
ACCOMMODATING AN EMPLOYEE'S COMMUTE TO WORK UNDER THE ADA: REASONABLE, PREFERENTIAL, OR BOTH?

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ABSTRACT

*The federal courts are split on whether a request to accommodate an employee's commute to work is a reasonable accommodation under the ADA. A majority of courts take the position that such a request is inherently unreasonable either because commuting occurs outside of the work environment or because granting such a request would amount to impermissible preferential treatment. A minority of courts, in contrast, find that commuting-related requests are not unreasonable *per se* and that the appropriateness of such requests should be determined on a case-by-case basis. This Article contends that those courts following the majority position take a mistaken categorical approach to reasonable accommodation analysis. Instead, courts should undertake an individualized analysis that focuses on the effectiveness of the requested accommodation and whether such an accommodation would impose an undue hardship. More broadly, this Article asserts that concerns about preferential treatment and the inside/outside distinction should not automatically defeat an otherwise effective reasonable accommodation.*

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I. INTRODUCTION

Jeanette Colwell worked day and night shifts as a cashier at a Rite Aid drugstore.¹ She lost vision in her left eye after developing retinal vein occlusion and glaucoma.² Due to her partial blindness, Colwell had difficulties driving at night, so she requested that her supervisor assign her only day shifts.³ The supervisor refused, saying that it “wouldn’t be fair” to the other workers.⁴ Colwell eventually submitted her resignation.⁵

Some circuits would regard Colwell’s request as a potential reasonable accommodation, and her employer’s denial of that request could violate the Americans with Disabilities Act (ADA).⁶ Other circuits would view Colwell’s request as asking for preferential treatment unrelated to the performance of her job.⁷ In those jurisdictions, courts find such a request unreasonable per se, and the employer’s denial of the request would be perfectly lawful.

This circuit split offers both a macro- and micro-level vantage point for observing the contours of the ADA’s reasonable accommodation requirement. With respect to the former, the circuit split is illustrative of the

1. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 498 (3d Cir. 2010).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 499.

6. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 (2012)); *see infra* Part III.B.

7. *See infra* Part IV.

confusing state of reasonable accommodation jurisprudence,⁸ resulting in what Justice Antonin Scalia has described as a “standardless grab bag.”⁹ In addition, many courts narrowly construe the reasonable accommodation obligation, expressing discomfort with what some perceive as a mandate for preferential treatment.¹⁰ This underdeveloped and constrained view of the reasonable accommodation requirement reflects the judiciary’s long-lasting obsession with determining who qualifies as an individual with a disability under the ADA.¹¹ The ADA Amendments Act (ADAAA) in 2008, however, lowered the bar for claiming disability status,¹² which now brings the issue of what constitutes a reasonable accommodation front and center.¹³

On a micro level, decisions finding that an employer has no obligation to accommodate an employee’s commute to work generally rely on two limiting rationales: (1) that an employer is not required to make accommodations primarily for an employee’s personal benefit in addressing obstacles outside the workplace,¹⁴ and (2) that an employer is not required to treat an employee with a disability in a preferential manner.¹⁵ Because courts often apply these limiting principles outside of the commuting context, it is important to ascertain their proper reach. In essence, the commuting context provides a microcosm of why many courts are reluctant

8. See, e.g., Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 546 (2013) (describing the “chaos of the reasonable accommodation provision”) [hereinafter Porter, *Martinizing*]; Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 81–82 (2003) (describing the often-confusing set of reasonable accommodation considerations and outcomes).

9. US Airways, Inc. v. Barnett, 535 U.S. 391, 414 (2002) (Scalia, J., dissenting).

10. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 48–50 (2000) (stating that some courts view the notion of reasonable accommodation as plaintiffs looking for a “handout” or for “special benefits”).

11. See Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122–23 (2010).

12. ADA Act Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56 (2008) (codified at 42 U.S.C. § 12102 (2012)).

13. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2055, 2064–66 (2013) (reporting on an empirical analysis of post-ADAAA summary judgment rulings that show an increased focus on determining whether a plaintiff is a qualified individual with or without a reasonable accommodation); Weber, *supra* note 11, at 1123 (stating that the ADAAA “vastly expand[ed] the range of covered individuals”).

14. See *infra* Part IV.A.

15. See *infra* Part IV.B.

to endorse accommodations even though they may be effective in enabling individuals with disabilities to enter and stay in the workforce.

This Article posits that employers and courts should not categorically dismiss requests for commuting accommodations as inherently unreasonable. Instead, they should evaluate these requests on a case-by-case basis to determine whether the desired accommodation would be plausible and effective, while not imposing an undue hardship. More broadly, this Article asserts that concerns about the inside or outside of work distinction and preferential treatment should not defeat an otherwise-effective reasonable accommodation.

This Article consists of five Parts. Part II provides an overview of the ADA's reasonable accommodation requirement. Part III discusses commuting accommodation decisions, including the majority view that requests for commuting accommodations are never reasonable and the minority view that commuting accommodations may be reasonable depending upon the circumstances. Part IV examines the two principal reasons cited by courts that have found these accommodations inherently unreasonable. Finally, Part V offers suggestions on how courts should handle requests for commuting accommodations, in particular, and how courts should determine the reasonableness of accommodation requests in general.

II. THE REASONABLE ACCOMMODATION REQUIREMENT

The ADA prohibits discrimination "against a qualified individual on the basis of disability."¹⁶ The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹⁷ If an employee is otherwise qualified, the employer has an affirmative obligation to provide the individual with a reasonable accommodation unless the employer would suffer an undue hardship in doing so.¹⁸

16. 42 U.S.C. § 12112(a). An individual has a "disability" for purposes of the ADA if the individual has "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).

17. 42 U.S.C. § 12111(8).

18. 42 U.S.C. § 12112(b)(5)(A); *see Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) ("[T]he plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions.").

“Reasonable accommodation” is defined generally as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy employment opportunities.”¹⁹ A reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.²⁰

The Equal Employment Opportunity Commission’s (EEOC’s) Interpretive Guidance states that “[t]his listing is not intended to be exhaustive of accommodation possibilities.”²¹

The EEOC regulations state that once an individual with a disability requests an accommodation, the employer should consult with that employee to ascertain an appropriate reasonable accommodation.²² The regulations envision that the employer will initiate an “informal, interactive process” with a qualified applicant or employee to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”²³

The ADA excuses an employer from accommodating an individual with a disability if the accommodation would impose an undue hardship on that employer.²⁴ The statute defines “undue hardship” as “an action

19. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o), at 397 (2014).

20. 42 U.S.C. § 12111(9).

21. 29 C.F.R. app. § 1630.2(o), at 397.

22. *See id.* (“The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations.”); *see also* 42 U.S.C. § 12112(c)(4)(B) (“A covered entity may make inquiries into the ability of an employee to perform job-related functions.”).

23. 29 C.F.R. § 1630.2(o)(3).

24. *See* 42 U.S.C. § 12112(b)(5)(A) (stating that an employer does not violate the ADA for failing to provide a reasonable accommodation if the employer can

requiring significant difficulty or expense”²⁵ and provides a list of factors to consider.²⁶ Unless an undue hardship is shown to exist, an employer’s failure to provide an accommodation that is otherwise reasonable results in a violation of the statute.²⁷

III. ACCOMMODATING THE COMMUTE TO WORK: A CIRCUIT SPLIT

A majority of the federal courts that have ruled on the issue hold that an employer has no duty to provide an employee with a commuting-related accommodation. The Sixth and Seventh Circuits have adopted this position, as have lower court and nonreported decisions in the Third and Eleventh Circuits.²⁸ In contrast, the Second, Third, and Ninth Circuits hold that requests for commuting-related accommodations are not unreasonable per se and that the appropriateness of these requests should be determined on a case-by-case basis.²⁹

A. The Majority Approach: Commuting Accommodations are Per Se Unreasonable

The U.S. District Court for the Northern District of Illinois initiated the majority line of cases with two early decisions. In the 1996 case of *Schneider v. Continental Casualty Co.*, an employee with severe back pain

“demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

25. 42 U.S.C. § 12111(10)(A).

26. 42 U.S.C. § 12111(10)(B) (“In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.”).

27. See 42 U.S.C. § 12112(b)(5)(A) (defining “discrimination” under the ADA to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”).

28. See *infra* Part III.A.

29. See *infra* Part III.B.

requested a transfer to an office closer to her home to reduce the amount of pain caused by her long commute.³⁰ The district court cited to an EEOC opinion letter that stated employers are only required to “provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside of the work environment” and ruled that the employer had no obligation to accommodate Schneider’s commute because it occurred outside of the work environment.³¹

Four years later, in *Bull v. Conyer*, the same district court considered the case of a legally blind employee whose low vision prevented him from driving.³² The employee requested an exemption from night-shift duty to accommodate his inability to access transportation to work.³³ The court noted the employee’s hardship but ruled that the ADA only requires an employer to assist an employee in performing the job.³⁴ The court reasoned,

Accommodations are directed at enabling an employee to perform the essential functions of a job. . . . Activities that fall outside the scope of the job, like commuting to and from the workplace, are not within the province of an employer’s obligations under the ADA. After all, the ADA addresses discrimination with respect to any “terms, condition, or privileges of employment.”³⁵

Subsequent decisions followed this reasoning with little independent analysis. The U.S. District Court for the Southern District of Florida ruled in *Salmon v. Dade County School Board* that an employer need not transfer an employee with a bad back to shorten her commute, stating that such an accommodation was “unrelated to and outside of her job.”³⁶ Similarly, in *LaResca v. AT&T*, the U.S. District Court for the District of New Jersey held that an employer has no obligation to exempt an employee with epilepsy from night-shift work because the employee’s inability to drive “was in

30. See *Schneider v. Cont'l Cas. Co.*, No. 95 C 1820, 1996 WL 944721, at *1–2 (N.D. Ill. Dec. 16, 1996).

31. *Id.* at *9 (citing Letter from Elizabeth M. Thornton, Deputy Legal Counsel, EEOC, to Edmund D. Cooke, Jr., Attorney, Winston & Strawn, in 7 NAT'L DISABILITY L. REP. 64, 64 (1995)).

32. See *Bull v. Conyer*, No. 98 C 7583, 2000 WL 224807, at *1 (N.D. Ill. Feb. 23, 2000).

33. *Id.* at *9.

34. *Id.*

35. *Id.* (citation omitted) (quoting 42 U.S.C. §12112(a) (2012) (emphasis added)).

36. *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998).

essence a commuting problem, which AT&T was not legally obligated to accommodate.”³⁷ A Third Circuit decision cited to *LaResca* in ruling that an employer has no duty to reassign an employee to a facility closer to the employee’s home.³⁸

The Sixth and Seventh Circuits have issued the two leading decisions for the majority approach. In *Filar v. Board of Education of Chicago*, a substitute teacher was assigned to fill vacancies as they occurred throughout the city’s school system.³⁹ The teacher had difficulty walking because of osteoarthritis, so she requested that the school board assign her only to schools near bus stops, but school administrators denied the request.⁴⁰ The Seventh Circuit ruled in favor of the employer, viewing the proposed accommodation as an inappropriate request for preferential treatment.⁴¹ The court quoted an earlier Seventh Circuit decision that stated an “employer is not required to give the disabled employee preferential treatment, as by . . . waiving his normal requirements for the job in question.”⁴²

The Sixth Circuit followed suit in *Regan v. Faurecia Automotive Seating, Inc.*, a 2012 decision.⁴³ In that case, an employee with narcolepsy requested a change in shift hours to avoid commuting in heavy traffic, which required her to pull over and rest partway through her commute.⁴⁴ The employer, a manufacturer of automobile seats, refused to permit the employee to deviate from normal shift hours.⁴⁵ The Sixth Circuit reviewed the majority line of decisions and ruled:

[T]he Americans with Disabilities Act does not require [the employer] to accommodate [the employee’s] request for a commute during more

37. *LaResca v. AT&T*, 161 F. Supp. 2d 323, 335 (D.N.J. 2001). The suit in *LaResca* was filed under the New Jersey Law Against Discrimination (NJLAD), which the New Jersey courts interpret in a manner similar to the ADA. *Id.* at 334.

38. *See Parker v. Verizon Pa., Inc.*, 309 F. App’x 551, 561 (3d Cir. 2009) (“Verizon’s failure to accommodate Parker by limiting his commute was not required [under the ADA].”).

39. *See Filar v. Bd. of Educ. of Chi.*, 526 F.3d 1054, 1057–58 (7th Cir. 2008).

40. *Id.* at 1059.

41. *See id.* at 1067–68.

42. *Id.* at 1068 (quoting *Williams v. United Ins. Co. of Am.*, 253 F.3d 280, 282 (7th Cir. 2001)) (alteration in original) (internal quotation marks omitted).

43. *See Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 479–80 (6th Cir. 2012).

44. *Id.* at 478.

45. *See id.* at 478–79.

convenient hours. Under the facts present here, [the employee's] proposal of a modified work schedule for purposes of commuting during hours with allegedly lighter traffic is not a reasonable accommodation.⁴⁶

B. *The Minority Approach: The Reasonableness of Commuting Accommodations Depends on the Circumstances*

In three decisions, the Second, Third, and Ninth Circuits have staked out a position contrary to the majority approach. These decisions are discussed below in chronological order.

In *Lyons v. Legal Aid Society*, a legal aid lawyer who was severely injured in an automobile accident was unable to access public transportation or walk moderate distances.⁴⁷ She requested that her employer pay for a parking space near her office, despite the fact that other employees were responsible for their own parking arrangements.⁴⁸ The employer denied her request, arguing that her "claim for financial assistance in parking her car amounts to a demand for unwarranted preferential treatment [on] a matter of personal convenience."⁴⁹ The district court granted the employer's motion to dismiss, but the Second Circuit Court of Appeals reversed and stated,

Plainly there is nothing inherently unreasonable, given the stated views of Congress and the agencies responsible for overseeing the federal disability statutes, in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work.⁵⁰

The court explained that the reasonableness of such a request "may well be susceptible to differing answers depending on, e.g., the employer's geographic location and financial resources."⁵¹

In *Colwell v. Rite Aid Corp.*, the employer denied Colwell's request to work only daytime shifts as an accommodation for her nighttime driving

46. *Id.* at 480.

47. See *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1513–14 (2d Cir. 1995).

48. *Id.* at 1514.

49. *Id.* at 1516 (quoting Brief of Petitioner-Appellee at 13, *Lyons*, 68 F.3d 1512 (No. 95-7030)).

50. *Id.* at 1517 (referencing H.R. REP. No. 101-485, pt. 2, at 61 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 343. and 29 C.F.R. app. § 1630, at 407 (1995)).

51. *Id.* at 1516.

difficulties.⁵² The district court granted the employer's motion for summary judgment, finding that the requested accommodation "had nothing to do with the work environment or the manner and circumstances under which she performed her work."⁵³ The Third Circuit reversed, holding that a modified work schedule that serves "to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates."⁵⁴ The court summarized its reasoning as follows:

We therefore hold that under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job.⁵⁵

The third decision closely mirrored the facts from *Colwell*. In *Livingston v. Fred Meyer Stores, Inc.*, a vision-impaired employee who worked as a wine steward requested an exemption from shifts that required her to drive in the dark.⁵⁶ The employer denied the request.⁵⁷ The district court rejected the employee's disability discrimination claim, finding that "the duty to accommodate does not extend to 'commute-related limitations.'"⁵⁸ Citing *Colwell*, the Ninth Circuit reversed, stating that the employer "had a duty to accommodate Livingston's inability to finish her scheduled shift, even though her disability did not affect her ability to function effectively as a wine steward."⁵⁹

IV. POLICY OBJECTIONS TO ACCOMMODATING AN EMPLOYEE'S COMMUTE

Courts that rule commuting accommodations are unreasonable per se rely on two principal limiting rationales: commuting accommodations (1) are

52. See *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 498–99 (3d Cir. 2010). The facts of *Colwell* are summarized *supra* text accompanying notes 1–5.

53. *Id.* at 500 (quoting *Colwell v. Rite Aid Corp.*, No. 3:07cv502, 2008 WL 4748226, at *9 (M.D. Pa. Oct. 27, 2008)) (internal quotation mark omitted).

54. *Id.* at 504.

55. *Id.* at 505 (citing 29 C.F.R. § 1630.2(o)(1)(ii)–(iii) (2005)).

56. See *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x. 738, 739 (9th Cir. 2010).

57. *Id.*

58. *Id.* at 740.

59. *Id.* at 741.

outside the work environment and thus outside the scope of the ADA's requirements,⁶⁰ and (2) amount to inappropriate preferential treatment for the disabled.⁶¹ Because courts apply these concepts beyond the realm of commuting, their proper reach is salient to the larger issue of requests for reasonable accommodations generally.

A. Outside the Work Environment

A number of decisions have found requests for commuting accommodations to be inherently unreasonable because commuting occurs outside the work environment.⁶² The U.S. District Court for the Southern District of Florida, for example, stated that “[w]hile an employer is required to provide reasonable accommodations that eliminate barriers *in* the work environment, an employer is not required to eliminate those barriers which exist *outside* the work environment.”⁶³ The U.S. District Court for the Northern District of Illinois similarly found that commuting accommodations are outside the scope of the ADA because getting to work does not affect any “terms, condition or privilege of *employment*.⁶⁴

The apparent origin of this inside or outside of the work environment distinction is a 1995 advisory letter issued by the EEOC’s Deputy General Counsel.⁶⁵ This nonbinding letter advised,

An employer is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside the work environment. For example, an employer would not be required to provide transportation to work as a reasonable accommodation for an employee whose disability makes it . . . difficult or impossible to use public or private means of transportation, unless the employer provides such transportation for employees without disabilities.⁶⁶

60. See, e.g., *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998).

61. See, e.g., *Filar v. Bd. of Educ. of Chi.*, 526 F.3d 1054, 1067–68 (7th Cir. 2008).

62. See, e.g., *Bull v. Coyner*, No. 98 C 7583, 2000 WL 224807, at *9 (N.D. Ill. Feb. 23, 2000); *Salmon*, 4 F. Supp. 2d at 1163; *Schneider v. Cont'l Cas. Co.*, No. 95 C 1820, 1996 WL 944721, at *9 (N.D. Ill. Dec. 16, 1996).

63. *Salmon*, 4 F. Supp. 2d at 1163 (citing *Schneider*, 1996 WL 944721, at *9).

64. *Bull*, 2000 WL 224807 at *9 (quoting 42 U.S.C. § 12112(a) (2000)).

65. *Thornton, supra* note 31.

66. *Id.*

This view, in essence, treats an employee's commute as a type of personal accommodation that is not required under the ADA.⁶⁷ In this regard, the EEOC's Interpretive Guidance makes a distinction between required job-related accommodations and adjustments or modifications that assist the individual "throughout his or her daily activities, on and off the job."⁶⁸ Such non-required personal use items include "prosthetic limb[s], wheelchair[s], and eyeglasses."⁶⁹ In a similar vein, an employer is not obligated to monitor an employee's use of medications.⁷⁰

However, a rigid inside–outside dichotomy is troublesome in several respects. First, the automatic disqualification of commuting accommodations is inconsistent with legislative and regulatory guidance. Notes from a House of Representatives Committee on the ADA indicate that "persons who may require modified work schedules are persons with mobility impairments who depend on a public transportation system that is not currently fully accessible."⁷¹ The EEOC's Interpretive Guidance similarly states that required accommodations might include "making employer provided transportation accessible, and providing reserved parking spaces."⁷² As the *Colwell* court concluded, this guidance "does not strictly limit the breadth of reasonable accommodations to address only those problems that an employee has in performing her work that arise once she arrives at the workplace."⁷³

Second, the blanket rejection of commuting accommodations contradicts the preferred method for determining the appropriateness of a reasonable accommodation. The EEOC's Interpretive Guidance describes

67. See 29 C.F.R. app. § 1630.9, at 403–04 (2014) (stating that a job-related accommodation is one that "specifically assists the individual in performing the duties of a particular job").

68. *Id.* at 403.

69. *Id.*

70. See EQUAL OPPORTUNITY COMM'N, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002) (citing *Robertson v. Neuromed*, Ctr., 161 F.3d 292, 296 (5th Cir. 1998)), available at <http://eeoc.gov/policy/docs/accommodation.html> [hereinafter EEOC, *Enforcement Guidance*].

71. H.R. REP. NO. 101-485, pt. 2, at 62–63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345.

72. 29 C.F.R. app. § 1630.2(o), at 397; see also *Thornton*, *supra* note 31 (stating that modified work schedules and parking spot assignments are examples of "workplace barriers" that may require accommodations).

73. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010).

reasonable accommodation analysis as a fact-specific, individualized inquiry that is performed on a case-by-case basis.⁷⁴ As stated in the findings section of the ADA:

If an employer denies an employee's request for accommodations before making fact-specific inquiries, then its decision is likely to be arbitrary or biased. The reasonable accommodations framework is best for achieving the ADA's goals because it instead forces employers to assess employees with disabilities on the basis of their merit.⁷⁵

Third, not all reasonable accommodations occur within the geographical boundaries of the workplace. Perhaps the best example is a leave of absence which, by definition, permits an employee with a disability to leave the work environment temporarily. Although not listed in the statute, both the EEOC and courts recognize that a leave of absence may serve as a type of reasonable accommodation.⁷⁶

Fourth, most potential commuting accommodations have their roots within the work environment. Several of the commuting decisions involved requests for modified work schedules to avoid driving at night⁷⁷ or during times of heavy traffic volume.⁷⁸ Even though the employee's commute may occur beyond the physical boundaries of work, a change in the employee's work schedule "is clearly a change in a workplace condition entirely under the employer's control."⁷⁹ The ADA expressly lists "modified work schedules" as a recognized type of reasonable accommodation.⁸⁰ The EEOC

74. See 29 C.F.R. app. § 1630.9, at 403–04.

75. Samrah Mahmoud, *Determining the Appropriate Framework for Commuting Accommodations Under the Americans with Disability Act*, 2 U.C. IRVINE L. REV. 1023, 1039 (2012).

76. See Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) ("Medical leave as an accommodation is not a novel concept.") (citing Ansonia Board of Education v. Philbrook, 479 U.S. 60, 71–74 (1986); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998) ("A leave of absence and leave extensions are reasonable accommodations in some circumstances.") (citing Rodgers v. Lehrman, 869 F.2d 253, 259 (4th Cir. 1989)); EEOC, *Enforcement Guidance*, *supra* note 70; see also Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 445 (2002).

77. See, e.g., *Colwell*, 602 F.3d at 498; *LaResca v. AT&T*, 161 F. Supp. 2d 323, 326 (D.N.J. 2001).

78. See, e.g., *Regan v. Faurecia Auto. Seating, Inc.* 679 F.3d 475, 478 (6th Cir. 2012); *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1159 (S.D. Fla. 1998).

79. See *Colwell*, 679 F.3d at 505–06.

80. 42 U.S.C. § 12111(9)(B) (2012).

Enforcement Guidance states that an employer should grant a request for a modified work schedule unless it would cause an undue hardship.⁸¹ Therefore, a request for a modified work schedule should not be deemed unreasonable per se simply because the motivation for such a request flows from a nonwork reason. As requests for modified work schedules in order to accommodate an employee's disability-related limitations have been found to be reasonable for other nonwork-related reasons, there is no principled reason to single out requests based upon commuting-related concerns for automatic disqualification.

Fifth, a commuting accommodation is not a personal accommodation akin to requiring an employer to provide a blind employee with a guide dog or to monitor an employee's medication regimen.⁸² The latter accommodations are deemed personal because they benefit an employee throughout the day, "both on and off the job."⁸³ By contrast, the purpose of commuting is to get to work. While some trips taken by a disabled worker are primarily personal in nature, such as driving to a grocery store or to visit a health care provider, transportation from home to work is undertaken primarily—if not wholly—for the purpose of enabling an employee to perform his or her job.

Workplace access is a central goal of the ADA.⁸⁴ Both Title II and Title III, applicable to public services and places of public accommodation, mandate that new facilities be "readily accessible to and usable by" individuals with a disability.⁸⁵ With respect to the employment provisions of Title I, the statute provides that a reasonable accommodation may include "making existing facilities . . . readily accessible to and usable by individuals with disabilities."⁸⁶ The EEOC's Technical Assistance Manual on Title I

81. See EEOC, *Enforcement Guidance*, *supra* note 70 (citing US Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002)) ("An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees."); see also 29 C.F.R. § 1630.2(o)(4) (2014).

82. See 29 C.F.R. app. § 1630.9, at 403–04; see also discussion *supra* text accompanying notes 70–73.

83. See EEOC, *Enforcement Guidance*, *supra* note 70 (citing 29 C.F.R. app. § 1630.9 (1997)).

84. See 42 U.S.C. §§ 12101(a)(5) (2012) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of . . . transportation . . . barriers.").

85. 42 U.S.C. § 12146 (Title II); 42 U.S.C. § 12183(a) (Title III).

86. 42 U.S.C. § 12111(9)(A).

advises employers to provide access for “an individual employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees.”⁸⁷ While the principal focus of these provisions is on the removal of architectural barriers,⁸⁸ the Technical Assistance Manual discusses access to a “work site” and remarks that some individuals “are excluded because of rigid work schedules that allow for no flexibility for people with special needs caused by disability.”⁸⁹ A logical extension of this principle is that an employer should be required to remove transportation-related barriers to workplace access, unless doing so would impose an undue hardship.⁹⁰

A commuting accommodation that enables access to the workplace serves the fundamental purpose of the ADA’s reasonable accommodation requirement.⁹¹ A core function of a reasonable accommodation is to assist an individual with a disability to perform “the essential functions” of the job.⁹² Courts have held that regular and predictable attendance at the workplace is an essential function of most jobs.⁹³ Accordingly, an effective commuting accommodation that enables an individual with a disability to maintain regular and predictable attendance in the workplace could be a

87. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT III-17 (1992) [hereinafter EEOC, TECHNICAL ASSISTANCE MANUAL] (emphasis omitted).

88. *See id.* at III-19 (giving “[e]xamples of accommodations” including “installing a ramp at the entrance to a building” and “removing raised thresholds”); *see also* 42 U.S.C. § 12182(b)(2)(A)(iv) (specifically defining “a failure to remove architectural barriers” impeding access as discrimination).

89. EEOC, TECHNICAL ASSISTANCE MANUAL, *supra* note 87, at III-2.

90. *See, e.g.*, Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (finding that a requested accommodation in the form of “a change to a workplace condition that is entirely within an employer’s control and that would allow the employee to get to work and perform her job” may be reasonable).

91. *See* EEOC, TECHNICAL ASSISTANCE MANUAL, *supra* note 87, at III-2 (stating that the ADA is designed to remove “unnecessary barriers” that prevent people with disabilities from performing their jobs and benefitting from continued employment).

92. *See* 42 U.S.C. § 12111(8) (defining a “qualified individual” as a person who is capable of “perform[ing] the essential functions” of the job “with or without reasonable accommodation”); 29 C.F.R. § 1630.2(n)(1) (2014) (“The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires.”).

93. *See, e.g.*, Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237–38 (9th Cir. 2012).

reasonable accommodation required by the ADA.

Finally, the rigid inside–outside distinction is inconsistent with the ADA’s broad policy goals. The statute’s findings section states that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”⁹⁴ It goes on to state that the purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁹⁵ These remedial goals are further bolstered by the ADAAA, which provides for a broader and more inclusive interpretation of the statute.⁹⁶ A regime in which all commuting accommodations are automatically disqualified as unreasonable clearly runs counter to these policies by reducing opportunities for participation in the workforce and economic self-sufficiency.⁹⁷

B. Avoiding Preferential Treatment

Courts also deny commuting accommodations to avoid treating individuals with disabilities in a preferential manner.⁹⁸ In *Filar v. Board of Education of City of Chicago*, for example, a school district denied a request by a teacher with osteoarthritis to be assigned only to schools near bus stops.⁹⁹ The Seventh Circuit approved, ruling that an “employer is not required to give the disabled employee preferential treatment, as by . . . waiving his normal requirements for the job in question.”¹⁰⁰

94. 42 U.S.C. § 12101(a)(7).

95. *Id.* § 12101(b)(1).

96. See Americans with Disability Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (2008) (stating that a purpose of the ADAAA is to “reinstat[e] a broad scope of protection”); see also Mahmoud, *supra* note 75, at 1028 (“Congress’s statement of intent in amending the ADA was a clear endorsement of a broader, more inclusive interpretation of the statute.”) (citing Americans with Disability Act Amendments Act of 2008, 122 Stat. at 3555–57); Weber, *supra* note 11, at 1123.

97. See Mahmoud, *supra* note 75, at 1037 (“If the inability of individuals with disabilities to travel to and from the workplace prevents them from holding productive jobs, they will be unable to compete on an equal basis. . . . Thus, accommodating only those problems that are confined to the physical bounds of the workplace would not realize the goal of assuring full participation and economic self-sufficiency for individuals with disabilities.”).

98. See, e.g., *Filar v. Bd. of Educ. of Chi.*, 526 F.3d 1054, 1067–68 (7th Cir. 2008).

99. See *id.* at 1059.

100. *Id.* at 1067–68 (alteration in original) (quoting *Williams v. United Ins. Co. of*

In contrast, the Second Circuit in *Lyons v. Legal Aid Society* rejected an employer's argument that an employee's request for a parking space close to work was a request for preferential treatment.¹⁰¹ The employer argued that the employee's "claim for financial assistance in parking her car amounts to a demand for unwarranted preferential treatment . . . [on] 'a matter of personal convenience.'"¹⁰² The Second Circuit rejected that argument, finding that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work."¹⁰³

Concerns that an accommodation may result in preferential treatment are not limited to the commuting context.¹⁰⁴ Indeed, these concerns have been most frequently voiced in cases involving requests for reassignment to new positions.¹⁰⁵ According to the EEOC, an employee with a disability is entitled to reassignment if the desired position is vacant and the employee is qualified to perform the duties of that position.¹⁰⁶ The preferential treatment issue arises when an employee's request for reassignment clashes with an employer's existing transfer and assignment policy.¹⁰⁷

When this occurs, many courts have ruled that reassignment is not required on the grounds that it would impermissibly privilege the employee with a disability over the employee who would be entitled to the position under the terms of the transfer and assignment policy. In *Daugherty v. City of El Paso*, a part-time city bus driver was denied reassignment to a different position because of a policy that gave full-time city employees priority.¹⁰⁸

Am., 253 F.3d 280, 282 (7th Cir. 2001)) (internal quotation marks omitted).

101. See *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516–17 (2nd Cir. 1995).

102. *Id.* at 1516 (quoting Brief of Petitioner-Appellee at 13, *Lyons*, 68 F.3d 1512 (No. 95-7030)).

103. *Id.* at 1517.

104. See Diller, *supra* note 10 and accompanying text.

105. See Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities under United States Law*, 9 YALE J.L. & FEMINISM 213, 222 (1997) ("The controversy surrounding whether or not the ADA is an 'affirmative action' statute has largely centered on [the reassignment] requirement.").

106. See 29 C.F.R. § 1630.2(o) (2014).

107. See Stephen F. Befort & Tracey Homes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1063–78 (2000) (reviewing conflicting caselaw on the interplay between reassignment accommodations and employer transfer and assignment policies).

108. *Daugherty v. City of El Paso*, 56 F.3d 695, 698–700 (5th Cir. 1995).

The court concluded that the city was not required to make an exception to that policy, stating that the ADA does not require “affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.”¹⁰⁹ Similarly, in *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*, the Seventh Circuit concluded that “the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it’s the employer’s consistent and honest policy to hire the best applicant for the particular job in question.”¹¹⁰ A contrary result, the court opined, would give “bonus points” to individuals with disabilities and constitute “affirmative action with a vengeance.”¹¹¹

Other courts have adhered to the EEOC’s position and ruled that employers’ transfer and assignment policies must give way to their obligation under the ADA to reassign qualified employees with disabilities.¹¹² For example, the Tenth Circuit in *Smith v. Midland Brake* held that the reassignment obligation trumps an opposing “best qualified” employer policy.¹¹³ The court found that any other interpretation would be “not only contextually indefensible, [but also] illogical.”¹¹⁴

In the 2002 case of *US Airways, Inc. v. Barnett*, the Supreme Court

109. *Id.* at 700.

110. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000). The Seventh Circuit has since overruled the *Humiston-Keeling* decision. See EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012) (holding that *Humiston-Keeling* “did not survive” the Supreme Court’s ruling in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)).

111. *Humiston-Keeling*, 227 F.3d at 1027, 1029; see also *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998) (holding that requiring an employer to reassign disabled employees “when such a transfer would violate a legitimate, nondiscriminatory policy of the employer . . . would convert a nondiscrimination statute into a mandatory preference statute”) (citation omitted); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) (finding no requirement under the ADA that an employer transfer employees to another position when the employer “has a business policy against the pertinent kind of transfer”).

112. See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1166–67 (10th Cir. 1999) (en banc); Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 959 (2004) (stating that some courts have held that if an employee with a disability is qualified for another position, the employer “must reassign the employee even if there are other more qualified individuals who are also interested in the same position”).

113. *Midland Brake*, 180 F.3d at 1167, 1170.

114. *Id.*

addressed the preferential treatment issue.¹¹⁵ Robert Barnett worked for US Airways in a cargo-handling position.¹¹⁶ He injured his back and successfully sought reassignment to “a less physically demanding mailroom position.”¹¹⁷ US Airways had a longstanding seniority policy that afforded senior employees a preference in bidding on various positions, and two senior employees placed bids to transfer to the mailroom position that Barnett occupied.¹¹⁸ Barnett asked US Airways to make an exception to the seniority policy, but US Airways denied the request.¹¹⁹ Barnett lost his job as a result of the seniority bidding process.¹²⁰

The Supreme Court granted certiorari to decide whether “the [ADA] requires an employer to reassign a disabled employee to a position as a ‘reasonable accommodation’ even though another employee is entitled to hold the position under the employer’s bona fide and established seniority system.”¹²¹ In response, the members of the Court issued five separate opinions, with a five-vote majority controlling.¹²²

The majority opinion began its analysis by summarizing the dueling positions of the parties as to what Congress meant to encompass in the term “reasonable accommodation.”¹²³ US Airways contended that the ADA requires only equal treatment for individuals with disabilities and that Barnett’s request, by subverting an existing seniority system, was preferential treatment and therefore inherently unreasonable.¹²⁴ Barnett asserted that the term “reasonable accommodation” is synonymous with “effective accommodation.”¹²⁵ In Barnett’s view, a workplace adjustment qualifies as a reasonable accommodation if it effectively enables an individual with a disability to perform the essential functions of the job, and

115. See *Barnett*, 535 U.S. at 397–98; see also Ball, *supra* note 112, at 962–65.

116. See *Barnett*, 535 U.S. at 394.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 395–96 (alteration in original) (internal quotation marks omitted) (quoting Brief for Petitioner at *I, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), 2001 WL 747864, at *i).

122. See *id.* at 393; *id.* at 406 (Stevens, J., concurring); *id.* at 408 (O’Connor, J., concurring); *id.* at 411 (Scalia, J., dissenting); *id.* at 420 (Souter, J., dissenting).

123. *Id.* at 396–402.

124. *Id.* at 396–97.

125. *Id.* at 399.

“a seniority rule violation, having nothing to do with the accommodation’s effectiveness, has nothing to do with its ‘reasonableness.’”¹²⁶

The majority opinion concluded that reassessments conflicting with the rules of a seniority system “would not be reasonable in the run of cases.”¹²⁷ Nevertheless, the Court recognized a limited exception when an employee can “show that special circumstances warrant a finding” that the requested reassignment is reasonable, such as when an employer frequently deviates from the terms of the seniority system.

In reaching this conclusion, the majority rejected both parties’ positions with respect to the preferential treatment issue.¹²⁸ The Court disposed of US Airways’s argument by reasoning that without more, the fact that an accommodation would permit an employee with a disability to avoid the impact of a neutral rule that others must obey does not necessarily make that accommodation unreasonable.¹²⁹ The Court left open the possibility that some requests for preferential treatment might be unreasonable or impose an undue hardship¹³⁰ but ruled that a request for preferential treatment does not create an “automatic exemption” from the ADA’s reasonable accommodation mandate.¹³¹ The Court explained its rationale as follows:

[P]references will sometimes prove necessary to achieve the Act’s basic equal opportunity goal. The Act requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employee’s disability neutral rule cannot by itself place the accommodation beyond the Act’s potential reach.¹³²

126. *Id.*

127. *Id.* at 403–05 (stating that “it will ordinarily be unreasonable for the assignment to prevail” when it would “trump the rules of a seniority system”).

128. *See id.* at 397–402.

129. *Id.* at 397–99.

130. *Id.* at 400–02.

131. *Id.* at 398.

132. *Id.* at 397. Justice Scalia’s dissent argued that the ADA only obligates employers to accommodate disability-related obstacles, which, according to Justice Scalia, includes only “those employment rules and practices that the employee’s disability prevents him from observing.” *Id.* at 412 (Scalia, J., dissenting) (emphasis removed). Applying that principle to the case at hand, Justice Scalia concluded that

The majority opinion also rejected Barnett's contention that an "effective" accommodation is necessarily a reasonable accommodation.¹³³ The Court explained that a proposed accommodation could be effective in terms of enabling job performance, yet still be unreasonable.¹³⁴ The Court noted, "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees."¹³⁵

Following *Barnett*, judicial antipathy toward preferential accommodations receded.¹³⁶ But, the Supreme Court in *Barnett* did not endorse preferential reassignment accommodations; it only found them not inherently objectionable.¹³⁷ As a result, many post-*Barnett* decisions continue to reject proposed accommodations on preferential treatment grounds.¹³⁸ In 2007, the Eighth Circuit concluded that "the ADA is not an

"reassignment to a vacant position' does not envision that elimination of obstacles . . . that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications." *Id.* at 416 (emphasis removed). Justice Scalia's position has been described as "descriptively inaccurate and normatively unsound" and has not gained traction in subsequent caselaw. Porter, *Martinizing*, *supra* note 8, at 557; Weber, *supra* note 11, at 1165; *see EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761, 763 (7th Cir. 2003) (recognizing that the *Humiston-Keeling* line of reasoning regarding preferential treatment "did not survive *Barnett*" because *Barnett* "rejected [the] anti-preference interpretation of the ADA").

133. *Barnett*, 535 U.S. at 400.

134. *Id.* at 401 (reasoning that the ADA "will sometimes require [effective] affirmative conduct to promote entry of disabled people into the work force" but does not go so far as to "demand action beyond the realm of the reasonable").

135. *Id.* at 400.

136. The most notable illustration of this reaction was the Seventh Circuit's decision overruling *Humiston-Keeling*. *See United Airlines*, 693 F.3d at 761. The court in that case gave preference to a reassignment request—despite the presence of the employer's "best qualified" policy—explaining that *Barnett* had rejected the anti-preference logic of *Humiston-Keeling*. *Id.* at 763–65.

137. *See Barnett*, 535 U.S. at 398 ("The simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'").

138. *See, e.g., Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483–84 (8th Cir. 2007)); *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 867 (7th Cir. 2005) ("Accommodations which require special dispensations and preferential treatment are not reasonable under the ADA."); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004) (holding that an employer is not "required to waive legitimate, non-discriminatory employment policies or displace other employees' rights in order to

affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”¹³⁹ In the same year, the Seventh Circuit held that an employer is not required to provide an employee with a preferential commuting accommodation.¹⁴⁰

The source of the preferential treatment debate lies in the different models embodied in the various federal antidiscrimination statutes. Both Title VII¹⁴¹ and the Age Discrimination in Employment Act (ADEA)¹⁴² prohibit employers from making adverse employment decisions “because of” a protected characteristic such as race, sex, or age.¹⁴³ These statutes, however, do not impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of the job.¹⁴⁴

accommodate a disabled employee” (citing *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000)); *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2nd Cir. 2003) (stating that while the ADA requires employers to put employees on “an even playing field,” the ADA “does not authorize a preference for disabled people generally”). Other courts reached similar results by denying accommodations that were not causally related to the employee’s impairment. *See, e.g., Peebles v. Potter*, 354 F.3d 761, 769 (8th Cir. 2004) (“We do not read the Act as requiring the employer to level the playing field beyond those undulations that are related to the person’s disability.”); *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003) (holding that there is no cause of action under the ADA when “the reasonable accommodation requested is unrelated” to the disability).

139. *Huber*, 486 F.3d at 483 (footnote omitted).

140. *Filar v. Bd. of Educ. of Chi.*, 526 F.3d 1054, 1068–69 (7th Cir. 2008).

141. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

142. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

143. *See* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice for an employer “to fail or refuse to hire or . . . otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin”); 29 U.S.C. § 623(a)(1) (making it an unlawful employment practice for an employer “to fail or refuse to hire or . . . otherwise discriminate against any individual . . . because of such individual’s age”).

144. A limited duty of reasonable accommodation arises under these statutes only with respect to religion, which is a protected trait under Title VII. *See generally* 42 U.S.C. § 2000e. Title VII, like the ADA, provides that an employer must reasonably accommodate the religious observances and practices of its employees up to the point of undue hardship. *See id.* § 2000e(j). The reasonable accommodation duty for religious observances, however, is much more limited than that mandated by the ADA; the Supreme Court has ruled that an employer need not incur more than a *de minimis*

While the ADA also bans discrimination “on the basis of disability,”¹⁴⁵ it goes beyond traditional antidiscrimination laws by requiring employers to make “reasonable accommodations” that take the form of favorable adjustments for the disabled.¹⁴⁶

The presence of the reasonable accommodation provision has led some commentators to characterize the ADA as imposing an affirmative action requirement. One article described the ADA as “one of the most radical affirmative action laws in recent U.S. history.”¹⁴⁷

Admittedly, the ADA compels employers to provide favorable workplace adjustments for individuals with disabilities regardless of whether those same adjustments are provided to others.¹⁴⁸ The preferential nature of the reasonable accommodation obligation is discomforting to those who are accustomed to Title VII’s nondiscrimination model.¹⁴⁹

As this Author previously countered:

[S]ignificant differences distinguish affirmative action with respect to race and gender, on the one hand, from reasonable accommodation under the ADA, on the other. Conventional affirmative action programs consist of pre-designed policies by which employers seek to increase the proportion of a historically underrepresented minority group in its overall workforce. Employers typically establish target goals

hardship in providing an accommodation for religious purposes. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (“To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off [to observe his Sabbath] is an undue hardship.”).

145. See 42 U.S.C. § 12112(a).

146. See *id.* § 12112(b)(5)(A) (defining discrimination to include the failure to “mak[e] reasonable accommodations to the known physical or mental limitations of otherwise qualified individuals with a disability”).

147. Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*, 18 LAW & INEQ. 85, 85 (2000); see also CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 108 (1997) (“The [ADA] is the most radical affirmative action program in the nation’s history.”).

148. See Diller, *supra* note 10, at 43 (stating that race-based affirmative action and the ADA’s reasonable accommodation framework both “rely on visions of equality that call for differential treatment of the subordinated individual or group”).

149. See, e.g., *US Airways, Inc., v. Barnett*, 535 U.S. 391, 419 (2002) (Scalia, J., dissenting) (arguing that the majority’s approach “does not merely give disabled employees the opportunity to unmask sham seniority systems; it gives them a vague and unspecified power (whenever they can show ‘special circumstances’) to undercut *bona fide* systems”).

through a statistical comparison of their workforce with the relevant labor market. Once a plan is established, an employer implements the plan throughout its recruitment and hiring processes until the numerical goals for the underrepresented group are met. In contrast, reasonable accommodation under the ADA occurs on a much more individualized basis. The reasonable accommodation process occurs only after the employer and disabled employee have engaged in an interactive process designed to identify both the essential functions of the position and the special needs of the disabled person.

Viewed in this light, reassignment under the ADA is much less pervasive than conventional affirmative action programs in several respects. First, the reassignment accommodation applies only to employees and not to applicants. Second, reassignment does not involve the setting of pre-determined numerical goals or quotas. Third, no other employee loses employment as a result of a job reassignment since such a transfer occurs only to an already vacant position. In short, reassignment operates only as a post-hire mechanism by which an employer may retain the services of a current employee with a disability, while affirmative action operates as a pre-hire formula that reserves employment opportunities for one group of applicants at the expense of another group of applicants.¹⁵⁰

This comparison underscores the different antidiscrimination formulas embodied in Title VII and the ADA. Title VII utilizes an equal-treatment model of discrimination.¹⁵¹ By prohibiting discrimination “because of” certain listed characteristics such as an employee’s race or gender, Title VII compels employers to make employment decisions without reference to those listed traits.¹⁵² Prohibited discrimination occurs whenever an employer

150. Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After US Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 968–69 (2003) [hereinafter Befort, *Reasonable Accommodation*] (footnotes omitted) (citing Befort & Donesky, *supra* note 107, at 1085).

151. For a discussion of the equal-treatment model of antidiscrimination statutes, see generally Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 515–16 (1998) (describing the traditional civil rights paradigm as one requiring a “level playing field” for all workers); *see also* Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236–37 (1971) (describing Title VII’s “norm of color blindness”).

152. *See* 42 U.S.C. § 2000e-2(a) (2012).

decides not to hire someone because of a specific trait or favorably takes account of a person's race or gender in making an employment decision.¹⁵³

The ADA requires different treatment by compelling employers to provide reasonable accommodations to qualified individuals with disabilities.¹⁵⁴ Under this model, an employer who merely refrains from treating employees with disabilities differently than other employees may be engaging in prohibited discrimination.¹⁵⁵ The incorporation of the reasonable accommodation requirement in the ADA, accordingly, represents Congress's recognition that "in order to treat some persons equally, we must treat them differently."¹⁵⁶

This objective likely explains Congress's decision to adopt a different treatment model of discrimination in the ADA. While consideration of race or gender may be inappropriate because neither characteristic bears any inherent relationship to an individual's work-related abilities, consideration of disability may be required because the impairment is often directly related to the ability to perform the job.¹⁵⁷ Reasonable accommodation therefore

153. See *id.* § 2000e-2(j) (prohibiting preferential treatment of any individual or group as a way to remedy gender or racial imbalance).

154. For a discussion of how the ADA adopts a different-treatment model of antidiscrimination law, see generally Ball, *supra* note 112, at 960 (stating that the ADA requires preferential treatment "to remove employment-related barriers to job performance and to provide those employees with an equal opportunity to compete"); Diller, *supra* note 10, at 40–44 ("The ADA relies on a different treatment vision of equality The reasonable accommodation requirement . . . is based upon a more complex and richer conception of equality than a simple requirement that the disabled and nondisabled be treated the same." (citing Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 10–11 (1996))); Miller, *supra* note 151, at 514 ("[T]he traditional civil rights model of treating people 'exactly the same' does not apply to disability discrimination.").

155. See Miller, *supra* note 151, at 514 ("For disabled people who need reasonable accommodations in order to perform the essential functions of their jobs, 'equal' treatment is tantamount to a barrier to employment, not a gateway."); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 146 (1998) ("[I]t is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.").

156. Karlan & Rutherglen, *supra* note 154, at 10 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)); see also US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) ("The [ADA] requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.") (emphasis in original).

157. See Cheryl L. Anderson, "*Neutral*" Employer Policies and the ADA: The

ensures that persons with disabilities are not deprived of job opportunities they otherwise might not have access to under a disability-blind statute.¹⁵⁸ The bottom line is that preferential treatment is not inimical to the ADA's purpose but part and parcel of the statutory design and key to enabling those with disabilities to move into mainstream American life, including the workforce.¹⁵⁹

V. DETERMINING REASONABLE ACCOMMODATIONS

According to the EEOC, “[w]hether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis.”¹⁶⁰ The Interpretive Guidance advises that the best means of determining the appropriateness of a requested accommodation is “through a flexible, interactive process that involves both

Implications of US Airways, Inc. v. Barnett, 51 DRAKE L. REV. 1, 17 (2002) (stating that ADA claims differ from Title VII claims in that “[d]isability is often an explicit factor in the employer’s reasons for its actions”); Diller, *supra* note 10, at 40 (observing that disabilities “do have an impact on an individual’s ability to perform a job,” and thus “unlike race, disability is frequently a legitimate consideration in employment decisions”).

158. See Ball, *supra* note 112, at 963 (“[P]referential treatment is sometimes necessary in order to place individuals with disabilities in a position where they are similarly situated to their nondisabled counterparts.” (citing Befort, *Reasonable Accommodation*, *supra* note 150, at 971)); Diller, *supra* note 10, at 41 (“[T]he reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs.”); Weber, *supra* note 11, at 1152 (stating that the reasonable accommodation duty “removes the barriers that currently exist to the full participation of people with disabilities in employment”).

159. See *Barnett*, 535 U.S. at 397 (finding that the ADA’s reasonable accommodation requirement, “[b]y definition . . . requires the employer to treat the employee with a disability differently, i.e., preferentially”); Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*”, 89 VA. L. REV. 825, 830 (2003) (arguing that “the ADA’s accommodation requirement is fundamentally of a piece with the core antidiscrimination requirements of Title VII”); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 863 (2004) (arguing that the ADA is “akin to other antidiscrimination laws” as it is “broadly concerned with the removal of barriers that prevent historically disadvantaged groups from enjoying equal opportunities”); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651, 696–97 (2001) (contending that accommodation and antidiscrimination are overlapping concepts that both advance broader “antisubordination” goals).

160. 29 C.F.R. app. § 1630.9, at 403–04 (2014).

the employer and the individual with a disability.”¹⁶¹ The Interpretive Guidance further states that “[t]his process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation.”¹⁶²

The majority view of commuting accommodations represents a flawed approach to determining the appropriateness of a reasonable accommodation. Rather than undertaking an individualized examination of the employee and the job, the majority view adopts a categorical approach that disqualifies all requests for commuting accommodations as inherently unreasonable.¹⁶³ This categorical approach is inconsistent with the case-by-case determination envisioned by the EEOC¹⁶⁴ and unduly restricts the multitude of potential accommodations that could enable individuals with disabilities to find and keep employment.

Determining the appropriateness of a reasonable accommodation requires a two-step analysis: (1) Is the proposed accommodation reasonable? And if so, (2) would it impose an undue hardship?¹⁶⁵ In my view,¹⁶⁶ these two concepts are not identical. As Justice Stephen Breyer explained in *Barnett*, the reasonable accommodation inquiry focuses generally on whether a work-related adjustment or modification is “reasonable on its face, *i.e.*, ordinarily or in the run of cases.”¹⁶⁷ The undue hardship inquiry, on the other hand, focuses narrowly on whether such an accommodation would impose a significant burden on the employer “in the particular circumstances.”¹⁶⁸ “Thus, these two concepts resemble the opposite ends of a telescope with one end focusing broadly and the other focusing narrowly.”¹⁶⁹

161. *Id.* at 405.

162. *Id.*

163. See, e.g., *Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 465, 480 (6th Cir. 2012); *Filar v. Bd. of Educ. of Chi.*, 526 F.3d 1054, 1067–68 (7th Cir. 2008).

164. See 29 C.F.R. app. § 1630.9, at 403–04.

165. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002).

166. But see *Weber*, *supra* note 11, at 1124 (arguing that “[r]easonable accommodation and undue hardship are two sides of the same coin”).

167. *Barnett*, 535 U.S. at 401–02.

168. *Id.* at 402.

169. Befort, *Reasonable Accommodation*, *supra* note 150, at 958; see also *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (“[A] reasonable accommodations is one employing a *method of accommodation* that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff’s preferred

A. Reasonable Accommodation

What makes an accommodation reasonable and appropriate? Three inquiries guide this analysis: the accommodation's (1) effect, (2) purpose, and (3) impact.

1. Is the Requested Accommodation Effective?

The first inquiry asks whether the proposed accommodation is effective.¹⁷⁰ The EEOC's Enforcement Guidance states that a modification or adjustment satisfies the reasonable accommodation requirement if it is effective.¹⁷¹ According to the EEOC, a proposed accommodation is effective if it enables an employee to "perform the essential functions of the position."¹⁷² If the employee is otherwise qualified for the job, an employer has a duty to provide an accommodation that would enable the employee to perform essential functions, unless providing the accommodation would impose an undue hardship.¹⁷³

In the realm of commuting, a modified work schedule may be an effective accommodation. Assume that regular and predictable attendance is an essential function for a particular job and that an employee with a sleep disorder has difficulty showing up for work in a timely fashion for a morning shift. If a modified work schedule with a later start time enables the employee to attain regular and predictable attendance, that accommodation would be effective and presumptively reasonable.¹⁷⁴ But, if the later start time does not result in regular and predictable attendance, the accommodation is ineffective, and the employee is not qualified for the position.¹⁷⁵

accommodation in the context of the particular agency's operations.").

170. See *Cowell v. Rite Aid Corp.*, 602 F.3d 495, 505–06 (3d Cir. 2010).

171. EEOC, *Enforcement Guidance*, *supra* note 70 ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective." (citing 29 C.F.R. app. § 1630.9 (1997))).

172. *Id.* Of course, an employer is required to provide an accommodation only if doing so is within its control. See *Colwell*, 602 F.3d at 505.

173. EEOC, *Enforcement Guidance*, *supra* note 70.

174. See *id.* ("Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies.").

175. See *id.* at n.65 ("[I]f the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.").

2. Is the Requested Accommodation Primarily Personal in Nature?

An employer is not obligated to provide personal accommodations, such as a wheelchair or medication monitoring, which benefit an employee throughout the day, both on and off the job.¹⁷⁶ As noted above, most commuting accommodations are not personal because their purpose is to enable an employee to get to work.¹⁷⁷

It is conceivable, however, that a requested commuting accommodation might be primarily motivated by personal reasons. Take, for example, the factual scenario presented in *Schneider v. Continental Casualty Co.*¹⁷⁸ In that case, the employer hired Schneider to work out of the company's downtown Chicago office.¹⁷⁹ Schneider, who was relocating from Baltimore, rented a townhouse in a far western suburb, which required her to commute 90 minutes each day.¹⁸⁰ Schneider had a back impairment and requested a transfer to the Downers Grove office, which was closer to her residence, to limit the pain associated with the long commute.¹⁸¹ The employer denied the request because many of Schneider's job responsibilities required her presence in the downtown office.¹⁸² In denying Schneider's ADA claim, the U.S. District Court for the Northern District of Illinois stated,

[W]hen Schneider was hired it was to work out of the Chicago office not the Downers Grove office. Schneider then made the choice to live in Aurora rather than Chicago or closer to Chicago. Thus, the limitation of the hour commute was self-imposed by Schneider and at no time did she try to change this self-imposed limitation.¹⁸³

While the *Schneider* outcome is a close call, blending both personal and work-related elements, the case illustrates that an accommodation for an employee's choice of residence may be primarily personal in nature.

176. See *supra* text accompanying notes 70–73.

177. See Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 88 (2008); see also *supra* Part IV.A.

178. See *Schneider v. Cont'l Cas. Co.*, No. 95 C 1820, 1996 WL 944721, at *1–5 (N.D. Ill. Dec. 16, 1996).

179. *Id.* at *1.

180. *Id.*

181. *Id.*

182. *Id.* at *2.

183. *Id.* at *9.

3. Is the Requested Accommodation Unreasonable Because of its Impact on Coemployees?

The majority opinion in *Barnett* rejected the plaintiff's contention that an effective accommodation is always a reasonable accommodation.¹⁸⁴ The Court explained that "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees."¹⁸⁵ The *Barnett* majority held that the reassignment was unreasonable because it has the effect of dashing the expectations of coemployees under the terms of US Airways's seniority system.¹⁸⁶

Building on this logic, a commuting accommodation could be deemed unreasonable due to its impact on other employees. The EEOC's Enforcement Guidance, however, cautions that a proposed accommodation should not be denied due to a slight impact on coworkers.¹⁸⁷ The Enforcement Guidance asserts, as examples, that lowered morale or the imposition of some additional marginal duties on other employees should not defeat an otherwise reasonable accommodation.¹⁸⁸ On the other hand, courts have held that "an accommodation that would result in other employees having to work harder or longer is not required under the ADA."¹⁸⁹

Two scholars have suggested standards for determining when an accommodation's impact on coworkers should render the accommodation unreasonable. Alex Long recommends that a requested accommodation

184. US Airways, Inc. v. Barnett, 535 U.S. 391, 399–02 (2002); *see supra* notes 133–35 and accompanying text.

185. *Barnett*, 535 U.S. at 400 (stating that otherwise-effective accommodations may be unreasonable if they result in "dismissals, relocations, or modification of employee benefits" of other employees).

186. *Id.* at 404–05.

187. EEOC, *Enforcement Guidance*, *supra* note 70. The Enforcement Guidance, which was issued prior to *Barnett*, assumes that an accommodation's impact on coemployees is an undue hardship issue rather than a reasonable accommodation issue.

188. *See id.* (identifying reasonable accommodations related to job restructuring, including "reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability").

189. *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (citing *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995); 29 C.F.R. § 1630.2(p)(2)(v)). "Moving one operator to a straight day shift would place a heavier burden on the rest of the operators in the plant." *Id.*; *see also* Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863, 878–79 (2003) (collecting cases).

should be considered unreasonable if “it would violate the contractual rights of another employee or otherwise result in an adverse employment action . . . for a nondisabled employee.”¹⁹⁰ Nicole Porter would tilt the balance more favorably for the employee with a disability, recommending that an accommodation should be found unreasonable only if it “would lead to the nondisabled employee’s termination.”¹⁹¹ While the courts have not yet endorsed either of these recommendations, both are normatively sound in that they suggest the impact on a coemployee must be very significant to render an effective accommodation unreasonable.¹⁹²

In the world of commuting, requested accommodations would seldom fail on these grounds. For example, the employer’s concern in *Colwell* that exempting the plaintiff from night-shift work “wouldn’t be fair” to the other workers would not, by itself, render such an accommodation unreasonable.¹⁹³

B. Undue Hardship

Undue hardship is an affirmative defense to an employer’s reasonable accommodation obligation.¹⁹⁴ Thus, an employer need not provide an employee with an accommodation—even a reasonable one—if it can “demonstrate that the accommodation would impose an undue hardship” on its operations.¹⁹⁵

190. Long, *supra* note 189, at 901 (arguing that this standard would place “the focus . . . on the actual effects or likely effects that providing an accommodation would have on other employees”).

191. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 335 (2007) (noting that this would be “a relatively rare occurrence”).

192. Cf. EEOC, *Enforcement Guidance*, *supra* note 70 (stating that an accommodation may impose an undue hardship if it would be “unduly disruptive of other employees’ ability to work”).

193. See *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 498 (3d Cir. 2010) (internal quotation marks omitted).

194. See 42 U.S.C. § 12112(b)(5)(A) (2012) (excluding accommodations that “would impose an undue hardship on the operation of the business” from the definition of discrimination on the bases of disability); 29 C.F.R. app. § 1630.15(d), at 412 (2014) (“An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.”).

195. See 42 U.S.C. § 12112(b)(5)(A); see also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (ruling that once a plaintiff shows a requested accommodation is reasonable, “the defendant/employer then must show special (typically case-specific)

The statute defines undue hardship as “an action requiring significant difficulty or expense.”¹⁹⁶ The EEOC’s Interpretive Guidance states that while the undue hardship provision “takes into account the financial realities of the particular employer . . . , the concept of undue hardship is not limited to financial difficulty.”¹⁹⁷ The Interpretive Guidance states that the term

circumstances that demonstrate undue hardship in the particular circumstances.”)

196. 42 U.S.C. § 12111(10)(A). The statute provides a list of four factors to consider in determining whether the proposed accommodation would cause a particular employer to suffer an undue hardship:

- (i) the nature and cost of the accommodation needed under [the ADA];
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B). The regulations add a fifth factor to this list: “The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facilities ability to conduct business.” 29 C.F.R. § 1630.2(p)(2)(v).

197. 29 C.F.R. app. § 1630.2(p), at 398. Some courts have concluded that the cost of an accommodation is relevant to the issue of an accommodation’s reasonableness, as well as to the issue of undue hardship. *See, e.g.*, *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 n.10 (6th Cir. 1996) (“In our view, determining whether a proposed accommodation is ‘reasonable’ requires a factual determination of reasonableness (perhaps through a cost-benefit analysis or examination of the accommodations undertaken by other employers) untethered to the defendant employer’s particularized situation.”), *abrogated by* *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2nd Cir. 1995) (“[A]n accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce.”); *Vande Zande v. Wisc. Dep’t of Admin.*, 44 F.3d 538, 542–43 (7th Cir. 1995) (“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.”). The EEOC disagrees with the need for a strict cost–benefit analysis. EEOC, *Enforcement Guidance*,

“‘undue hardship’ refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”¹⁹⁸ The Interpretive Guidance provides the following example of an accommodation that would fundamentally alter the nature of an employer’s operation:

[S]uppose an individual with a disabling visual impairment that makes it extremely difficult to see in dim lighting applies for a position as a waiter in a nightclub and requests that the club be brightly lit as a reasonable accommodation. Although the individual may be able to perform the job in bright lighting, the nightclub will probably be able to demonstrate that that particular accommodation, though inexpensive, would impose an undue hardship if the bright lighting would destroy the ambience of the nightclub and/or make it difficult for the customers to see the stage show.¹⁹⁹

The existence of an undue hardship must be determined “on a case by case basis.”²⁰⁰ The Interpretive Guidance goes on to state that “an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.”²⁰¹ Therefore, the undue hardship defense is “a floating concept that varies with the nature and cost of the proposed accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general.”²⁰² Thus, a request by an employee with a mobility impairment for an employer-paid

supra note 70, at n.9 (stating that while the employer may weigh costs and benefits in choosing between two or more options or in arguing whether an accommodation imposes an undue hardship, a cost–benefit analysis cannot determine whether an accommodation is reasonable).

198. *Id.*

199. *Id.*

200. 29 C.F.R. app. § 1630.15(d), at 412; *see also* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (determining that the existence of an undue hardship “requires a fact-specific, individualized inquiry”); EEOC, *Enforcement Guidance, supra* note 70 (“[U]ndue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.” (citing 29 C.F.R. app. § 1630.15(d) (1996))).

201. 29 C.F.R. app. § 1630.15(d), at 412.

202. Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 37 (1999).

nearby parking spot may result in an undue hardship for a downtown employer with limited resources but not for a suburban employer with large resources.

The Enforcement Guidance indicates that undue hardship is established in the event that a proposed accommodation would significantly disrupt the employer's business operations.²⁰³ The EEOC suggests that an undue hardship would result if an accommodation provided to an employee with a disability causes other employees to experience a significant decline in productivity.²⁰⁴

In a commuting context, a request by an employee for a modified work schedule may or may not impose an undue hardship. By analogy to the Enforcement Guidance example, if an employee with a disability is part of a team that works collaboratively on an assembly line, a request for a later start time might constitute an undue hardship if the accommodation would impede the ability of the other team members to perform their jobs in the employee's absence.²⁰⁵ On the other hand, if the employee works independently, such that a later start time would have no negative effect on the productivity of other workers, a later start time likely would not constitute an undue hardship.²⁰⁶

Some courts have stated that a cost–benefit analysis should be used in determining the existence of an undue hardship.²⁰⁷ Under this approach, the

203. See EEOC, *Enforcement Guidance*, *supra* note 70 (“Employers should carefully assess whether modifying the hours could significantly disrupt their operations—that is, cause undue hardship—or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.”).

204. *See id.* (“A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business.”).

205. *See id.*

206. *See id.* (“In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter . . . when they performed their individual assignments.”).

207. *See, e.g.*, Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 139 (2nd Cir. 1995)

benefits provided by an accommodation must be balanced with the costs that the employer would bear in providing the accommodation. The EEOC disagrees with this position.²⁰⁸ In its Enforcement Guidance, the EEOC states that “[n]either the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.”²⁰⁹ In support of this view, the Enforcement Guidance cites to the House of Representatives rejection of a proposed amendment to the ADA which would have presumed the existence of an undue hardship if a proposed accommodation would cost more than 10 percent of the employee’s annual salary to implement.²¹⁰ According to the EEOC, the proper role of the undue hardship defense is not a comparison between costs and benefits but between costs and the employer’s overall budget.²¹¹

VI. CONCLUSION

The majority view of commuting accommodations uses a flawed approach to the reasonable accommodation analysis. Rather than engaging in the individualized, case-by-case determination envisioned by the EEOC, courts in the majority view take a categorical approach that all requests for commuting-related accommodations are unreasonable *per se*.²¹² This categorical disqualification necessarily denies possible accommodations that could assist employees in getting to work and inappropriately limits employment opportunities for individuals with disabilities.

Courts adopting the majority view rely on two principal rationales for denying commuting accommodation requests. One is that commuting occurs

(“The burden on the employer, then, is to perform a cost/benefit analysis.”); *Vande Zande v. Wisc. Dep’t of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (“The legislative history equates ‘undue hardship’ to ‘unduly costly.’” (citing S. REP. NO. 101-116, at 35 (1989))).

208. See EEOC, *Enforcement Guidance*, *supra* note 70.

209. *Id.*

210. *Id.*; see 136 CONG. REC. H2471-75 (1990).

211. 29 C.F.R. app. § 1630.15(d), at 412 (2014); see also Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1449 (1991) (“[W]hat matters most in determining whether an accommodation causes undue hardship is not the cost of the accommodation in the abstract, but rather the employer’s ability to bear the cost.” (citing H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 35)); Weber, *supra* note 11, at 1150 (“The statutory term requires balancing of accommodations’ costs, but it is a balance with the overall site-specific resources of the employer, not with the benefit to the employee nor with anything else.”).

212. See *supra* Part III.A.

outside the work environment and is primarily for the employee's personal benefit.²¹³ The second is that requests for commuting accommodations are essentially requests for preferential treatment as compared to the remainder of the employer's workforce.²¹⁴

These two rationales, however, do not warrant an approach that finds all commuting accommodations unreasonable *per se*. Although an employee's commute is outside of the workplace, many requests for commuting accommodations are wholly under the employer's control, such as modified work schedules or reassignments to different work sites.²¹⁵ Additionally, most commuting accommodations are not purely personal in nature but are designed to ensure access to the workplace and the ability to perform the job.²¹⁶ As to the arguable issue of preferential treatment, the Supreme Court has explained that a difference in treatment does not create an automatic exemption from the Act's reasonable accommodation requirement.²¹⁷ Instead, some preferential accommodations are necessary to afford individuals with disabilities the same opportunities as those who are not disabled.²¹⁸

These principles apply beyond the commuting context and provide guidance for the reasonable accommodation analysis as a whole. Accommodation requests should be analyzed on an individualized basis that takes into account the interests of both the requesting employee and the responding employer.²¹⁹ Categorical limitations, such as the inside–outside distinction, should not trump this case-by-case approach.

In undertaking this individualized assessment, three inquiries should inform the reasonable accommodation analysis. First, would the requested accommodation be effective in enabling successful performance of essential job functions?²²⁰ Second, is the requested accommodation primarily work-related, or is it primarily personal in nature?²²¹ Third, would the proposed

213. See *supra* Part IV.A.

214. See *supra* Part IV.B.

215. See, e.g., *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505–06 (3d Cir. 2010).

216. See generally *Basas, supra* note 177.

217. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397–99 (2002).

218. See *id.* at 397 (“Were that not so, the ‘reasonable accommodation’ provision could not accomplish its intended objective.”).

219. See 29 C.F.R. app. § 1630.9, at 403–04 (2014).

220. See *supra* Part V.A.1.

221. See *supra* Part V.A.2.

accommodation significantly impair the productivity of other employees?²²² If the answer to each of these questions favors granting an accommodation to the employee, the accommodation request should be deemed reasonable, and the employer should be obligated to grant the request unless it would impose an undue hardship.

222. *See supra* Part V.A.3.