also Stevenson, supra note 320.
337. Id.
338. Id. at 359-60.
339. Id. at 360.
with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.\(^{340}\) The court noted that the definition of the term under the ADA is identical to its definition under the Rehabilitation Act of 1973,\(^{341}\) and therefore decided that case law construing the term under that Act would be useful.\(^{342}\)

The court then laid out the prima facie case requirements that a plaintiff must establish in this circumstance to obtain relief under the ADA. The plaintiff must prove "(1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe),\(^{343}\) he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability."\(^{344}\)

Relying on *Pushkin v. Regents of the University of Colorado*,\(^{345}\) White contended that in order to establish a prima facie case, he need only demonstrate that he is qualified apart from his disability.\(^{346}\) The court distinguished *Pushkin* on the ground that it was a pretext case. The plaintiff in *Pushkin* claimed that the University’s reason for not admitting him into the program was a pretext for discrimination because of his disability.\(^{347}\) The court noted that when pretext is the only issue, the *Pushkin* analysis is appropriate.\(^{348}\) The court rejected the application of the *Pushkin* analysis in cases where pretext is not at issue since the purpose of that analysis (and implicitly the purpose of the *McDonnell Douglas/Burdine/Hicks* prima facie case and burden shifting analysis) is already achieved in cases where the employer admits taking the plaintiff’s disability into account in the adverse employment decision.\(^{349}\) The court concluded that the “objective claims”


\(^{342}\) Id. at 360 n.5 (noting that “the ADA expressly requires its provisions to be interpreted in a way that ‘prevents imposition of inconsistent or conflicting standards for the same requirements’ under the two statutes, 42 U.S.C. § 12117(b)).

\(^{343}\) The words “which he must describe” are often dropped from cases which cite *White* when using this framework for deciding cases under the ADA. See, e.g, supra text accompanying note 299. It is arguable in light of the lack of uniformity in these decisions whether these words actually make a difference.


\(^{345}\) 658 F.2d 1372 (10th Cir. 1981).

\(^{346}\) See *White*, 45 F.3d at 361 n.6.

\(^{347}\) Id.

\(^{348}\) Id. The pretext prima facie case as established in *Pushkin* is as follows: The plaintiff must show that he is a “qualified handicapped individual apart from his handicap” and that he has been rejected under circumstances which give rise to an inference that his rejection was based solely on his disability. Id. (citing *Pushkin*, 658 F.2d at 1387).

\(^{349}\) Id.
presented here—(1) that the employee is an individual with a disability; (2) that the employee can perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer failed to reasonably accommodate the plaintiff's disability, thereby discriminating against him because of disability within the meaning of the ADA—may be tested through what the court referred to as "traditional burdens of proof" under the prima facie case framework it had established in this case. 350

Having concluded that the McDonnell Douglas/Burdine/Hicks method is inapplicable when pretext is not at issue, the court analyzed the remaining issue—whether York failed to reasonably accommodate White. The court applied a framework similar to that used by the Ninth Circuit in Benson. 351 Once the plaintiff has made a prima facie showing that accommodation is possible, the burden shifts to the employer to show an inability to accommodate. 352 After the employer meets this burden of production, the plaintiff must not simply rest on his pleadings (or "remain silent" in McDonnell Douglas/Burdine/Hicks parlance), but must come forward with evidence concerning his individual capabilities as well as with suggestions for possible accommodations to rebut the employer's evidence. 353 "[T]he plaintiff . . . bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability." 354

The court assumed without deciding that White was an individual with a disability based on the District Court's finding, and proceeded to analyze whether White met his burden of creating a genuine issue of material fact as to whether he was qualified. 355 The court applied the two-pronged test developed in Chandler v. Dallas. 356 That test is as follows: (1) can the plaintiff perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue; and (2) if (but only if) the plaintiff cannot perform the essential functions of the job, whether any reasonable accommodation by the employer would enable him to perform those functions. 357

In determining what the essential functions of White's job at York were, the court looked at York's evidence that lifting more than fifteen

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350. Id. Recognizing that in this case, the plaintiff's disability must be taken into account, the court also rejected White's claim that his qualifications should be determined without reference to his disability because, in the court's view, doing so would lead to an "absurd result." The court observed that under White's construction of the definition of "qualified individual with a disability," a blind person having all the qualifications of a bus driver with the exception of sight would be qualified for the job and would therefore meet the burden of proving a prima facie case of discrimination because of disability. Id.

351. See supra notes 339-45 and accompanying text.

352. See White, 45 F.3d at 361.

353. Id.

354. Id.

355. Id.

356. 2 F.3d 1385 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994).

357. See White, 45 F.3d at 361-62.
pounds was essential to both the job that White had held originally and the
position in which White was employed at the time he re-injured his an-
kle.\footnote{358} White did not dispute that the ability to lift more than fifteen pounds
was an essential function, nor did White dispute York’s contention that the
purpose of these jobs was to move heavy objects, and that they required
both lifting and standing.\footnote{359} Finally, White did not dispute that the lifting
and standing requirements could not be eliminated without fundamentally
altering the nature of the jobs, something the ADA does not require.\footnote{360}

Because the court concluded that the lifting and standing requirements
were essential functions of the job, and because White did not dispute that
he was unable to perform those functions without a reasonable accommoda-
tion, the court examined whether White had raised a genuine issue of mate-
rial fact regarding his ability to perform the essential functions with
reasonable accommodation.\footnote{361} White failed to offer evidence of any ac-
commodation that would have enabled him to perform the essential lifting
and standing requirements of either job, with the exception of bald asser-
tions that, with reasonable accommodation, he could do the job.\footnote{362} The
court pointed out that in other cases concerning reasonable accommodation,
when a plaintiff put forward no evidence regarding possible accommoda-
tions, summary judgment was proper. Summary judgment was also proper,
the court noted, in cases where the plaintiff suggested possible accommoda-
tions, but failed to show how those accommodations would actually enable

\footnote{358} \textit{Id.} at 362; \textit{see also} 42 U.S.C. § 12111(8) (consideration shall be given to the employer’s
judgment as to what functions of a job are essential, and if an employer has prepared a written descrip-
tion before advertising or interviewing applicants for the job, this description shall be considered evi-
dence of the essential functions of the job); 29 C.F.R § 1630.2(n) (1995): Essential functions—
(1) In general. The term essential functions means the fundamental job duties of the employment posi-
tion the individual with a disability holds or desires. The term “essential functions” does not include the
marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to
the following:
(i) The function may be essential because the reason the position exists is to perform that function;
(ii) The function may be essential because of the limited number of employees available among whom
the performance of that job function can be distributed; and/or
(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her
expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:
(i) The employer’s judgment as to which functions are essential;
(ii) Written job descriptions prepared
before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.

\footnote{359} \textit{See White}, 45 F.3d at 362.
\footnote{360} \textit{Id.} (citing 29 C.F.R. pt. 1630 App. § 1630.2(o) (1995)).
\footnote{361} \textit{Id.}
\footnote{362} \textit{Id.}
the plaintiff to do the job. In contrast, the court cited Wood v. Omaha School District, noting that where the plaintiff provided affidavits describing an actual accommodation that would enable the plaintiff to do the essential functions and describing how that accommodation would do so, the court held that the plaintiff raised a material issue of fact as to whether an accommodation was possible.

White also contended that he could have been reassigned to another position. White stated in his deposition that he could have worked in a number of York's other jobs. York, however, offered affirmative evidence as to each of the jobs to which White suggested reassignment showing that all of these positions had lifting and walking requirements which exceeded White's restrictions, that moving him to such a position would be a promotion, that there was no identified job category, or that the position in question was not vacant. The court's discussion reasserted that conclusory assertions that the plaintiff could have been reassigned, like conclusory assertions that some accommodation is possible, are insufficient to withstand summary judgment.

Lastly, White argued that York, after learning of White's disability had an affirmative duty to "engage in an interactive process" with White to identify reasonable accommodations. White argued that York's failure to do so precludes summary judgment in favor of York. The court rejected this argument determining that the EEOC regulation was a recommendation and not a statutory command. The court construed the regulation to mean that the EEOC recommends that an "interactive process" occur only after the employer makes the threshold determination that the employee may be accommodated and is, therefore, qualified. The court determined

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363. Id. at 362 n.8 (comparing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126-27 (11th Cir. 1993) (firefighters suggested accommodations, but failed to demonstrate how the accommodations would enable them to perform essential functions)).

364. 985 F.2d 437, 438-39 (8th Cir. 1993) (holding plaintiff school van drivers with type II diabetes raised genuine issue of material fact by offering evidence, by way of affidavit, regarding how they could readily monitor their blood sugar levels and maintain them at proper levels so as to avoid the risk of hypoglycemic reaction while driving).

365. See White at 362 n.8.

366. Id. at 362 n.9; see also 29 C.F.R. § 1630.2(o)(2)(ii) (1995) (reasonable accommodation may include reassignment to a vacant position).

367. Id.

368. Id. (citing 29 C.F.R. pt. 1630, App. § 1630.2(o)).

369. Id. at 363.

370. See 29 C.F.R. pt. 1630 App. § 1630.9(o)(3) (1995) ("The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.")

371. Id. at 363 (relying in part on 29 C.F.R. pt. 1630 App. § 1630.9 (1995)).
that not engaging in this process did not constitute a per se preclusion to summary judgment.\textsuperscript{374}

The court held that because White failed to show that reasonable accommodation was possible, he failed to establish an essential element of his prima facie case—that he is a qualified individual with a disability.\textsuperscript{375} For this reason alone, summary judgment for York was proper.\textsuperscript{376}

2. Analysis

The White court, like the Benson court, concluded that in cases alleging a failure to reasonably accommodate, once the plaintiff makes out a prima facie case, the employer’s burden to show an inability to accommodate is minimal. The Benson court held the employer must bring forth “some evidence” of its inability to accommodate\textsuperscript{377} and the White court allocated only the burden of production, not persuasion, to employers.\textsuperscript{378} Although it recognized the difference between the nature of indirect proof cases and cases where the employer clearly takes the plaintiff’s disability into account, the White court nonetheless found that shifting only the burden of production to the employer to show an ability to provide reasonable accommodation is appropriate.\textsuperscript{379}

Because the plaintiff in White failed to bring forward any evidence of how a reasonable accommodation would have enabled him to perform the essential functions of the job he had or those to which he requested reassignment,\textsuperscript{380} shifting the burden of persuasion in this case would not likely have altered the result. However, as will be discussed below in Part VI, the employer’s failure here to engage in any attempt to identify a reasonable accommodation before taking adverse action against White (which is part of the reasonable accommodation obligation) was, contrary to the court’s decision, a violation of the ADA.\textsuperscript{381} Combining this evidence with a shift in the burden of persuasion to the employer to show an inability to accommodate may very well have altered the result in White.

\textsuperscript{374} But see Castellano, Pt. II, supra note 111, at 1788 (arguing that “if the promise of the ADA is to be kept, courts must respect the ADA’s mandate that the employer explore reasonable accommodation prior to termination and that the employee need not be held solely responsible for establishing that reasonable accommodation is feasible”) (emphasis added); see also infra Part VI.B.

\textsuperscript{375} Id.

\textsuperscript{376} Id. See generally Stevenson, supra note 320.

\textsuperscript{377} See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995).

\textsuperscript{378} See White, 45 F.3d at 361.

\textsuperscript{379} Id. at 361 n.6.

\textsuperscript{380} Although the Court uses Wood v. Omaha Sch. Dist., 985 F.2d 437 (8th Cir. 1993), as an example, it is somewhat unclear from this decision what precise evidence a plaintiff must bring to overcome this burden.

\textsuperscript{381} See Castellano, supra note 114, and infra note 384, and text accompanying notes 401-03.
VII

THE ADA: WHEN THE EMPLOYER ASSERTS AN INABILITY TO MAKE REASONABLE ACCOMMODATION—A SHIFT IN THINKING ABOUT SHIFTING BURDENS

As both Benson and White illustrate, issues involving a claim that the employer failed to provide a reasonable accommodation arise most often in cases where the plaintiff has sustained an injury which effects the plaintiff's ability to do the job currently held, and where, because of the injury or disability, the employer terminates the plaintiff. The duty to provide reasonable accommodation is broad and requires that before an employer takes adverse action against an employee who has requested an accommodation, it must consider how it can reasonably accommodate the employee. For the reasons that follow, once the plaintiff has made out a prima facie case of discrimination based on the employer's failure to provide reasonable accommodation, the employer should bear both the burden of production and persuasion as to its inability to make a reasonable accommodation.

382. Because Title I of the ADA is designed to eliminate obstacles which prevent individuals with disabilities from obtaining employment, it is interesting that the reasonable accommodation provisions of the ADA appear to be used not by employees who have existing disabilities, but rather by those who sustain injuries while already employed. An optimistic assessment of this development might lead one to believe that persons seeking jobs who have existing disabilities are actually being accommodated by employers. Realistically, however, it would seem that only those who already hold a job and who, while working at that job, incur disabilities will continue to bring reasonable accommodation claims.

383. 29 C.F.R. § 1630.2(o) (1995) provides in part:
   (o) Reasonable accommodation.
   (1) The term reasonable accommodation means:
      (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
      (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
      (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
   (2) Reasonable accommodation may include but is not limited to:
      (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
      (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.


Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment.
A. Shifting the Burden Because the Employer Considered the Disability in Making the Decision

Unlike the situation where an employer asserts that its reason for taking some adverse employment action against the plaintiff was completely unrelated to the plaintiff's disability, in a claim based on a failure to reasonably accommodate, the causal relationship between the adverse action and the disability is already established. The purpose of the plaintiff's prima facie case under these circumstances is not to raise a rebuttable presumption of discriminatory intent. Instead, the "elusive factual question" to be determined is whether the employer complied with its statutory obligation to provide reasonable accommodation. In addition, the burden placed on the plaintiff to prove a prima facie case in these circumstances is onerous, particularly in contrast to the routine Title VII case or disability discrimination cases where the employer claims no reliance on the plaintiff's disability. 385

The employer defending a claim under the ADA, as in all employment discrimination contexts, has the opportunity to attack the elements of plaintiff's prima facie case. When liability depends upon a finding that the employer's action was taken because of the plaintiff's disability, and the employer denies this reason, the employer's defense will involve nothing more than a showing that other valid reasons existed for its action. 386 The employer will not generally attack the plaintiff's assertion that the plaintiff is an individual with a disability in these circumstances, precisely because the employer's defense hinges on not having considered the disability in its decision making. When, however, liability depends upon a failure to reasonably accommodate, given the complex interweave of elements the plaintiff must prove and the fact that the employer will have relied on the plaintiff's impairment in making its decision, the employer has both the opportunity and an enormous incentive to attempt to derail the plaintiff's claim by attacking the various components of the prima facie case. Also, because the duty to make reasonable accommodation extends only to qualified individuals with disabilities, if the employer can show the plaintiff does not fit the statute's complex definition of "a qualified individual with a disability," the employer will have shown that it was under no duty to accommodate and will escape liability completely. 387

Unlike the Title VII plaintiff, the ADA plaintiff cannot simply assert that she is a member of the class entitled to protection under Title I, but

385. For a description of the prima facie case requirements employed in cases involving a failure to provide reasonable accommodation, see supra text accompanying notes 299 and 343-44. Because both the Benson court and the White court held that only the burden of production shifts to the employer to show an ability to accommodate, the plaintiffs in both of these cases were saddled with a seemingly insurmountable burden. See supra note 321 explaining the potential hurdles a plaintiff faces in reasonable accommodations cases.

386. See, e.g., discussion supra Part III.

387. See, e.g., Casetellano, Part I, supra note 111.
rather must prove each component of the term “qualified individual with a disability.” *White* demonstrates the obstacles the ADA plaintiff must overcome in establishing a prima facie case. First, the plaintiff must produce sufficient evidence to persuade a trier of fact by a preponderance of the evidence that the plaintiff is substantially limited in a major life activity, or has a record of or is regarded as having such a substantial limitation. In this step, the plaintiff must take great care to establish a sufficient disability to avoid summary judgment on this issue without proving that the impairment is so substantially limiting as to prevent the plaintiff from being qualified. 388 Second, the plaintiff must produce evidence that he or she is qualified. This requires proving being qualified in the ordinary sense (e.g. having the requisite skill, experience, education, etc.), as well as proving being qualified to perform the essential functions of the job with or without accommodation. 389 Third, although the employer will at least bear the burden of production as to what the essential functions are, 390 the plaintiff under the *White* method will have to prove what precise accommodation is needed and precisely how that accommodation will enable the plaintiff to perform the essential functions. 391 This burden is considerably more onerous than asserting in the complaint, for example, “Plaintiff is an African-American.”

Because considerably more is required of the plaintiff bringing ADA claims for failure to make a reasonable accommodation, and because the ADA imposes the affirmative obligation on employers to provide reasonable accommodation, placing the burden of persuasion on the employer to prove that no reasonable accommodation is possible fits the purposes of allocations of proof as they have been outlined in employment discrimination cases under Title VII. When the issue is whether discrimination occurred, the plaintiff and the employer have light burdens, but when the issue is whether the employer violated a statutory directive, the employer should bear the burden of persuasion.

**B. Shifting the Burden Based on the Employer’s Affirmative Obligations Under the ADA**

Because the definition of “qualified” includes a determination of the plaintiff’s ability to perform the essential functions of the job with reason-

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388. Compare Bolton v. Scrivner, Inc., 36 F.3d, 939, 941-44 (10th Cir. 1994) (failure of plaintiff who was fired because physical limitations interfered with ability to do the job was not an individual with a disability because plaintiff failed to produce evidence showing a significant restriction in ability to perform either a class of jobs or a broad range of jobs in various classes) with White v. York Int’l Corp., 45 F.3d, 357, 358-63 (10th Cir. 1995) (restrictions on ability to stand and walk assumed a disability, but employee not qualified for any job because employer asserts inability to accommodate disability, and employee failed to prove what accommodation is needed and how it will work).


390. See, e.g., supra text accompanying notes 316, 352-53.

391. See supra text accompanying notes 352-54.
able accommodation, and because the plaintiff bears the burden of proof as to this element of the prima facie case, the plaintiff is put in the position of possessing absolute knowledge. According to the White court, in order to make out the prima facie case, the plaintiff must not only assert that a reasonable accommodation is possible, but must name the accommodation and describe with some precision how the accommodation will work.\textsuperscript{392} The plaintiff will not have such knowledge in most cases. The employer is in a far better position than the employee to identify and determine what functions are essential. On the other hand, the employee is in a far better position than the employer to know the extent of any limitations caused by the employee's disability and how those limitations might effect the plaintiff's ability to perform the job.\textsuperscript{393} The White court, in effect, demands omniscience on the part of the plaintiff before the employer has a duty to reasonably accommodate, and if the plaintiff is incapable of such absolute knowledge, the employer's complete lack of effort is excused. The duty to provide reasonable accommodation must not be so dependent on the predictive capabilities of employees or applicants with disabilities. In fact, the ADA provides a means for achieving its reasonable accommodation mandate in full recognition of the division of knowledge between employers and employees: the interactive process.\textsuperscript{394}

The White court's characterization of this process as a recommendation to be used once the employer determines some accommodation is possible is, at best, an odd construction of the regulation.\textsuperscript{395} As a result of the division of knowledge just discussed, neither the employee nor the employer can be assured whether a reasonable accommodation which enables the employee to perform the job is possible until the process envisioned in the regulations actually takes place. Because the duty of reasonable accommodation belongs to the employer, once the employee makes known to the employer the existence of a disability or the need for possible accommodation,\textsuperscript{396} it should be the employer's obligation to initiate this process in order to determine if a reasonable accommodation is possible. In addition, because the White court's construction gives all of the decision making power to the employer who may misperceive the abilities of the employee based on an inaccurate assessment of the capabilities of that employee due to the disability, this approach to the reasonable accommodation mandate

\textsuperscript{392} See supra text accompanying notes 352-54.
\textsuperscript{393} See 29 C.F.R. pt. 1630 App. § 1630.9 (1995) (recognizing this division of knowledge).
\textsuperscript{394} See 29 C.F.R. pt. 1630 App. § 1630.9(o)(3) (1995) ("The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.")
\textsuperscript{395} See supra text accompanying notes 370-74.
\textsuperscript{396} Obviously the employer must be aware of the disability or the need for accommodation before any obligation is created. See Beck v. Univ. of Wisc. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996) (an employer that has no knowledge of an employee's disability cannot be held liable for not accommodating the employee).
provides great potential for causing precisely what the ADA was designed to prevent.397

The Seventh Circuit has in dicta recognized that the ADA places an affirmative duty on employers to enter into an interactive process. In *Beck v. University of Wisconsin Board of Regents*,398 the court recognized that in cases where the plaintiff alleges discrimination based on a failure to reasonably accommodate, both the employer and the employee bear responsibility for determining the necessary accommodation,399 and that the ADA contemplates that this determination shall be made through the interactive process.400 The ADA regulations specify that it may be necessary for the employer to initiate an “informal, interactive process with the qualified individual with a disability in need of the accommodation,” and that “this process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”401 The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the employee with a disability.402 Therefore, the ADA and its implementing regulations envision a work place where the employer and employee or applicant collaborate in order to reach mutually satisfactory solutions before the fact, instead of resolving the issue of whether a reasonable accommodation might have been possible in a court room after the employee is fired or the applicant is refused a position. By requiring employers and employees to engage in the interactive process, the ADA ensures that all of the possibilities will have been at least considered before any adverse employment decision is made. At bottom, in cases where a failure to provide reasonable accommodation is alleged, the employer should be required to persuade the trier of fact that it made some effort at identifying, with the employee with a disability, whether a reasonable accommodation was possible. If the employer can do so, and the evidence shows that the process broke down as a result of action or inaction by the plaintiff, the employer has met its obliga-

397. *See 42 U.S.C. § 12101(a)(7) (1995) (Congress found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations [and] subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals . . . ”); see also 29 C.F.R. pt. 1630 App. § 1630.5 (1995) (employers “are prohibited from restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual’s disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis.”).*

398. 75 F.3d 1130 (7th Cir. 1996).

399. *Id. at 1135.*

400. *Id. at 1136 (“Once an employer knows of an employee’s disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary.”) (emphasis added). The court ultimately held for the employer because the plaintiff was responsible for the breakdown in the interactive process.*


In its characterization of the interactive process, the White court simply ignores the method by which the reasonable accommodation duty is designed to be implemented, and thus renders the duty itself meaningless.

C. Shifting the Burden Based on Employment Discrimination Cases in Other Areas

When an employer argues that reasonable accommodation is not possible, it has quite clearly considered the plaintiff's disability in arriving at that decision. The plurality opinion by the Supreme Court in *Price Waterhouse* recognized that, in such situations, something more is required of the employer than simply alleging a nondiscriminatory reason for its action.\(^{404}\) Admittedly, an employer taking the plaintiff's disability into account for purposes of determining whether the plaintiff can perform the essential functions of the job does not equate to an employer basing its decision on a factor having no bearing on the plaintiff's ability to perform the job. However, as the *Price Waterhouse* plurality noted, courts have repeatedly shifted the burden of persuasion to the employer in a variety of circumstances where the employer alleges a need to use the impermissible factor as a criterion in its employment decisions.\(^{405}\) For example, employers asserting the BFOQ defense under Title VII are required to bear the burden of persuasion that gender had to be considered. Similarly, the burden of persuasion should be shifted to employers who claim that the effects of their employee's disability are substantial enough that no reasonable accommodation exists which would enable the employee to perform the essential functions of the job. The affirmative mandate under Title VII is nondiscrimination in the sense of similar treatment—when an employer asserts the need to discriminate (e.g. based on a BFOQ), the employer bears the burden of persuasion that it was necessary to violate the Title VII mandate. Nondiscrimination under the ADA requires making reasonable accommodation. When an employer claims that it is unable to provide such accommodation, therefore, the employer must bear the burden of persuasion that it could not comply with its duty.

As explained *supra* in Part IV, what makes eliminating discrimination on the basis of disability unique is that it often requires treating the employee differently from the non-disabled employee. Congress recognized this when it defined discrimination to include failing to make reasonable accommodation. Unlike the prohibited conduct under Title VII, which simply prevents employers from treating employees differently based on the listed factors, the obligation to provide reasonable accommodation is an

\(^{403}\) See *Beck*, 75 F.3d at 1134-37 (when interactive process breaks down through no fault of employer, employer will not be held liable for failure to reasonably accommodate).

\(^{404}\) See *supra* text accompanying notes 98-102 and 105 regarding "motivating factor" and "but-for" causation.

\(^{405}\) See *supra* text accompanying notes 91-102.
affirmative duty placed on employers, requiring them to take an active part in eradicating barriers which have prevented employees with disabilities from working.

The reason for shifting only the burden of production in *McDonnell Douglas/Burdine/Hicks* pretext cases is to provide the employer an opportunity to meet the plaintiff’s allegations of discrimination on an equal footing so that a question of fact concerning whether the employer based its decision on an impermissible factor can be raised. In other words, the plaintiff’s “non-onerous” burden of proving a prima facie case (which is required when the plaintiff lacks direct evidence) should be met with an equally “non-onerous” burden of production by the employer. Fairness dictates that when a plaintiff makes an accusation in the absence of direct evidence, the employer must be able to respond to that accusation without bearing the burden of proof. In contrast, when the employer asserts an inability to accommodate, the plaintiff possesses direct evidence that the employer was motivated by the plaintiff’s disability. If the plaintiff has shown that a reasonable accommodation is possible, the employer’s contrary assertion, which necessarily involves a claim that the employer cannot comply with its affirmative duty, should be treated as an affirmative defense. As the plurality of the Supreme Court concluded in *Price Waterhouse* regarding mixed-motives cases, the burden shifting framework established under *McDonnell Douglas/Burdine/Hicks*, where the very purpose of the inquiry is to ascertain the “true reason” for the employer’s decision, has no application when the employer admits that the impermissible factor motivated its decision.\(^\text{406}\)

The framework has even less applicability when the employer makes its decision based on the impermissible factor and does so in face of an affirmative duty imposed by statute. Because the employer has an obligation to provide reasonable accommodation determined through an interactive process with the employee, when the employee survives the complexity of the prima facie case requirements and shows that some accommodation is possible, the employer should be required not only to provide "some evidence" of an inability to accommodate, but should be required to prove that reasonable accommodation was impossible.

### D. Shifting the Burden Based on the ADA’s Own Language

The language of the ADA itself declares that discrimination includes failing to make reasonable accommodation “unless [the employer] can

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\(^{406}\) See *Price Waterhouse* v. Hopkins, 490 U.S. 228, 248 (1989); see also *Rizzo v. Children’s World Learning Ctr.* [Inc.], 84 F.3d 758, 762 (5th Cir. 1996) (“The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence . . . . In the rare situation in which the evidence establishes that an employer openly discriminates against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination . . . . “[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.”) (internal quotation marks omitted).
demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 407 "Undue hardship" is defined as an activity "requiring significant difficulty or expense." 408 This language suggests an intent to make an employer's assertion that accommodation is not possible an affirmative defense requiring proof of either significant difficulty or significant expense. Because Congress defined the employer's duty in this expansive way, demonstrating an intent that employers provide all reasonable accommodations to employees short of undue hardship, it appears that Congress intended that when a plaintiff shows that a reasonable accommodation is possible, the employer must have the burden of persuading the trier of fact that the accommodation is impossible only if unduly expensive or difficult. 409

E. Shifting the Burden Because Employers Have Incentives to Accommodate

Congress provided a further incentive to employers to engage in an interactive process with employees in order to meaningfully ascertain accommodations which will enable the employee to be productive. The Civil Rights Act of 1991 410 amended, among other things, the remedies provisions pertaining to the failure to make reasonable accommodation under the ADA. 411 This amendment prohibits damages from being awarded against employers

who demonstrate good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business. 412

In recognition of the importance of the duty of reasonable accommodation in eradicating disability discrimination, Congress again evinced its intent

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408. 42 U.S.C. § 12111(10)(A) (1995); see also Epstein, supra note 284.
409. Cf. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542-543 (7th Cir. 1995) (employer would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee). Judge Posner takes a cost/benefit approach to the meaning of reasonable accommodation and undue hardship: "The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." Id. at 543. Judge Posner argues that "reasonable" limits "accommodation" in the sense that it pertains to both the costs of accommodation and the benefit received from making the accommodation. See id. at 542. Although the word "reasonable" does modify "accommodation, the unanswered question becomes who, plaintiff or defendant, has the burden of persuasion on the issue of "reasonableness" of the accommodation? See supra note 321. Or, as this author believes, is "reasonableness" (as in the "reasonable person" test in tort cases) a fact question requiring resolution by a jury?
411. Id. (codified at 42 U.S.C. § 1981, § 1977A(3)).
412. Id.
that employers do as much as possible to accommodate employees with disabilities by eliminating the remedy of damages for this form of discrimination when the employer makes an effort to accommodate. Therefore, once an employee raises the inference that accommodation was possible, the employer should shoulder the burden of persuading the trier of fact that, after carefully considering all of the available options in consultation with the employee with a disability, nothing could be done to accommodate the plaintiff. If the employer engages in these good faith efforts with the employee, doing what it can to determine whether a reasonable accommodation exists that will enable the employee to work, and neither can identify an accommodation that will work, the employer's obligation has been met. Furthermore, if the employer takes its duty of reasonable accommodation seriously and meets its obligation in this way, the employee is much less likely to become a plaintiff. If the employer and employee work through the possible accommodations together, and neither can reach a solution as to what would enable the employee to do the job in question, the employee will be hard-pressed to show later in court that some accommodation was possible.

Finally, placing the burden of persuasion on the employer to prove an inability to make a reasonable accommodation will ensure that employers take the duty seriously and will provide an incentive for employers to comply with the duty. For the employer who complies with the duty to reasonably accommodate, the burden of persuasion will be “non-onerous.”

VIII

CONCLUSION

What works in one employment discrimination context may not work in all. Courts reviewing claims brought under the ADA should always keep in mind the purposes underlying the burden shifting frameworks as they have developed in employment discrimination cases under other statutes. When those purposes coincide, the framework should be applied; when there are differences, the courts must look to other sources to find a similarity of purpose before readily applying what is familiar. Courts must not simply assume that, because the case before the court involves employment discrimination, the allocation of burdens of production and persuasion used in employment discrimination cases in the past automatically apply. Just as the plurality recognized in *Price Waterhouse* that different factual circumstances necessitate different avenues of burden allocation for the plaintiff and the defendant, courts reviewing claims brought under Title I of the ADA must recognize the different factual circumstances arising out of reasonable accommodation cases. If the nature of the discrimination is different, so must the burdens of proof be different. If evidence of the act which constitutes discrimination under the statute exists, the employer must bear a
greater burden than simply providing "some evidence" of its inability to comply with the statute.

Courts have and may continue to apply effectively the *McDonnell Douglas/Burdine/Hicks* indirect method of proof, in cases under the ADA where the employer's justification for its decision is wholly unrelated to the plaintiff's disability. Shifting only the burden of production to the employer is sensible because the fact question to be determined, like the issue in Title VII pretext cases, is simply whether the employer took the adverse action because of the impermissible factor or for some other legitimate reason. When, however, the employer makes an adverse employment decision which clearly takes the employee's disability into account, in light of the duty to provide reasonable accommodation, the burden of persuasion should be shifted to the employer in the same way that the burden of persuasion shifts in mixed motives cases. When the employer asserts an inability to reasonably accommodate an employee's disability, this should be deemed an affirmative defense, requiring that the employer bear the burden of persuasion.

In summary, the burden of persuasion should shift to the employer for the following reasons: (1) the employer has made the adverse employment decision based on the impermissible factor; (2) the plaintiff's burden of proving a prima facie case is substantially more burdensome than in the Title VII context, which is complicated further by the employer's incentive to exploit that complexity; (3) the employer has access to information (that the employee does not have) that is required in order to ascertain the employee's ability to do the job with reasonable accommodation; (4) the employer has an affirmative obligation to reasonably accommodate the employee which requires collaborating with the employee to fulfill the duty; (5) Congress has made clear that the duty to reasonably accommodate is broad and has created incentives to exercise that duty to the greatest extent possible; (6) placing the burden of persuasion on the employer creates an incentive for employers to take the obligation seriously, which in turn, serves the purposes of the ADA; and finally, (7) if employers fulfill their duty to provide reasonable accommodation, individuals with disabilities will become or will remain productive employees, beneficial to their respective employers' work places, and will be much less likely to become plaintiffs on the opposing end of an ADA Title I lawsuit.