DISQUALIFYING UNIVERSALITY UNDER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

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ABSTRACT

This Article reveals a new resistance strategy to disability rights in the workplace. The initial backlash against the Americans with Disabilities Act of 1990 (ADA) targeted protected class status by characterizing the ADA's accommodation mandate as special treatment that benefitted the disabled at the expense of the nondisabled workforce. As a result, federal courts treated the ADA as a welfare statute rather than a civil rights law, which resulted in the Supreme Court dramatically narrowing the definition of disability. Congress responded with sweeping amendments in 2008 to expand the class of individuals with disabilities who are entitled to accommodations and to align the ADA with Title VII of the Civil Rights Act of 1964 by establishing nearly universal impairment-based antidiscrimination protection. While these amendments have largely dismantled the disability status barrier, employers and their attorneys are working to erect a new barrier with the ADA's "otherwise qualified" provision, which requires plaintiffs to prove the ability to perform all of the "essential functions of the job" as part of a prima facie disability discrimination case. This Article shows how federal courts are using the concept of "essential job functions" to entrench able-bodied norms into seemingly neutral job descriptions and workplace designs to again restrict access to accommodations and undermine the ADA as a universal civil rights law. By replacing "non-disabled" with "non-qualified" as the

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ADA's new gatekeeper, this strategy effectively shifts disability stereotypes away from individuals with disabilities and onto the definition of work itself, which may render those stereotypes even more difficult to recognize and disrupt.

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INTRODUCTION

The unrealized potential of the original Americans with Disabilities Act of 1990 (ADA)[1] is a well-documented story. Not long after disability rights advocates and lawmakers heralded the ADA as a "comprehensive national mandate" to eliminate disability discrimination in the workplace,[2] the business community launched an effective narrative in both the popular press and in federal courts to undercut the statute's impact as a core piece of civil rights

1. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117 (2012)).
2. *See* 42 U.S.C. § 12101(b)(1).

legislation.[3] By characterizing the ADA's accommodation mandate as a form of special treatment, and by describing individuals with disabilities as unworthy recipients who were benefiting at the expense of the nondisabled workforce, employers convinced the federal judiciary to view the ADA as a costly welfare statute rather than a civil rights law.[4] As a result, judges focused not on enforcing antidiscrimination protection, but on strictly policing the boundaries of the statute's protected class.[5] This persuasive campaign culminated in a series of United States Supreme Court cases that greatly restricted the ADA's reach by narrowly defining who constitutes an individual with a disability.[6]

Congress responded to those decisions by enacting the ADA Amendments Act of 2008 (ADAAA),[7] which opened the door for a disability rights revival. The ADAAA's explicit purpose was to restore the class of individuals with disabilities to the broad scope that Congress had intended under the original ADA.[8] The ADAAA's implicit objective, however, was to recast the ADA as a civil rights statute on par with Title VII of the Civil Rights Act of 1964. Congress accomplished this larger objective by extricating disability from the broader concept of impairment and placing impairment alongside race, religion, national origin, sex, and age as an additional protected class under federal antidiscrimination law.[9] Yet this major

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3. *See generally* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003) (compiling articles on the social and judicial backlash against the original ADA).

4. *See* Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315-20 (2009) (summarizing evidence of this narrative).

5. *Id.* at 318.

6. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139-60 (2000) (detailing the Supreme Court's narrowing of the ADA's disability definition during the 1990s).

7. Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADAAA] (codified at 42 U.S.C. §§ 12101-12113). The ADAAA took effect on January 1, 2009. *See id.* § 8.

8. *See id.* § 2; *see also* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1270 (2009); Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187 (2008); Ani B. Satz, *Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 985.

9. *See generally* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937 (2012) [hereinafter Travis, *Impairment*].

accomplishment garnered little attention as advocates wisely framed the amendments as only addressing the definition of disability and as merely restoring that definition to what was intended under the original ADA.[10]

Understanding the ADAAA's real contribution to the civil rights landscape requires an understanding of the various roles played by the statute's three-pronged definition of disability and how those roles changed before and after the amendments. Under the original ADA, all of the prongs potentially served the same two purposes: both defining the class of individuals who are protected from employment discrimination and determining who may be eligible for reasonable workplace accommodations. The three-pronged definition included: (1) individuals with "a physical or mental impairment that substantially limits one or more major life activities" (the "actual" disability prong); (2) individuals with "a record of such an impairment" (the "record of" prong); and (3) individuals who are "regarded as having such an impairment" (the "regarded as" prong).[11] Employees rarely invoked the "record of" prong, so nearly all pre-ADAAA case law involved "actual" and "regarded as" claims.

Because courts were focused on limiting the impact of the ADA's accommodation mandate—and because it was unclear whether that mandate applied to all parts of the disability definition[12]—courts scrutinized all of the categories and restricted their scope under the original statute in dramatic ways. Courts narrowed the "actual" disability category by assessing the effects of impairments with the use of mitigating measures such as medication, setting a high hurdle for the "substantially limits" requirement, and deeming "major life activities" to only include functions that are central to most people's daily lives.[13] Courts virtually eliminated "regarded as" claims by requiring an employee to prove that an employer mistakenly regarded him or her as meeting the narrow

10. *See id.* at 940.

11. 42 U.S.C. § 12102(1).

12. *See* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 920-27 (2000) [hereinafter Travis, *Leveling*] (documenting the Circuit Court split); *see also* Michael D. Moberly, *Letting* Katz *Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 610-33 (1998) (same).

13. *See* Feldblum, *supra* note 6, at 139-57.

judicial definition of an actual disability.[14] In so doing, courts effectively grafted a functional limitations test onto the "regarded as" prong, and many courts further required proof that the employer's misperceptions resulted from disability-based animus or stereotypes.[15] By the time Congress responded with the ADAAA in 2008, case law had blurred together the "actual" and "regarded as" categories and had limited the statute's reach to a very small minority group.[16]

The ADAAA made major changes to both the "actual" and "regarded as" prongs, which is how Congress accomplished both its explicit and its implicit goals. The ADAAA has received the most attention for expanding the "actual" disability category by requiring courts to assess impairments without reference to mitigating measures,[17] by lowering the "substantial limitations" hurdle,[18] by expanding the list of "major life activities,"[19] and by demanding that courts interpret the protected class as broadly as possible.[20] Yet in many ways, Congress's greatest accomplishment was in the ADAAA's amendments to the "regarded as" prong. It was through the "regarded as" amendments that Congress established nearly universal impairment-based antidiscrimination protection, thereby solidifying the ADA's status alongside Title VII as a core civil rights law.

Congress accomplished this result in two steps. First, the ADAAA severed the accommodation mandate from claims brought under the "regarded as" prong.[21] Second, the ADAAA provided that a "regarded as" plaintiff need only prove that an employer took an adverse employment action because of the plaintiff's real or perceived impairment—not that the employer also regarded the

14. *See id.* at 157-60; *see also* Travis, *Impairment*, *supra* note 9, at 946-49.

15. *See* Travis, *Impairment*, *supra* note 9, at 947-49.

16. *Id.* at 947.

17. *See* ADAAA, *supra* note 7, §§ 2(b)(2), 4(a) (codified at 42 U.S.C. § 12102(4)(E)(i)). The ADAAA also expanded the "actual" disability prong by clarifying that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(D)).

18. *See id.* § 2(a)(7)-(8), (b)(4)-(5) (codified at 42 U.S.C. § 12101 note); *see also id.* § 4(a) (codified at 42 U.S.C. § 12102(4)(B)).

19. *See id.* § 4(a) (codified at 42 U.S.C. § 12102(2)) (expanding the list of "major life activities" and including major bodily functions); *see also id.* § 2(b)(4) (codified at 42 U.S.C. § 12102 note).

20. *See id.* § 4(a) (codified at 42 U.S.C. § 12102(4)).

21. *See id.* § 6(a)(1) (codified at 42 U.S.C. § 12201(h)).

impairment as substantially limiting a major life activity, nor that the employer's decision resulted from disability-based prejudice or stereotypes.[22] Without a functional limitations component or a stigma-based inquiry, the "regarded as" prong now protects nearly all individuals from impairment-based decision-making in the workplace, just as Title VII protects against employment decisions based on race, color, national origin, religion, and sex.[23] By applying the accommodation mandate only to individuals whose impairments are or have been substantially limiting, and by expanding simple antidiscrimination protection to cover individuals with nearly all physical or mental impairments, the ADAAA extricated disability from the broader concept of impairment and bestowed upon impairment the status of an independent protected class.[24] In other words, the amended ADA now prohibits discrimination on the basis of impairment, while using disability as the trigger for accommodation rights.

Through these amendments, Congress did more than just reject federal courts' narrow interpretation of disability status, which is often described as the ADAAA's sole contribution. The amendments also reflect congressional rejection of federal courts' treatment of the ADA as a welfare statute for a minority group whose members must demonstrate their worthiness to receive the statute's benefits. By providing nearly universal impairment-based antidiscrimination protection, Congress firmly established the amended ADA alongside Title VII as a core piece of civil rights legislation.

Because of the original ADA's history of backlash and resistance, scholars received the amendments with guarded optimism. Despite explicit congressional repudiation of Supreme Court decisions and well-crafted language to support broad access to disability-based accommodations and impairment-based antidiscrimination protection, scholars wondered whether employers and courts would continue to resist the ADAAA's full import as a civil rights law. Although the ADAAA largely eliminated courts' ability to use disability status as the law's gatekeeper, the

22. *See id.* § 3 (codified at 42 U.S.C. § 12102(3)); *see also* Travis, *Impairment*, *supra* note 9, at 950-51.

23. *See* Travis, *Impairment*, *supra* note 9, at 951-55. Protection from impairment-based discrimination is "nearly" universal because Congress carved out a narrow exclusion for impairments that are both transitory and minor. *See* ADAAA, *supra* note 7, § 3 (codified at 42 U.S.C. § 12102(3)(B)). "Transitory" is defined as having "an actual or expected duration of 6 months or less." *Id.*

24. *See* Travis, *Impairment*, *supra* note 9, at 951-55.

amendments did not eliminate the incentives on employers and courts to find another gate-keeping mechanism to avoid the difficult questions of accommodation and full recognition of disability civil rights.[25] So while disability rights advocates rightfully applauded Congress's bold restoration of the ADA's protected class, scholars worried that a lurking Hydra head might soon emerge.[26] In Greek mythology, the Hydra was an infamous, multi-headed creature that was nearly impossible to slay because every time a would-be vanquisher severed one of the creature's heads, another head grew in its place.[27] While commentators awaited new case law during the delay period caused by the ADAAA's nonretroactivity, they speculated about the risk that a new head might replace the one severed by Congress's rejection of courts' narrow interpretations of disability status.[28]

Although scholars identified several potential sources for a new Hydra head,[29] the most common concern was that the ADA's

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25. *See* Hillary K. Valderrama, Comment, *Is the ADAAA a "Quick Fix" or Are We Out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 202-03 (2010) (describing the "definition of disability" as the pre-ADAAA "gatekeeper," and arguing that "courts have similar incentives to establish another gatekeeping mechanism"); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 4-5 (2014) [hereinafter Porter, *Backlash*] (positing that "[b]ecause courts and employers see the ADA as giving preferential treatment to individuals with disabilities . . . [and] because courts can no longer limit ADA protection using the definition of disability, [courts] might feel compelled to limit protection in other ways").

26. The Hydra image is borrowed from Professor Deborah A. Widiss, who used it to describe courts' tendency to continue applying a congressionally overridden statutory interpretation precedent to similar language in other statutes. *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 863, 866, 877 (2012). In the ADA context, the Hydra problem is intra- rather than inter-statutory in nature.

27. *See id.* at 877.

28. *See, e.g.*, Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 722 (2014) ("If the primary result of plaintiffs [overcoming] . . . the question of disability is only that they lose on summary judgment on the other elements of the prima facie case, little will have been gained by the ADAAA . . . .").

29. One potential Hydra head is the ADA's "impairment" definition, which was largely ignored in pre-ADAAA case law. *See* Travis, *Impairment*, *supra* note 9, at 959-81 (analyzing the risk that courts might use "impairment" to limit protection under the ADAAA); *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51-52 (2009) (suggesting that pre-ADAAA case law "gives judges tools to read 'impairment' parsimoniously" in post-ADAAA cases); Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 209, 213 (2012) (noting

"qualified individual" requirement might become the new gatekeeper for statutory protection.[30] Although the ADAAA expanded the protected class of individuals with disabilities, Congress did not change the wording in the ADA's antidiscrimination provision, which has always extended protection not to *all* individuals with disabilities, but only to individuals with disabilities who are "*qualified*."[31] Nor did Congress change the statute's definition of a

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that courts might "put more pressure on the evidence required to demonstrate an 'impairment'" as a "new way[ ] to narrow the ADA's protections"). *But see* Nicole Buonocore Porter, Essay, *Relieving (Most of) the Tension: A Review Essay of* Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement, 20 CORNELL J.L. & PUB. POL'Y 761, 776 (2011) (expressing a "positive outlook" that courts will not "turn to interpreting 'impairment' strictly to limit coverage"). Another potential Hydra head is the ADA's causation element, which requires plaintiffs to prove "that any adverse action was taken on the basis of disability." *See* Stein et al., *supra* note 28, at 723-26 (analyzing case law indicating that causation might replace disability status as a new ADA gatekeeper).

30. *See, e.g.*, Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts To Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1022 (predicting that ADAAA cases "will center more on whether an individual is qualified"); Emens, *supra* note 29, at 213-14 (predicting that the ADAAA will "put pressure on courts to decide who is 'otherwise qualified,'" and that "courts inclined to keep the scope of the statute limited may interpret [that] provision[] restrictively"); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1499 (2011) (warning that the ADAAA may not increase plaintiffs' success rate because "a court may determine that a plaintiff was not qualified for the job in question"); Jennifer M. Jackson, *The Americans with Disabilities Act, Mental Illness, and Medication: A Historical Perspective and Hope for the Future*, 12 MARQ. ELDER'S ADVISOR 219, 242 (2010) (predicting that the ADAAA will "shift focus . . . to whether [a plaintiff] is a 'qualified individual'"); Satz, *supra* note 8, at 989 (warning that "after the ADAAA, courts may shift focus . . . to what it means to be 'qualified'"); Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 860 (2009) (predicting that the ADAAA will "direct[] the focus of future litigation to whether an individual is a 'qualified individual'"); Valderrama, *supra* note 25, at 204 (warning that courts might "achiev[e] the same result as the restrictive definition of disability" by "end[ing] the inquiry . . . based on the plaintiff's qualifications").

31. *See* 42 U.S.C. § 12112(a) (2012) (emphasis added). The ADAAA modified the original language prohibiting discrimination against a qualified individual "because of the disability of such individual" to "on the basis of disability." *See* ADAAA, *supra* note 7, § 5(a)(1) (codified at 42 U.S.C. § 12112(a)). This was intended to align the ADA's language with Title VII. *See* 154 CONG. REC. S8347 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments of 2008); *see also* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of*

"qualified individual with a disability,"[32] which remains: "an individual [with a disability] who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[33] In pre-ADAAA litigation, an employee's status as a "qualified" individual was typically overshadowed by analysis of the employee's status as an individual "with a disability."[34] Because courts were so willing to dismiss cases on a finding of "non-disability," courts rarely got to the qualification issue.

Unfortunately, evidence is mounting in the growing body of post-ADAAA case law to suggest that commentators' concerns about the ADA's "qualified individual" provision were well-founded. This Article documents the ways in which the qualification requirement is being used to replace disability status as the new gatekeeper for ADA protection. More specifically, this Article demonstrates how the "essential functions" component of the qualifications test has become the critical source for undermining the ADAAA. Because the problem is revealing itself in post-ADAAA case law, it is easy to describe this development simply as the new form of judicial backlash. But judicial backlash does not capture the entire story. Just as the original ADA backlash was fueled in part by concerted efforts from the business community, the new disqualification strategy for undermining the ADAAA is also gaining momentum because of sophisticated strategies and narratives by employers and by the management-side attorneys and human resource professionals who advise them.

This Article begins in Part I by revealing the role that employers and their advisors have played in launching the disqualification strategy, and by documenting the empirical evidence of this strategy's success in federal courts. Part II explains more specifically how the essential functions concept is enabling "non-qualified" to replace "non-disabled" as the new gatekeeper for ADA

Causation and Reasonable Accommodation Under the ADA, 82 MISS. L.J. 67, 71 (2013).

32. *See* EEOC, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, ¶ 29 [hereinafter EEOC, Q&A], http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Oct. 19, 2015).

33. 42 U.S.C. § 12111(8) (2012).

34. *See* Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 552-53 (2011) (noting that before the ADAAA, "the 'otherwise qualified' analysis was subsumed and even eclipsed by the disability/coverage analysis" and was "largely ignored by courts and scholars").

protection. This development indicates that the welfare-statute view of the ADA is still influencing courts to strictly police access to workplace accommodations in claims under the "actual" disability prong. By shifting the gate-keeping method away from scrutinizing who is truly disabled to instead scrutinizing who is truly qualified, courts are subtly shifting disability-based stereotypes away from individuals with disabilities and onto the workplace itself, which may be even more difficult to disrupt. By broadly defining a job's essential functions—and by deferring to employers' unsubstantiated characterizations of essential job functions—courts are embedding able-bodied norms into the definition of work itself.

While Part II focuses on how the essential functions concept is limiting access to workplace accommodations for individuals with actual disabilities, Part III reveals how the essential functions concept is undermining universal impairment-based antidiscrimination protection under the "regarded as" prong. Because impairment-based discrimination under the "regarded as" prong no longer triggers accommodation rights under the ADAAA, the essential functions inquiry should have no role to play—just as it plays no role in discrimination claims under Title VII on the basis of race, color, national origin, religion, or sex. By applying the essential functions concept to claims alleging simple impairment-based discrimination (as opposed to claims seeking accommodations), courts are imposing an artificial hurdle that does not exist for other protected statuses under federal antidiscrimination law. Applying the essential functions component of the ADA's qualification requirement to "regarded as" claims builds disability stereotypes into ADA doctrine by reinforcing the notion that impairments typically *are* related to job performance unless proven otherwise, rather than adopting the opposite presumption as is done for protected statuses under Title VII. The result is to misalign the ADA from Title VII and to relegate impairment to a second-class protected class status.

Although this analysis highlights the new battleground for the disability civil rights struggle, the ADAAA is not a failure. The amendments successfully shifted the conversation away from policing protected class status, which lays the foundation for universalizing and destigmatizing disability, and which pushes courts closer to confronting the issues that really matter for combating impairment and disability-based decision-making and exclusionary workplace design. Yet in order to achieve the ADAAA's full potential, disability rights advocates must proactively confront the risks posed by the ADA's qualification requirement and essential

functions inquiry to help ensure that the ADA retains its stature as a core component of federal civil rights law.

I. THE DISQUALIFICATION STRATEGY: "NOT QUALIFIED" AS THE ADA'S NEW GATEKEEPER

When Congress enacted the ADAAA, management-side attorneys and human resource organizations recognized the major impact that the law would have on covered employers. These advisors launched a swift educational campaign to help employers understand how the expanded definition of disability also expanded employers' obligations and potential legal risk. In addition to advising employers how to modify their practices to comply with the expanded legal responsibilities, however, these influential intermediaries also went to work identifying new areas of potential resistance and alternative sources for litigation defense. Recognizing that the ADAAA erects a daunting barrier to employers' previous strategy of challenging an employee's disability status, management-side attorneys and human resource (HR) professionals quickly converged upon the ADA's "qualified individual" requirement to counteract the ADAAA. Just as scholars and commentators had feared, employers were informed in quite specific and pragmatic terms about how to embark upon a new "disqualification strategy."

Many management-side law firms published newsletters, bulletins, and updates for employers explicitly advising them that their pre-ADAAA litigation strategy of challenging an employee's disability status should be replaced by challenging employees' qualifications for the job. A typical publication by one management-side law firm was titled, "An Employer's Roadmap for Defending ADA Claims."[35] The law firm warned employers that because the ADAAA had "expanded the definition of a 'disability,'" it had "thereby reduc[ed] the effectiveness of one of an employer's best defenses to a disability claim: that the employee was not disabled."[36] "With the advent of the ADAAA," the publication explained, "an employer's best chance to defeat a disability discrimination claim may require the employer to show that the plaintiff was not a qualified individual."[37] Another attorney publication providing

35. Alan Rupe, *An Employer's Roadmap for Defending ADA Claims*, LAW 360 (July 19, 2013, 12:51 PM), http://www.law360.com/articles/456014/an-employer-s-roadmap-for-defending-ada-claims.

36. *Id.*

37. *Id.*

guidance to employers similarly warned that the ADAAA had largely eliminated the "attractive argument for employers . . . that an individual did not have a 'disability,'" which was the litigation strategy that previously had enabled employers to "prevail at summary judgment."[38] The attorneys explained that "the new battleground" should be waged by challenging whether "an employee is a qualified individual."[39]

Management-side attorneys and HR consultants did more, however, than just identify "disqualification" as a new strategy for employers to pursue if they faced an ADAAA lawsuit. They also gave specific advice about prelitigation steps that employers should take to build the foundation for such a defense. These legal and professional advisors urged employers to "[l]ay the groundwork"[40] and take "proactive measure[s]"[41] in order to "best position themselves in the event of a claim,"[42] and to "preserve . . . the 'not qualified' defense."[43]

The central piece of advice for employers to preserve a "not qualified" defense for ADAAA litigation was to strategically write

38. A. Dean Bennett & Scott E. Randolph, *Is Everyone Disabled Under the ADA? An Analysis of the Recent Amendments and Guidance for Employers*, 36 EMP. REL. L.J. 1, 5 (2011).

39. *Id.* at 7; *see also* JOHN M. HUSBAND & BRADFORD J. WILLIAMS, YOU JUST MIGHT FIND . . . YOU GET WHAT YOU NEED—A PRACTICAL GUIDE TO FINDING AND MANAGING DISABILITY ACCOMMODATIONS (2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/031.authcheckdam.pdf (suggesting that employers focus on "whether plaintiffs are 'qualified individuals'" to defeat claims after the ADAAA); Margaret Vroman, *Hiring and Firing the Mentally and Psychiatrically Disabled: Advice for HR Professionals*, CORNELL HR REVIEW (Sept. 16, 2013), http://digitalcommons.ilr.cornell.edu/chrr/49/ (advising HR professionals to focus on demonstrating lack of qualification in post-ADAAA claims); Frank C. Morris, Jr., *ADA Amendments Act: Final EEOC Regulations—What Employers Need to Know*, SS051 ALI-ABA 1263, 1268 (2011) (advising employers to "focus on whether the applicant or employee is qualified for the job" after the ADAAA).

40. *See* Frank C. Morris, Jr., *Selected ADA Developments*, ST001 ALI-ABA 399, 409 (2011).

41. *See The Importance of Job Descriptions Under the Americans with Disabilities Act*, THE HUMAN EQUATION, INC., http://www.thehumanequation.com/en/news_rss/articles/2009/12-04-importance-of-job-descriptions-under-americans-with-disabilities-act.aspx (last visited Oct. 19, 2015).

42. *See* Bennett & Randolph, *supra* note 38, at 8; *see also* Rupe, *supra* note 35 (using case studies to give employers a "roadmap" on "how to preserve, raise and present the 'not qualified' defense").

43. *See* Rupe, *supra* note 35.

job descriptions for each position in the firm.[44] Employment attorneys correctly observed that, even before the ADAAA, courts had shown great deference to an employer's definition of a job's "essential functions" if an employer had listed them in a job description prepared before litigation.[45] Employment attorneys recognized that broadly defining a job's essential functions would help employers use a disqualification strategy later in court. Attorneys explained to employers that "a successful 'unqualified' defense" can be raised if an employer "show[s] that the employee is unable to perform the essential functions of the job."[46] "Individuals who cannot perform the essential job functions are not considered qualified under the ADA, and are therefore not protected by it," explained one HR training organization to employers in a publication describing the importance of job descriptions after the ADAAA.[47] "A job description is often an employer's first line of defense," employers were advised, "because it is one of the employer's best chances to clearly and unequivocally show the court what it considers to be the essential functions of the job."[48]

In general, management-side attorneys and HR organizations encouraged employers to include all possible essential functions in their job descriptions[49]—i.e., the push was toward being over- rather

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44. *See, e.g.*, THE HUMAN EQUATION, INC., *supra* note 41 (advising that "the most effective proactive measure employers can take" to avoid ADAAA liability is "written job descriptions"); Stephen C. Sutton, *The EEOC Final Regulations Under the ADAAA*, BAKER HOSTETLER (May 24, 2011), http://www.bakerlaw.com/the-eeoc-final-regulations-under-the-adaaa-5-24-2011/ (telling employers to "seriously consider drafting job descriptions" to avoid ADAAA liability).

45. *See, e.g.*, Morris, *supra* note 39, at 1268 (advising employers that "[p]roperly prepared job descriptions should be afforded considerable weight by the EEOC and the courts"); Vroman, *supra* note 39 (advising HR professionals that "[c]ourts give the employer's judgment great deference when determining the essential functions of a job," and that "an employer may protect itself from liability by preparing a written job description before advertising or interviewing applicants for the job").

46. *See* Rupe, *supra* note 35.

47. *See* THE HUMAN EQUATION, INC., *supra* note 41 (providing online training to employers).

48. *See* Rupe, *supra* note 35 (advising employers that job descriptions can establish "evidence regarding the essential functions of the job"); *see also* Vroman, *supra* note 39 (advising HR professionals that job descriptions are "considered evidence of the essential job functions").

49. *See, e.g.*, Morris, *supra* note 40, at 409 (encouraging employers to "review and update all job descriptions" to include "all essential job functions"); *see also* Sutton, *supra* note 44 (advising employers "to ensure that the essential functions of positions are appropriately defined, documented and supportable");

than under-inclusive in essential function lists. Attorneys emphasized, for example, that job functions need not be routine aspects of a job to be deemed essential, and that courts would accept an employer's characterization of a task as essential even if it was performed "rarely"[50] or only "from time to time."[51]

Many employment attorneys went even further by suggesting specific essential functions for employers to consider adding to their job descriptions—items that the attorneys calculated would help courts later reject a wide range of potential accommodation requests. These suggested essential functions to list in job descriptions included, for example, "reading, performing manual tasks, concentrating, thinking, communicating, and interacting with others."[52] HR advisors urged employers to include not just "functions and tasks," but also "qualifications," including "education and experience requirements."[53] Employers were urged to think

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ADAAA REFERENCE TOOLS, BLANK ROME, LLP 1, https://www.blankrome.com/siteFiles/PracticeAreas/7E8ACAB6B3BBF687CF74F741FFE2B009.pdf (advising employers to "update their job descriptions to ensure that they include all the essential functions of the position"); Thom K. Cope, *The ABCs of the ADAAA: What Employers Need to Know About Recent Changes to the Americans with Disabilities Act*, MESCH, CLARK & ROTHSCHILD, http://www.mcrazlaw.com/the-abcs-of-the-adaaa-what-employers-need-to-know-about-recent-changes-to-the-americans-with-disabilities-act/ (last visited Oct. 19, 2015) (urging companies to "update job descriptions and document the essential functions of every job"); *New ADAAA Regs Now in Effect! Get Ready for More Lawsuits*, HR SPECIALIST (May, 24, 2011), http://www.thehrspecialist.com/37254/New_ADAAA_regs_now_in_effect_Get_ready_for_more_lawsuits.hr?cat=hr_management&sub_cat=personnel_files (telling employers to "[r]eview your job descriptions to ensure they fully detail each position's essential functions"); Megan Anderson, *Employment Edge 123rd Edition—Are You Prepared to Comply with the New ADAAA Regulations?*, GRAY PLANT MOOTY (May 19, 2011), http://www.gpmlaw.com/resources/newsletters/employment-edge-123rd-edition.aspx (urging employers to "revis[e] written job descriptions to update the description's list of 'essential functions'").

50. *See, e.g.*, Bill Donahue, *Rare Job Tasks Can Be 'Essential' Under ADA, 8th Circ. Says*, LAW 360 (Apr. 5, 2013, 2:39 PM), http://www.law360.com/articles/430432/rare-job-tasks-can-be-essential-under-ada-8th-circ-says.

51. *The Ability to Perform a Rare Job Task Can Be "Essential*,*"* FOLEY & LARDNER, LLP. (Apr. 15, 2013), http://www.foley.com/the-ability-to-perform-a-rare-job-task-can-be-essential-04-15-2013/ (advising employers that "job tasks can indeed be 'essential' even if they are not routinely performed," so employers should include in job descriptions "tasks that may need to be performed from time to time").

52. *See* Anderson, *supra* note 49 (urging employers to list the ADAAA's new major life activities as essential job functions).

53. *See* THE HUMAN EQUATION, INC., *supra* note 41 (providing online training to employers).

expansively and to consider listing items such as "mathematical reasoning ability, willingness to learn, customer service skills, [and] experience working on a team."[54] Advisors also recommended that employers include "probable physical demands of the position," such as lifting, and include "typical environmental factors affecting the position," such as the ability to tolerate "excessive noise, high temperatures, [or] outdoor work in rain and snow."[55] Attorneys also emphasized to employers the importance of including "mental," not just "physical," functions of each job.[56]

The Society for Human Resource Management (SHRM), which is the world's largest HR membership organization, also gave employers a practical tool to help reduce employee claims: a sample employment policy that purports to establish the employer as the final authority on defining the essential functions of a job.[57] The sample policy, which is available for free on the Internet, states: "Essential functions of the job . . . refers to those job activities that are determined *by the employer* to be essential or core to performing the job; these functions cannot be modified."[58] SHRM's suggestion is for employers to adopt the policy and distribute it to their employees in advance of litigation. Some attorneys have further advised employers to require employees to sign an acknowledgement of the essential functions listed in a job description to make it more difficult for employees to characterize functions as nonessential during a disqualification challenge in later litigation.[59]

Although it is difficult to assess the impact that management-side attorneys and HR organizations have had getting employers to "lay the foundation" for a disqualification strategy to resist the ADAAA's full effect, preliminary data suggests that employers have indeed heeded the advice and that attorneys have begun using the

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54. *See id.*

55. *See id.*

56. *See* CHAMBERLAIN HRDLICKA, ATTORNEYS AT LAW, LABOR & EMPLOYMENT ALERT: HIGHLIGHTS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S FINAL ADAAA REGULATIONS 2 (2011), https://www.chamberlainlaw.com/media/news/136_L_E_Alert_EEOC_Final_Regulations_on_ADAAA.pdf (stating that the ADAAA makes it "more important than ever" for job descriptions to include all "essential functions (both physical and mental)").

57. *ADA/ADAAA Policy*, SOC'Y FOR HUMAN RES. MGMT. (July 3, 2014), http://www.shrm.org/templatestools/samples/policies/pages/adaadaaapolicy.aspx.

58. *Id.* (emphasis added).

59. *See, e.g.*, HUSBAND & WILLIAMS, *supra* note 39 (advising that "[e]mployees should also be apprised of—and ideally acknowledge their agreement with—the essential functions of their positions").

new strategy successfully in federal courts.[60] Because the ADAAA applies only to alleged discriminatory conduct that occurred after the statute's effective date,[61] courts applied pre-ADAAA law to many cases during a lengthy transition period after the ADAAA's enactment. That period offered a unique data set for analysis because courts were simultaneously deciding some cases under pre-ADAAA law and some under the ADAAA, depending upon whether the allegations were based on employer conduct that took place before or after January 1, 2009.[62]

Professor Stephen Befort conducted an empirical analysis of case decisions during that transition phase to help assess employers' new litigation strategies and their effectiveness in federal courts.[63] His study reviewed all reported federal district court summary judgment decisions in ADA cases from January 1, 2010, through April 30, 2013.[64] Specifically, Befort analyzed whether employers were responding to the ADAAA by shifting their asserted grounds for seeking summary judgment from challenging the employee's disability status to challenging the employee's qualifications, and if so, whether that strategy was succeeding.[65] The data answered both questions in the affirmative.[66]

On the positive side, the data reveals that the ADAAA is achieving its intended effect of making it harder for employers to challenge an employee's disability status.[67] While district courts

60. *See generally* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013) (describing data showing that employers have increased their use of a disqualification strategy in defending claims under the ADAAA).

61. *See* Reynolds v. Am. Nat'l Red Cross, 701 F.3d 143, 151-52 (4th Cir. 2012).

62. *See* Befort, *supra* note 60, at 2046, 2049-50.

63. *See id.*

64. *Id.* at 2046-49 (describing the methodology for collecting and coding cases).

65. *See id.* at 2050-57.

66. *See id.* at 2057-66.

67. *See id.* at 2057-58; *see also* Porter, *Backlash*, *supra* note 25, at 4, 19-47 (analyzing case law and concluding that the ADAAA has "made it much easier for a plaintiff to satisfy the threshold question of whether the individual meets the statutory definition of disability"); NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 13 (2013), https://www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb.pdf (finding that the ADAAA "has had a dramatic impact in improving the success rates of plaintiffs in establishing disability"); Stein et al., *supra* note 28, at 719-21 (analyzing cases from the first half of 2013 and concluding that "plaintiffs have fared markedly better than pre-ADAAA plaintiffs

applying pre-ADAAA law granted summary judgment for the employer in 74.4% of cases in which the employer challenged the employee's disability status, district courts applying the ADAAA granted summary judgment for the employer in only 45.9% of cases in which the motion was sought on that ground.[68] That represents a 28.5 percentage point drop in pro-employer summary judgment rulings under the ADAAA when employers challenged an employee's status as an individual with a disability.[69] If anything, that finding likely underestimates the magnitude of the shift, as it only measures employers' win rate in cases in which the employer contested disability status, which fails to capture the ADAAA's effect of increasing cases in which employers do not challenge an employee's disability status at all.[70]

In contrast to this positive finding, the data also reveals an opposite trend for summary judgment motions in which employers contest the employee's status as a qualified individual. As predicted, employers are challenging an employee's qualifications as a basis for seeking summary judgment in a larger percentage of cases after the ADAAA than they did before.[71] While district courts only ruled on challenges to an employee's qualifications in 28.2% of summary judgment cases governed by pre-ADAAA law, employers raised a qualification challenge that was resolved at summary judgment in 47.1% of cases governed by the ADAAA.[72] Not only are employers contesting qualifications more frequently under the ADAAA, but courts are also responding more favorably to those challenges in post-amendment cases. In claims governed by pre-ADAAA law, district courts granted employers summary judgment on qualifications grounds in 47.9% of the cases in which employers raised a qualification issue.[73] That win rate for employers rose to 69.7% in cases governed by the ADAAA, which represents a 21.8

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on the determination of whether they met the initial requirement [of] . . . being a person with a disability").

68. Befort, *supra* note 60, at 2050-51, 2057-58.

69. *Id.* at 2051, 2058.

70. *Id.* at 2051. Another reason that the data may underestimate the effect is "that the plaintiffs' bar is pushing the envelope by asserting more marginal claims of disability status, thereby dampening the decline in employer win rates." *Id.*

71. *Id.* at 2055, 2064.

72. *Id.*

73. *Id.* at 2055.

percentage point increase in the rate of employer success on summary judgment when using the disqualification strategy.[74]

Overall, these results indicate that the ADAAA is likely to make less progress for employees than advocates had hoped, as the ADAAA's gains from broadening the disability definition are being partially offset by losses from raising the bar on establishing job qualifications.[75] In a recent training session by the National Employment Law Institute for employment lawyers, a director summarized these ADAAA results by explaining that although courts "have been pretty favorable . . . to plaintiffs" on the issue of disability status, "courts have been pretty favorable to employers" on qualification challenges.[76]

What this data reveals, more broadly, is the risk that "non-qualified" may replace "non-disabled" as the new gate-keeping mechanism erected by opponents to disability rights and federal judges who continue to view the ADA as a welfare statute for a minority group rather than a civil rights law.[77] Unless disability rights advocates and plaintiffs' attorneys recognize and resist this trend, the courts' treatment of the qualifications hurdle may undermine the congressional goal of universal impairment-based antidiscrimination protection.[78] As explained below, this shift away from focusing on disability status toward using a disqualification strategy is particularly pernicious because it imbeds disability and impairment-based stereotypes and assumptions into the definition of work and

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74. *Id.* (cautioning that "the post-amendment outcomes are relatively few in number (thirty-three)," which may impact reliability).

75. *See id.* at 2068, 2071; *see also* Stein et al., *supra* note 28, at 721 (finding evidence that judicial resistance "may be shifting from the determination on summary judgment of disability to the determination on summary judgment of qualifications").

76. *See* C. Reilly Larson, *NELI Speakers Discuss Legal Trends, Offer Practical Guidance Under Amended ADA*, 71 DAILY LAB. REP. C-1 (2014) (quoting NELI's Director of ADA and Equal Employment Opportunity Services, David Fram); *see also* Stein et al., *supra* note 28, at 722-23 (identifying cases in which plaintiffs prevailed on disability status "only to lose on summary judgment on the determination of whether they were qualified").

77. *Cf.* Amy Knapp, *The Danger of the "Essential Functions" Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 732 (2012) (arguing that "[i]f the essential functions requirement of the ADAAA is used as a gatekeeper for disability discrimination claims, it . . . could undermine the disability rights movement").

78. *See* Stein et al., *supra* note 28, at 719 (arguing that "the ADAAA may prove illusory" if "the only result is to shift judgments . . . from the determination of disability to . . . the determination that the plaintiff is qualified").

the workplace itself, making them even more difficult to recognize and disrupt.

II. USING "ESSENTIAL FUNCTIONS" TO SHIFT DISABILITY STEREOTYPES FROM THE WORKER TO THE WORKPLACE

The key to employers' success in shifting to a disqualification strategy has been the "essential functions" component of the statute's "qualified individual" requirement. As explained above, the ADAAA expanded the definition of disability but did not significantly change the rest of the statute. The ADA's core substantive provision continues to prohibit discrimination not against all individuals with disabilities, but only against "qualified" individuals with disabilities.[79] The amendments did not alter the ADA's definition of a "qualified individual with a disability,"[80] which remains: "an individual [with a disability] who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[81]

The "essential functions" concept—which is absent from Title VII—was included in the ADA to help define the accommodation

79. *See* 42 U.S.C. § 12112(a) (2012).

80. *See* EEOC, Q&A, *supra* note 32, ¶ 29.

81. 42 U.S.C. § 12111(8) (2012); *see also* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 33 n.157 (2013) (noting "much concern about provisions of the ADA left untouched by the ADAAA, such as 'essential functions'"). The regulations define "qualified" to require an individual with a disability to perform all essential job functions and also to satisfy "the requisite skill, experience, education and other job-related requirements." *See* 29 C.F.R. § 1630.2(m) (2015). This second part of the definition is analogous to the qualification element of a Title VII *prima facie* case using the *McDonnell Douglas* framework, which focuses just on the minimal, objective requirements for the job. *See* William H. Danne, Jr., Annotation, *Who Is "Qualified Individual" Under Americans with Disabilities Act Provisions Defining, and Extending Protection Against Employment Discrimination to Qualified Individual with Disability (42 U.S.C.A. §§ 12111(8), 12112(a))*, 146 A.L.R. FED. 1, §§ 2[a], 9 (1998) [hereinafter *Who Is Qualified Individual*] (drawing this parallel); *see also infra* notes 264-72 and accompanying text. This second part of the definition has been a much lower hurdle for plaintiffs than the essential functions requirement. *See Who Is Qualified Individual*, *supra*, § 2[a] (reviewing pre-ADAAA case law); *see also* Michel Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts* Really *Demanding?*, 13 LAB. LAW. 149, 170 (1997) (concluding from pre-ADAAA case law that "[w]hether a job applicant or employee has the requisite proficiencies for a position tends to be a rather concrete determination which does not often arise as a significant controversy").

mandate by preventing employers from invoking marginal job tasks to disqualify individuals with disabilities.[82] While the purpose of the essential functions component was to focus the accommodation inquiry on parts of the job that really matter,[83] courts are instead using the concept to replace disability status as a new gatekeeper for ADA protection. Although this possibility existed before the amendments,[84] courts addressed the "qualified individual" requirement infrequently because it became so easy for employers to obtain dismissals by arguing that the plaintiff did not meet courts' narrow interpretation of disability. Now that the ADAAA has curtailed that prior strategy, the essential functions concept is taking center stage in ADA litigation and its shortcomings are becoming more evident.

Courts treat the ADA's "qualified individual" provision as a required element of the plaintiff's *prima facie* disability discrimination case.[85] The employee bears the burden of proving that he or she can perform all essential functions of the job with or without accommodation in order to seek ADA protection.[86] When an employer disputes the employee's assertion that he or she can perform the essential functions, some courts require the employer to put forth evidence establishing that the challenged function is indeed essential and cannot be performed with or without reasonable accommodation.[87] But the ultimate burden of persuading the fact-finder of the ability to perform all essential job functions remains with the employee.[88]

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82. *See Who Is Qualified Individual*, *supra* note 81, § 2[a].

83. *See* Travis, *Leveling*, *supra* note 12, at 972-74.

84. *See* W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295, 297, 304 (1992) (arguing that "the essential-functions standard is an exclusionary concept" that "promises to be a legal impediment to the achievement of equality").

85. *See infra* notes 282-84 and accompanying text. This is regardless of whether the case uses the *McDonnell Douglas* or mixed-motive burden-shifting framework. *See infra* notes 336-39 and accompanying text.

86. *See* Branham v. Snow, 392 F.3d 896, 905 (7th Cir. 2004); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997).

87. *See* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007); Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995); Richardson v. Friendly Ice Cream Corp., 594 F.3d 69, 76 (1st Cir. 2010); Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007); *see also* Valderrama, *supra* note 25, at 183-84 (describing the inconsistency in case law on the burden of proof structure for essential functions).

88. *See Benson*, 62 F.3d at 1113; *Richardson*, 594 F.3d at 76.

The problem with the essential functions concept is not just that the statute fails to define the term, but that the statute sets the stage for employers to step in and fill that void. Specifically, the statute states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[89] The EEOC's regulations attempt to provide a definition and a more complete framework for the essential function inquiry.[90] According to the regulations, "[t]he term essential functions means the fundamental job duties of the employment position" and "does not include the marginal functions of the position."[91] The regulations state that

> job function[s] may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.[92]

The regulations also suggest a range of evidence that courts should consider in assessing the essential or marginal nature of a job function, which

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

89. 42 U.S.C. §12111(8) (2012).
90. *See* 29 C.F.R. § 1630.2(n)(1) (2015).
91. *Id.* (emphasis omitted).
92. *Id.* § 1630.2(n)(2).

(vii) The current work experience of incumbents in similar jobs.[93]

While these regulations attempt to establish the type of fact-intensive and case-specific inquiry that is necessary to determine the essential functions of widely diverse positions, the regulations are not binding on courts, which have paid them little regard.[94] Many courts give dispositive or nearly dispositive weight to just the two evidentiary sources mentioned in the statute: the employer's judgment and written job descriptions.[95] As a result, the essential functions determination no longer plays the circumscribed role of defining the boundary of an employer's accommodation mandate, but instead becomes a gatekeeper for legal protection. Even more concerning is that judicial deference to employers' judgment is allowing employers themselves (and the attorneys who advise them) to control the operation of this entry gate.

Judicial deference to employers' judgment in identifying the essential job functions is not just a post-amendment phenomenon. Even before the ADAAA, scholars had observed that the foremost type of evidence that courts consider in determining essential job functions "is the employer's own judgment as to whether a particular job function is essential."[96] Written job descriptions, in particular, have always been among the most frequently cited sources for establishing the essential nature of job functions.[97] Courts have routinely invoked judicial noninterference with managerial prerogatives as a way to avoid meaningful scrutiny of the essential functions of a job.[98] These long-time trends were less concerning in

93. *Id.* § 1630.2(n)(3).

94. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 144-60 (1999) (demonstrating the low level of deference that federal courts have shown to EEOC regulations interpreting the ADA).

95. *See* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 25 (2005) [hereinafter Travis, *Recapturing*].

96. *See Who Is Qualified Individual*, *supra* note 81, § 2[a]; *see also id.* § 33[a] (compiling pre-ADAAA cases); Travis, *Recapturing*, *supra* note 95, at 21-35.

97. *See Who Is Qualified Individual*, *supra* note 81, § 34[a] (compiling pre-ADAAA cases).

98. *See* Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who Is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 486 (2011) (observing "a strong judicial trend toward noninterference in determining what constitute the essential duties of a job"); Lee, *supra* note 81, at 170-77 (concluding from pre-ADAAA case law that "courts have generally been unwilling to second guess the employer's assessment of essential

pre-ADAAA litigation because such a high percentage of cases were being dismissed on disability status grounds.[99] As employer deference on defining essential job functions starts becoming entrenched in post-ADAAA opinions, the impact is being magnified as far more cases are being litigated on qualification grounds.

In post-ADAAA cases, courts have continued to ignore both the statutory language and the regulatory framework that mandates only "consideration" of an employer's judgment as one of many evidentiary sources. Courts have instead described an employer's judgment as being subject to "substantial"[100] or "significant"[101] deference or weight, and as being "highly probative"[102] in determining the essential job functions. "Whether a particular duty is an essential function of an identified job," explained a recent district court, "is based largely on the employer's judgment as to what functions of a job are essential."[103] If an employer says that a particular function "may be required," courts may deem that function essential even if the plaintiff is an incumbent employee who has never had to perform the function.[104] This deferential approach was

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functions"); Stein et al., *supra* note 28, at 723 (describing cases that "credit rather than contest the employer's definition of qualifications and essential job functions").

99. *See* Knapp, *supra* note 77, at 729-30 ("Because so many cases under the original ADA focused on whether a plaintiff had a disability, case law concerning whether a plaintiff can perform the essential functions of a job . . . is less developed.").

100. *See, e.g.*, Chin-McKenzie v. Continuum Health Partners, 876 F. Supp. 2d 270, 290 (S.D.N.Y. 2012) (stating that "an employer's identification of essential job duties is a business judgment to which a court must give substantial deference" (citation omitted)); Harty v. City of Sanford, No. 6:11-cv-1041-Orl-31KRS, 2012 WL 3243282, at *6 (M.D. Fla. Aug. 8, 2012) (giving employer's view "substantial weight" in determining essential job functions); Kinghorn v. Gen. Hosp. Corp., No. 11-12078-DPW, 2014 WL 3058291, at *5 (D. Mass. July 1, 2014) (giving "substantial weight to the employer's view of job requirements" (citation omitted)).

101. *See* Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 88 (1st Cir. 2012) (giving "significant degree of deference" to employer's judgment about essential job functions, although not deciding ADAAA's applicability (citation omitted)).

102. *See* Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 914 (8th Cir. 2013) ("The employer's judgment about an essential job function is considered highly probative." (citation omitted)); Mashek v. Soo Line R.R. Co., No. 11-487 (MJD/JJG), 2012 WL 6552795, at *6 (D. Minn. Dec. 14, 2012) (same).

103. *See Chin-McKenzie*, 876 F. Supp. 2d at 290 (citation omitted); *see also Kinghorn*, 2014 WL 3058291, at *5 (stating that the essential functions inquiry "is not intended to second guess the employer" (citation omitted)).

104. *See Knutson*, 711 F.3d at 915 (holding that plaintiff's "specific personal experience [as an incumbent employee on the job] is of no consequence in the essential functions equation" if a job function is deemed essential according to "the employer's judgment" and a "written job description" (citation omitted)).

recently reinforced by EEOC Commissioner Chai Feldblum, who was asked in a public forum how the essential functions of a job should be determined.[105] "'The bottom line,'" Feldblum responded, "'is [that] it's the employer that decides.'"[106]

In extreme cases, courts' deference to employers may allow the qualifications requirement to override the ADA's antidiscrimination mandate altogether by permitting employers to define "the absence of a disability" as itself an essential job function. In *Hoback v. City of Chattanooga*, for example, a police officer who had PTSD after returning from a military deployment in Iraq brought an ADA claim against the city for deeming him unfit for duty and discharging him.[107] The plaintiff's condition met the expanded definition of disability under the ADAAA, so the employer focused on a disqualification strategy by challenging the employee's ability to perform the essential job functions.[108] The trial court permitted the police chief to testify to the jury as to the essential functions of a police officer position.[109] Rather than just explaining the specific tasks that police officers must accomplish on the job, the police chief was allowed to tell the jury that police officers "have to be of sound mind, clear-thinking, able-bodied people in good physical health and mental health."[110]

The police chief's testimony in *Hoback* would be similar to an employer in a sex discrimination case saying that employees "have to be male" or in a race discrimination case saying that employees "have to be white." Such testimony would be an admission of a facially discriminatory practice, and the employer's only defense would be to prove that the status was a "bona fide occupational qualification" (BFOQ) for the job.[111] The BFOQ defense is not

105. *See* Kevin P. McGowan, *EEOC's Views on Accommodation Under Amended ADA Discussed*, BLOOMBERG BNA (Jan. 10, 2012), http://www.bna.com/eeocs-views-accommodation-n12884906922/.

106. *See id.* (alteration in original).

107. No. 1:10-CV-74, 2012 WL 3834828, at *1-2 (E.D. Tenn. Sept. 4, 2012).

108. *Id.* at *2, *4-5.

109. *Id.* at *6.

110. *Id.* (citation omitted). The jury nevertheless found for the employee, and the court denied the employer's motion for a new trial or judgment as a matter of law because the employee's mental health professionals testified that he was able to perform the essential functions of a police officer's job. *See id.* at *1, *4, *7.

111. *See* 42 U.S.C. § 2000e-2(e)(1) (2012); *cf.* Gray, *supra* note 84, at 297 (stating that "[n]o analogue exists" to the essential functions requirement for individuals with disabilities "for other groups suffering discrimination, save perhaps for the very limited exception of the bona fide occupational qualification").

available in race discrimination claims,[112] so an employer's testimony that employees "have to be white" would establish automatic liability. In cases involving sex, religion, or national origin, the employer would have to meet a very high standard to prove a BFOQ defense, which is treated as an extremely narrow exception to the prohibition against status-based discrimination.[113] To lawfully select only men for a position, for example, an employer would have to show that hiring women would undermine the essence of the business operation itself.[114]

By allowing an employer to assert that being "able-bodied" and of "sound mind" are essential job functions, the employer effectively gets a finding that being non-disabled is a BFOQ without having to prove the very demanding requirements for that defense.[115] Although Title VII's BFOQ defense and the ADA's essential function concept play a similar role in providing legal cover for status-based employment decision-making, the BFOQ defense operates only at the margins of Title VII law, while the essential functions concept operates at the heart of ADA litigation.[116] This difference reflects an unwillingness to embrace a real presumption against status-based decision-making for disability as is done for other protected statuses—i.e., a presumption that the status is irrelevant to job performance unless the employer proves otherwise. The ADA's essential functions concept instead builds in an assumption that impairments typically *are* relevant to performance unless the employee can prove him or herself truly capable for the job.[117] The essential functions concept thus marks disability as a second-class

112. *See* 42 U.S.C. § 2000e-2(e)(1).

113. *See* Gray, *supra* note 84, at 330 (describing the BFOQ defense as "an extremely narrow exception . . . to the general prohibition of discrimination against the protected class" (emphasis omitted)); *see also* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 412 (1985).

114. *See* Gray, *supra* note 84, at 329 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)).

115. *See id.* at 330 (noting that the BFOQ defense "is construed narrowly," while the essential functions analogue is construed "broadly").

116. *See id.* (explaining that the BFOQ defense operates at Title VII's "periphery," while the essential functions concept "remains at the center of disabilities law").

117. *Cf.* Knapp, *supra* note 77, at 731 (arguing that using the essential functions concept as a screening device "would reflect the courts' view that disabilities negatively affect job performance, and that employers generally act rationally when they take adverse employment action against individuals with disabilities").

protected class from all other protected classes under federal antidiscrimination law.[118]

Courts' receptiveness to employers' disqualification strategy in post-ADAAA litigation may be exacerbated by the strict reading that some courts are giving to recent Supreme Court decisions regarding the pleading standard for a complaint to survive a motion to dismiss.[119] In *Bell Atlantic Corp. v. Twombly*, the Court held that a plaintiff must plead allegations demonstrating "a plausible entitlement to relief," rather than allegations showing only a possibility of relief or that are merely consistent with a legal claim.[120] In *Ashcroft v. Iqbal*, the Court reiterated this standard, holding that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[121] While the full impact of this "plausible entitlement" pleading standard on ADAAA claims remains unclear, several courts have applied it to dismiss pre-ADAAA cases because the plaintiff did not allege facts both identifying the essential functions of the job at issue and alleging the ability to perform all essential job functions.[122] If other courts act similarly, this could

118. *See* Gray, *supra* note 84, at 330 (arguing that because of the ADA's essential functions concept, "people with disabilities as a class suffer from the broadest legal exclusion from employment and from society of any group otherwise protected from discrimination by law"); *see also* Knapp, *supra* note 77, at 732 (arguing that the essential functions concept "reinforces the common stereotype that individuals with disabilities are lesser human beings" by "systematically scrutiniz[ing]" their "real or perceived limitations").

119. *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011) (analyzing how *Twombly* and *Iqbal* affect a plaintiff's ability to plead an employment discrimination claim).

120. 550 U.S. 544, 559 (2007).

121. 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

122. *See, e.g.*, Jackson v. Napolitano, No. CV-09-1822-PHX-LOA, 2010 WL 94110, at *1, *5 (D. Ariz. Jan. 5, 2010) (applying *Iqbal* and *Twombly* in a pre-ADAAA case and granting employer's motion to dismiss complaint for "fail[ing] to set forth any facts regarding the essential functions of the job and that he was able to perform those specific functions"); Longariello v. Phx. Union High Sch. Dist., No. CV-09-1606-PHX-LOA, 2009 WL 4827014, at *4-5 (D. Ariz. Dec. 15, 2009) (same); *see also Who Is Qualified Individual*, *supra* note 81, § 2[b] (advising plaintiffs' lawyers that an ADA "complaint may be dismissed if it does not allege that the plaintiff was able to perform the essential functions of the job in question"). *But see* Snider v. U.S. Steel-Fairfield Works Med. Dep't, No. 2:12-cv-03508-AKK, 2013 WL 1278973, at *1-3 (N.D. Ala. Mar. 26, 2013) (applying *Iqbal* and *Twombly* and denying employer's motion to dismiss ADAAA complaint by concluding that qualifications issues are "more appropriate at the summary judgment stage").

further restrict the ADAAA's impact as employers are turning to a disqualification strategy early in litigation.

While plaintiffs' lawyers need to be aware of this over-arching strategy of shifting from challenging a plaintiff's disability status to challenging a plaintiff's qualifications, three distinct methods of "disqualification" are emerging as particular areas of concern. Section A analyzes courts' tendency to treat structural workplace norms as essential job functions, which removes from scrutiny the biased ways in which employers organize when and where the actual job functions get done. Section B reveals courts' tendency to mischaracterize qualification standards as essential job functions, thereby relieving employers of the obligation to prove the business necessity for using the standard to determine job eligibility. Section C highlights how courts are blurring the statute's "direct threat" defense into the essential functions analysis, which reinforces stereotypes about individuals with disabilities both as threats to others and as lacking the capacity to assess their own personal risks. All three of these patterns illustrate the potential reach and impact of the new disqualification approach.

A. Treating Organizational Norms as Essential Job Functions

Perhaps the most concerning trend within the broader disqualification strategy is judges' willingness to apply the essential functions concept not just to actual job functions, but also to employer decisions about when and where those functions are accomplished. These organizational decisions are often embedded so deeply into the structural norms of the workplace that courts view them not just as the way in which work typically gets done, but as a defining feature of work itself.[123] These embedded workplace structures include, in particular, various components of the "full-time, face-time norm," which is the assumption that work must be done at a central worksite, in full-time positions, with unlimited scheduling flexibility, unlimited hour availability, and an uninterrupted work–life capacity.[124]

Although these workplace norms are conceptually distinct from the actual work tasks or duties that make up a particular job and

123. *See* Travis, *Recapturing*, *supra* note 95, at 7-33; *see also* Porter, *Backlash*, *supra* note 25, at 73 ("[M]ost judges assume that jobs are defined by their structural norms, which leads judges to hold that the structural norms are essential functions.").

124. *See* Travis, *Recapturing*, *supra* note 95, at 9-10.

therefore should not be characterized as job functions—essential or otherwise—courts have begun routinely treating employers' on-site attendance, shift, and hour requirements as essential functions of nearly every job.[125] Because the ADA's accommodation mandate does not require employers to modify any aspect of a job that is deemed an essential function, this characterization disqualifies a large and diverse group of individuals with disabilities who need some type of scheduling modification, hour limitation, or temporary leave in order to continue performing the *actual* functions of a job.[126]

Characterizing the when and where of workplace performance as an essential job function is inconsistent with the ADA's statutory language and regulations.[127] As explained above, the purpose of the essential functions concept is to define the boundaries of an employer's accommodation obligation. Essential functions, by definition, are the job duties that are *not* subject to the ADA's accommodation mandate.[128] The ADA and its regulations, however, explicitly define reasonable accommodations to include scheduling changes, flexible hour arrangements, part-time work, unpaid leave, and other forms of job restructuring.[129] An employer's scheduling, hour, and attendance requirements cannot, therefore, be essential functions of every job. If such policies and practices *were* essential functions, then modifications to those policies and practices would not be listed as potential accommodations.[130]

Nevertheless, courts began applying the essential functions concept to organizational norms even before Congress amended the ADA.[131] Although many scholars had criticized courts for undermining the ADA by too narrowly defining the protected class,[132] a few scholars had also warned about the risk of courts undermining the ADA by too broadly defining the essential functions of a job.[133] In the relatively small set of pre-ADAAA cases in which courts got beyond disability status and decided the case on qualification grounds, courts tended to unquestioningly accept

125. *See infra* notes 136-60 and accompanying text.

126. *See* Travis, *Recapturing*, *supra* note 95, at 19-33; *see also* Porter, *Backlash*, *supra* note 25, at 70-78.

127. *See* Travis, *Recapturing*, *supra* note 95, at 43-72.

128. *See id.* at 48-49.

129. *See id.*

130. *See id.*

131. *See id.* at 19-33.

132. *See, e.g.*, Feldblum, *supra* note 6, at 139-60.

133. *See, e.g.*, Travis, *Recapturing*, *supra* note 95, at 21-33.

employers' characterization of on-site attendance, scheduling, and hour requirements as essential job functions.[134] Critics warned that such an approach, if allowed to continue unchecked, could place sweeping aspects of the workplace beyond the reach of the ADA's accommodation mandate.[135]

Unfortunately, the small set of pre-ADAAA cases indicating the risk of judicial over-reaching on the essential functions inquiry have now become a disturbing pattern. In a review of post-ADAAA decisions, Professor Nicole Porter has found sufficient evidence of courts treating organizational norms as essential job functions to warrant labeling this trend the "new backlash against the ADA."[136] While Porter found that employees successfully are getting past summary judgment on qualifications challenges when the disputed job functions involve "the physical aspects of the job," she found the opposite when the disputed job functions involve "the structural norms of the workplace"—i.e., "the 'when' and 'where' the work was performed."[137] Specifically, Porter found that courts are readily applying the essential function label in post-ADAAA cases to a wide range of employer decisions about "schedules, shifts, hours, and attendance policies."[138] Once a court characterizes an organizational structure as an essential job function, that structure is not subject to the ADA's accommodation mandate, which ends up excluding any individual whose disability requires even a very modest scheduling change.[139]

Courts frequently invoke the mantra that "attendance is an essential function" as a shorthand way of rejecting ADAAA claims by such individuals.[140] In *Brown v. Honda of America*, the employee

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134. *See id.*; *see also Who Is Qualified Individual*, *supra* note 81, §§ 2[a], 40-41 (summarizing pre-ADAAA case law showing that "employer expectations" regarding attendance, tardiness, and timeliness "have been deemed to constitute essential functions of all or most jobs"); Porter, *Backlash*, *supra* note 25, at 78 (explaining that although structural norm cases "appeared in the pre-ADAAA case law, we saw relatively few . . . because so many cases were dismissed solely on the issue of disability" (footnote omitted)).

135. *See* Travis, *Recapturing*, *supra* note 95, at 18-33.

136. *See* Porter, *Backlash*, *supra* note 25, at 5, 70-78.

137. *Id.* at 70.

138. *See id.* at 71.

139. *See id.* at 70 ("Because the only way to accommodate an employee who cannot work a particular schedule or shift is to eliminate the requirement[,] . . . courts then conclude that accommodation is not required because it is never an appropriate accommodation to eliminate an essential function of the job.").

140. *See, e.g.*, Brown v. Honda of Am., No. 2:10-cv-459, 2012 WL 4061795, at *5 (S.D. Ohio Sept. 14, 2012).

was fired for "excessive unexcused absences."[141] The employee alleged that the employer had failed to accommodate her "depression, anxiety, and migraine headaches" by providing additional intermittent leave.[142] As is becoming more common under the ADAAA, the employer did not challenge the plaintiff's disability status, but instead sought summary judgment on qualification grounds.[143] The district court accepted the employer's characterization of "regular and reliable attendance" as an essential function of a Production Associate's job, and therefore deemed the plaintiff unqualified and granted the employer summary judgment.[144] Although the plaintiff could perform the *actual* job functions when at work—and despite the fact that the statute and the regulations list unpaid leave as a form of reasonable accommodation—the court not only treated the organizational time norm as a job "function," but failed to allow a jury to determine its essential nature.[145]

In *Basden v. Professional Transportation, Inc.*, the Seventh Circuit affirmed summary judgment for an employer on similar grounds.[146] The employee was fired from her dispatcher's position after requesting a thirty-day leave to get medical treatment for possible multiple sclerosis.[147] Rather than focusing on the plaintiff's ability to perform the *actual* job functions when she would return from her temporary medical leave, the district court deferred to the employer's characterization of "regular attendance as an essential job requirement" and deemed the plaintiff unqualified, therefore dismissing her claim.[148] Despite finding that the employer failed to

141. *Id.* at *1.
142. *Id.* at *1, *4.
143. *Id.* at *1 n.1.
144. *Id.* at *1, *4.
145. *Id.* at *4-5.
146. 714 F.3d 1034, 1036 (7th Cir. 2013).
147. *Id.* at 1037.
148. *Id.* at 1036-39; *see also* Lewis v. N.Y.C. Police Dep't, 908 F. Supp. 2d 313, 326-28 (E.D.N.Y. 2012) (dismissing ADA claim because "excessive absences" rendered plaintiff unqualified to perform essential function of regular attendance); Blackard v. Livingston Parish Sewer Dist., No. 12-704-SDD-RLB, 2014 WL 199629, at *3-5 (M.D. La. Jan. 15, 2014) (dismissing ADA claim because "excessive tardiness and absenteeism" rendered plaintiff unqualified to perform essential function of "regular attendance"); Fuentes v. Krypton Solutions, LLC, No. 4:11cv581, 2013 WL 1391113, at *1-4 (E.D. Tex. Apr. 4, 2013) (dismissing ADA claim because "repeated tardiness and excessive absences" rendered plaintiff unqualified to perform essential function of "regular attendance"); Brangman v. AstraZeneca, LP, 952 F. Supp. 2d 710, 722-23 (E.D. Pa. 2013) (dismissing ADA claim by characterizing accommodation request as one for "indefinite leave,"

properly engage in the ADA's required interactive process to identify accommodations, the Seventh Circuit nonetheless affirmed the dismissal on the grounds that "the employee fail[ed] to present evidence sufficient to reach the jury on the question of whether she was able to perform the essential functions of her job."[149]

The Sixth Circuit recently took the same approach in an en banc decision affirming summary judgment for the employer in *EEOC v. Ford Motor Co*.[150] Without citing any statutory or regulatory support, the court asserted a "general rule . . . that regularly attending work on-site is essential to most jobs."[151] The court then deferred to the employer's judgment that daily, face-to-face office interaction was an essential job function of a resale steel buyer position, and therefore deemed the employee unqualified because her irritable bowel syndrome required her to work from home multiple days a week.[152] This opinion was particularly disappointing because the Sixth Circuit panel decision had correctly reversed summary judgment based on a full, fact-specific inquiry that had revealed a triable issue on whether the employee could perform her *actual* job duties from home.[153]

Courts have reached similarly disappointing results when employees seek to accommodate a disability through schedule or shift changes, flextime, limited overtime, or part-time work. *Tucker v. Missouri Department of Social Services* provides one example involving a requested shift modification.[154] In *Tucker*, the employee was fired after falling asleep during the overnight shift at his job as a Youth Specialist.[155] The employee brought an ADAAA claim alleging that the employer had failed to accommodate his migraines, which required medication that made him drowsy, by scheduling him only during the day and evening shifts.[156] The employer sought

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rendering plaintiff unqualified); Coker v. Enhanced Senior Living, Inc., 897 F. Supp. 2d 1366, 1378-79 (N.D. Ga. 2012) (characterizing "regular attendance" as essential job function, but finding triable issue on plaintiff's attendance record).

149. *Basden*, 714 F.3d at 1038-39.

150. 782 F.3d 753, 757-58 (6th Cir. 2015) (en banc).

151. *Id.* at 761.

152. *Id.* at 763.

153. EEOC v. Ford Motor Co., 752 F.3d 634, 640-47 (6th Cir. 2014), *reh'g en banc granted*, *opinion vacated* (Aug. 29, 2014).

154. No. 2:11-CV-04134-NKL, 2012 WL 6115604, at *2 (W.D. Mo. Dec. 10, 2012).

155. *Id.* at *1-2.

156. *Id.* at *2-3.

summary judgment.[157] Just as Congress had intended under the ADAAA, the district court did not focus on the employee's disability status, which the employer did not appear to challenge.[158] Instead, the employer challenged the employee's qualifications for the job.[159] The district court accepted the employer's judgment—which the court described as "highly probative"—that the ability to work the day, evening, and overnight shifts was an essential job function.[160] Although it was undisputed that limiting the employee to only day and evening shifts would allow him to perform the *actual* job functions during those times, the court deemed the employee unqualified and granted the employer summary judgment.[161]

What is particularly disturbing about this trend is that it embeds the same disability-based stereotypes that the ADA was intended to disrupt back into the definition of the workplace itself. The full-time, face-time norm is an able-bodied norm.[162] It presumes a worker who has unlimited and uninterrupted physical stamina, and it prioritizes that above a worker's actual ability to perform required tasks. By characterizing aspects of the full-time, face-time norm as defining features of work—i.e., as essential functions of nearly all jobs—those disability-based stereotypes are shielded from the ADA's reach.

Demanding that courts properly treat attendance, shift, hour, and scheduling practices not as job functions, but as organizational norms for when and where the actual functions take place, would not force courts to ignore real impacts that an individual's disability may have on performance. It would simply force courts to meaningfully analyze those impacts in a fact-specific inquiry about the "reasonableness" of the employee's modification request and about whether the impact meets the high standard of "undue hardship" to eliminate the employer's accommodation obligation. By incorrectly characterizing attendance, shift, hour, and scheduling practices as essential job functions, those aspects of the workplace are rendered automatically untouchable by the ADA. As a result, many individuals with disabilities are automatically disqualified from jobs that are built upon unscrutinized able-bodied assumptions and norms.

157. *Id.* at *1.
158. *See id.* at *3.
159. *Id.* at *3-5.
160. *Id.* at *4 (citation omitted).
161. *Id.* at *6.
162. *See* Travis, *Recapturing*, *supra* note 95, at 10-11. The full-time, face-time norm is also a male norm. *See id.*

B. Mischaracterizing Qualification Standards as Essential Job Functions

The second concerning trend that is emerging within the disqualification strategy is the mischaracterization of employer-adopted qualification standards as essential job functions. This is more than a semantic error, as it has major consequences in establishing the burden of proof and therefore the scope of an employee's rights.

Under the ADA, "essential functions" and "qualification standards" are supposed to delineate distinct categories of job requirements with different legal rules.[163] As explained above, essential functions are defined as "the fundamental job duties of the employment position."[164] Qualification standards, in contrast, are defined as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements" that an employer establishes for job eligibility.[165] While essential functions focus on the job's required tasks, qualification standards focus on the employee's required attributes.[166] As explained above, employees have the burden to demonstrate their ability to perform the essential job functions to meet the "qualified individual" requirement of a *prima facie* disability discrimination case, and courts give great deference to employers' characterization of a job function as "essential." Qualification standards, in contrast, are supposed to receive special scrutiny when they have an exclusionary effect on individuals with disabilities. That required scrutiny gets bypassed when a court mischaracterizes a qualification standard as an essential function of a job.

The special scrutiny is established in the ADA's definition section, which defines unlawful discrimination to include: "using qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard . . . is shown to be job-related for the position in

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163. *See* John E. Rumel, *Toward an "Unqualified" Otherwise Qualified Standard: Job Prerequisites and Reasonable Accommodation Under the Americans with Disabilities Act*, 18 EMP. RTS. & EMP. POL'Y J. 35, 46 (2014).

164. 29 C.F.R. § 1630.2(n)(1) (2015).

165. *Id.* § 1630.2(q).

166. *Cf.* Stone, *supra* note 34, at 513-14, 551-63 (arguing that the ADA's qualifications requirement should focus on "necessary job skills" rather than "essential functions").

question and is consistent with business necessity."[167] In the ADA's section defining employer defenses, the statute reinforces the employer's burden to affirmatively defend exclusionary qualification standards. That section states that when an employee alleges that a qualification standard "screen[s] out or tend[s] to screen out or otherwise den[ies] a job or benefit to an individual with a disability," the employer may only defend the standard by showing that it is "job-related and consistent with business necessity."[168]

When a court mischaracterizes a qualification standard as a job function, the employer is never put to the task of proving the business necessity of using the standard for job eligibility. Instead, the employer need only describe the standard as "essential" rather than "marginal," to which courts readily defer, particularly if stated in a job description. Mischaracterizing a qualification standard as an essential job function thus affects the burden of proof in a very significant way: It shifts the burden away from the employer to defend the necessity of the requirement and onto the employee to prove his or her ability to meet the requirement to obtain protection under the ADA. As a result of this mischaracterization, employers are empowered to use unnecessary qualification standards to exclude individuals with disabilities from the workplace.

Management-side attorneys and HR advisors are facilitating this mischaracterization by advising employers to include various qualification standards in the list of "essential functions" in their job descriptions. Some advisors are quite explicit, urging employers to include in their job descriptions not just "functions and tasks," but also "qualifications," including "education and experience requirements."[169] Others simply suggest essential functions that employers are encouraged to include in their job descriptions, and those suggested lists contain items that are qualification standards

167. 42 U.S.C. § 12112(b)(6) (2012). This standard also applies to "employment tests or other selection criteria." *Id.* The ADA mentions two specific qualification standards: (1) a requirement "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," *id.* § 12113(b) (addressed *supra* Section II.C); and (2) a requirement of "uncorrected vision," which is subject to the same business necessity defense, *id.* § 12113(c).

168. *Id.* § 12113(a). The ADA also obligates employers to provide reasonable accommodations to enable employees to meet qualification standards, so an employer may be liable even when it proves business necessity if a reasonable accommodation exists. *See id.; see also* Rumel, *supra* note 163, at 57-72 (analyzing how the accommodation mandate may also apply to job prerequisites).

169. *See* THE HUMAN EQUATION, INC., *supra* note 41 (providing online training to employers).

rather than job functions. Some attorneys, for example, have encouraged employers to list general capacities as essential functions, such as the ability to read, to concentrate, to think, to communicate, and to interact with others.[170] Other attorneys have suggested that employers list a wide range of employee attributes as essential functions, including "mathematical reasoning ability, willingness to learn, customer service skills, [and] experience working on a team."[171] These are not job functions, tasks, or duties, but instead fall within the definition of a qualification standard that establishes "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements" for job eligibility.[172] Once these qualification standards find their way onto a job description's list of "essential functions," however, that label sticks, which relieves employers of their statutory obligation to prove business necessity.

This strategy appears to be working, as several courts have granted employers summary judgment on ADAAA claims by characterizing a qualification standard as a job function, deferring to an employer's job description listing the function as essential, and thereby deeming the employee unqualified for the job.[173] The Eighth Circuit's decision in *Knutson v. Schwan's Home Service, Inc.* provides an example.[174] In *Knutson*, the plaintiff was a general manager for several years, and he excelled in his job.[175] He then suffered an eye injury but continued to work successfully for nine months.[176] An eye doctor then examined his progress and decided not

170. *See* Anderson, *supra* note 49 (urging employers to list the ADAAA's new major life activities as essential job functions).

171. *See* THE HUMAN EQUATION, INC., *supra* note 41.

172. 29 C.F.R. § 1630.2(q) (2015).

173. *See, e.g.*, Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 87-89 (1st Cir. 2012) (mischaracterizing licensing exam as an essential job function rather than a qualification standard and deeming employee unqualified for not completing the exam); Mashek v. Soo Line RR Co., No. 11-487 (MJD/JJG), 2012 WL 6552795, at *5-6 (D. Minn. Dec. 14, 2012) (mischaracterizing Rail Association guideline that employees in safety-sensitive positions be seizure free for one year as an essential job function rather than a qualification standard and deeming employee unqualified for not meeting the rule); Thomas v. Werthan Packaging, Inc., No. 3:10-cv-00876, 2011 WL 4915776, at *5-8 (M.D. Tenn. Oct. 17, 2011) (mischaracterizing a twenty-pound lifting requirement as an essential job function rather than a qualification standard and deeming plaintiff unqualified due to his lifting restrictions); *see also infra* notes 174-79 and accompanying text.

174. 711 F.3d 911 (8th Cir. 2013).

175. *Id.* at 913.

176. *Id.*

to grant him a Medical Examiner's Certificate (MEC), which the plaintiff needed to retain his Department of Transportation (DOT) qualification to drive trucks weighing over 10,000 pounds.[177] The employer fired the plaintiff for not being DOT qualified to drive delivery trucks.[178] The employee argued that he could perform his general manager position without DOT qualification because he only had to drive a delivery truck occasionally in his two years on the job and he could make deliveries in his personal vehicle when needed.[179]

Although the physical act of driving a delivery truck would correctly be characterized as a job function, the requirement that all managers obtain DOT qualification and a corresponding MEC is not a job function, but a qualification standard. The district court mischaracterized the DOT qualification standard as a job function, however, and then deferred to the employer's view that it was essential to a general manager's position.[180] The court therefore granted the employer summary judgment on the plaintiff's ADAAA claim, finding the plaintiff unqualified for the job.[181] The Eighth Circuit affirmed, explaining that the employer's job description listed DOT qualification and medical certification as a job requirement and stating that "[t]he employer's judgment about an essential job function is considered highly probative."[182] The court held that the plaintiff's "specific personal experience is of no consequence in the essential functions equation," and instead found "the written job description [and] the employer's judgment" to be dispositive.[183]

If the court had properly characterized the DOT requirement as a qualification standard rather than an essential job function, the employer would have been required to prove that it was "job-related and consistent with business necessity"[184] because it tends to screen out individuals with visual and other impairments. Meeting the employer's burden of proof on business necessity would have required more than just pointing to a job description. The plaintiff's experience on the job could have been sufficient to raise a genuine issue on "business necessity" to at least get the case to a jury. Instead, the employer got the case dismissed before trial based

177. *Id.*
178. *Id.*
179. *Id.* at 914-15.
180. *Id.* at 915-16.
181. *Id.* at 913.
182. *Id.* at 914 (citation omitted).
183. *Id.* at 915 (citation omitted).
184. *See* 42 U.S.C. § 12113(a) (2012).

simply on its "judgment" that DOT certification was essential for the job.

In *Griffin v. Prince William Health System*, a district court similarly erred by mischaracterizing the employer's forty-pound lifting requirement as a job function rather than a qualification standard for a nurse in the Special Procedures Department.[185] The plaintiff was fired from her long-time nurse's position after a back injury resulted in a twenty-five pound lifting restriction.[186] The court deferred to the employer's job description that "identifie[d] lifting forty pounds as an essential function of the job," declared the plaintiff unqualified, and granted the employer summary judgment on the plaintiff's ADAAA claim.[187]

If the court had correctly characterized the forty-pound lifting requirement as a qualification standard, the employer would have had the burden to prove that it was "job-related and consistent with business necessity."[188] The evidence recited in the district court's opinion raised a question as to whether the forty-pound requirement was necessary or was arbitrarily selected.[189] Although the evidence indicated that nurses often were involved in "lifting, turning, and positioning patients," and that a nurse might need to "hold[] or lower[] patients to the floor" if a patient became dizzy, the evidence also indicated that patients "could weigh up to 250 to 300 pounds, and when sedated, were considered 'dead weight.'"[190] The fact that the employer did not impose a 300-pound lifting requirement suggests that the nurses had some means for moving patients without bearing a patient's full weight, which raises a question of whether the ability to lift forty pounds (as opposed to some lesser amount) was really necessary. The evidence also indicated that nurses were assigned to patients in pairs,[191] which raises the possibility that not all nurses would need to lift forty pounds. While the business necessity defense could go either way, a correct characterization of the lifting requirement as a qualification standard would at least have demanded serious inquiry into the requirement's necessity and may have gotten the case past summary judgment.

185. No. 10:10-cv-359, 2011 WL 1597508, at *4 (E.D. Va. Apr. 26, 2011).
186. *Id.* at *1-2.
187. *Id.* at *4-5.
188. *See* 42 U.S.C. § 12113(a).
189. *See Griffin*, 2011 WL 1597508, at *4-5.
190. *Id.* at *1, 4.
191. *Id.* at *4.

C. Blurring the Direct Threat Defense into the Essential Job Functions Analysis

The third concerning trend within the disqualification strategy involves judicial interpretation of the ADA's "direct threat" provisions.[192] These specific provisions—like the more general "essential functions" concept—do not exist in Title VII. While few courts have focused on the direct threat provisions in post-ADAAA claims, the cases raise the risk that these provisions may further cement the second-class status of disability relative to other protected statuses in federal antidiscrimination law.

The connection between the direct threat provisions and employers' disqualification strategy is not immediately obvious because these provisions are located in the ADA's section on employer defenses. As explained in Section II.B above, the ADA provides that an employer may defend against claims alleging the discriminatory application of a qualification standard by showing that the standard is "job-related and consistent with business necessity."[193] The ADA lists as one such qualification standard: "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[194] The statute's definition section clarifies that the direct threat defense applies only to "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[195] Yet, despite the narrow framing of the direct threat concept, courts may begin paying increased attention to these provisions in the wake of the ADAAA as an additional way to ratchet up the qualifications requirement.

This risk exists in part because many courts have failed to treat "direct threat" as an affirmative defense on which employers bear the burden of proof,[196] even though the direct threat provisions are in the

192. *See* 42 U.S.C. §§ 12111(3), 12113(a)-(b).

193. *See id.* § 12113(a).

194. *See id.* § 12113(b).

195. *Id.* § 12111(3).

196. Circuit courts are split on whether the employee bears the burden "as part of his[/her] obligation to show that he[/she] is a 'qualified' individual with a disability (by showing that he[/she] is not a direct threat to safety in the workplace)," or whether the employer bears the burden "as part of an . . . affirmative defense (that the plaintiff was a direct threat to safety)." Wurzel v. Whirlpool Corp., 482 F. App'x 1, 12 n.14 (6th Cir. 2012); *see also* Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1291-95 (10th Cir. 2000) (describing the case law split); Rizzo v. Children's

ADA's "defenses" section.[197] Instead, courts often treat direct threat issues as a qualifications question.[198] As a result, some courts are placing the burden on employees to prove that they do not pose a direct threat to themselves or others as a required part of the "qualified individual" element of the *prima facie* case.[199] In doing so, these courts effectively deem the absence of any direct threat to be a per se essential function of every job.[200]

While that may sound like a reasonable way to advance workplace safety, the legitimacy of such an approach—which exists solely in the context of disability and not for any other protected

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World Learning Ctrs., Inc., 213 F.3d 209, 212-13 (5th Cir. 2000) (en banc) (same); Branham v. Snow, 392 F.3d 896, 906 n.5 (7th Cir. 2004) (same).

197. *See* 42 U.S.C. § 12113.

198. *See, e.g.*, *Wurzel*, 482 F. App'x at 9-11, 10 n.10 (describing direct threat as a "qualifications" issue); *Borgialli*, 235 F.3d at 1295 (holding employee was "not a qualified person" because his impairment made him "a direct threat to others"); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 834-36 (11th Cir. 1998) (affirming dismissal because employee "was not a qualified individual because he could not perform the essential functions of the job without threat of harm to himself or others"); Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398, 402 (6th Cir. 1998) (holding an employee "is not 'qualified' . . . if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation"); Darnell v. Thermafiber, Inc., 417 F.3d 657, 660 (7th Cir. 2005) ("An individual is not qualified if he presents a 'direct threat.'").

199. *See, e.g.*, *LaChance*, 146 F.3d at 836 (holding that "[t]he employee retains at all times the burden of persuading the jury . . . that he was not a direct threat" as part of the qualifications element of a *prima facie* ADA case); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (holding that "plaintiff must demonstrate that she can perform [the essential] functions in a way that does not endanger others"); *cf.* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571-72 (8th Cir. 2007) (holding that "the employer bears the burden of proof, as the direct threat defense is an affirmative defense"); *Branham*, 392 F.3d at 906 (placing burden on employer "to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation" (citation omitted)); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 219 (2d Cir. 2001) (describing "direct threat" as an "affirmative defense[]"); Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 893 (9th Cir. 2001) ("Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat.").

200. One court has taken a more nuanced approach. *See Amego, Inc.*, 110 F.3d at 144 (holding that when the "essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others," but when "the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, [then] the defendant would bear the burden"); *see also Rizzo*, 213 F.3d at 220-22 (en banc) (suggesting that the burden should be on the employee when an alleged risk relates to "the ability to perform a particular job function safely," but on the employer when an alleged risk relates to "a general threat to the health or safety of others").

status—is undermined by the fact that it may be applied even if the alleged risk has nothing to do with an employee's job performance and even if the risk played no causal role in the adverse employment action. By housing the direct threat analysis in the qualifications component of the employee's *prima facie* case, courts eliminate the employer's obligation to demonstrate the business necessity of an alleged safety standard that excludes individuals with impairments from the workplace.

This effect is illustrated most dramatically in cases where the alleged threat posed by an impairment is solely to the employee's own safety or health. Although the ADA defines "direct threat" to include only "significant risk[s] to the health or safety of *others*,"[201] the Supreme Court has held that the direct threat provisions also apply when an employee's impairment poses a significant risk to him or herself.[202] In the case that established this principle, the Court allowed an employer to invoke "direct threat" to disqualify an employee from an oil refinery job because workplace toxins might exacerbate the employee's liver condition, which had no bearing on the employee's performance.[203] Allowing such paternalism to disqualify an employee from antidiscrimination protection on the basis of any other protected status under Title VII would likely be met with outrage, and the Supreme Court explicitly rejected such an attempt in the context of sex discrimination over twenty years ago.[204] Yet, when the risk is linked to one's impairment or disability, paternalism becomes an acceptable basis for disqualifying the individual from employment opportunities.

While the ADA purports to prohibit employers from acting upon disability-based stereotypes, it allows employers to invoke just such biases through the direct threat provisions. The existence of the direct threat provisions for disability—but not for any protected status under Title VII—builds into ADA doctrine the stereotyped view that individuals with disabilities pose unique risks to

201. 42 U.S.C. § 12111(3) (emphasis added); *see also id.* § 12113(b) (defining qualification standards to "include a requirement that an individual shall not pose a direct threat to the health or safety *of other individuals* in the workplace" (emphasis added)).

202. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 79-87 (2002).

203. *Id.* at 76-78.

204. *See* Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 206-07 (1991) (holding that an employer may not exclude women who are capable of bearing children from jobs at a battery manufacturing plant because of the risk that lead exposure may pose to a future fetus).

themselves and others in the workplace[205] and that they are not competent to assess the personal risks they are willing to take for economic security. This problem is compounded by courts' highly deferential application of the direct threat defense, under which courts have been particularly receptive to employers' arguments when mental illness or other stigmatized impairments are involved.[206] Judges often allow employment decision-makers' "personal perceptions of acceptable risks" to substitute for rigorous, individualized, medical assessments,[207] which allows the direct threat provisions to give effect to some of the same disability-based fears, stereotypes, and biases that the ADA was intended to combat.[208]

The direct threat provisions may become more significant under the ADAAA as employers shift focus away from challenging disability status to challenging employees' qualifications. In post-ADAAA cases, courts have used "direct threat" to disqualify employees with impairments ranging from a back injury[209] to angina,[210] which are far afield of the contagious diseases that were

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205. Some courts have expressed this bias openly. *See, e.g.*, *Rizzo*, 213 F.3d at 219 (Jones & Smith, JJ., dissenting) (describing the "common sense [notion] that an employee's ability to do the job, and to do so safely, is a matter of heightened concern when it comes to disability, and has a special meaning not present in the context of age or sex").

206. *See* Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35, 85 (2013); *see also* Brian S. Prestes, *Disciplining the Americans with Disabilities Act's Direct Threat Defense*, 22 BERKELEY J. EMP. & LAB. L. 409, 420, 422-36 (2001) (finding pre-ADAAA cases imposing low evidentiary burden on employers to prove direct threat defense, particularly for mental illness or other stigmatized impairments).

207. *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1281-82 (2001) (arguing that courts' lenient approach to proving the direct threat defense "shields from scrutiny 'common-sense,' but nevertheless erroneous, assessments of the risks posed by an employee who happens to have a disability"); Prestes, *supra* note 206, at 420 (arguing that employers get "free reign to impose their judgments of significant risk" to support a direct threat defense).

208. *See* Prestes, *supra* note 206, at 422-36 (arguing that "[t]he disabled individuals most feared, misunderstood, or stigmatized by society remain less protected as a result of an unanchored direct threat analysis").

209. *See* Cleveland v. Mueller Copper Tube Co., No. 1:10CV307-SA-SAA, 2012 WL 1192125, at *8-9 (N.D. Miss. Apr. 10, 2012) (dismissing ADAAA claim by concluding that plaintiff "would have constituted a direct threat to her safety" as a block-crane operator).

210. *See* Wurzel v. Whirlpool Corp., 482 F. App'x 1, 1, 19-20 (6th Cir. 2012) (affirming dismissal by finding plaintiff unqualified because his angina posed a direct threat in a manufacturing plant due to risk of arterial spasms causing sudden incapacitation).

the source of the direct threat provisions in the first place.[211] These cases illustrate yet another way in which the qualifications component of an ADA *prima facie* case may serve as a new gatekeeper for legal protection against disability-based discrimination in the workplace.

D. Sources of Optimism

While these three trends highlight the potential power that the disqualification strategy may have in undermining the ADAAA, several sources of optimism also exist. Some plaintiffs' attorneys have been able to successfully educate a few courts about the proper role of the ADA's qualification requirement and essential functions inquiry.[212] These litigants recognized at the outset of litigation that the battleground has shifted from disability status to qualifications, and they proactively framed their cases to challenge either the general presumption of employer deference or the specific mischaracterization of structural norms or qualification standards as essential job functions. This small set of encouraging cases should provide a template for plaintiffs' lawyers trying to preemptively counter a disqualification attack when litigating cases under the ADAAA.

The most important victories have been the small set of ADAAA cases in which courts were persuaded to meaningfully engage in a multi-factor, fact-specific inquiry of the essential functions of a job.[213] In *Thomas v. Werthan Packaging, Inc*., for example, a district court explicitly rejected the employer's position "that courts should defer to an employer in deciding what functions are essential to particular jobs."[214] The court instead embraced the entire regulatory framework for assessing essential job junctions and correctly stated that "[e]mployer judgment is merely *one* of the seven factors for the court to consider."[215] The court found support for the EEOC's multi-factor approach in the ADA's introductory section on

211. *See* Hubbard, *supra* note 207, at 1297-301.

212. *See infra* notes 213-41 and accompanying text.

213. *See, e.g.*, Shelton v. Price Waterhouse Coopers, LLP, No. 8:12-cv-02757-T, 2014 WL 2581348, at *5-6 (M.D. Fla. May 2, 2014) (citing EEOC's multi-factor analysis and holding that "[w]hether a particular function is essential is a fact-specific inquiry evaluated on a case-by-case basis by examining a number of factors" (citation omitted)).

214. No. 3:10-cv-00876, 2011 WL 4915776, at *6 (M.D. Tenn. Oct. 17, 2011).

215. *Id.*

congressional findings,[216] which states that one purpose of the statute is "to ensure that the Federal Government plays a central role in enforcing [the statutory protections] . . . on behalf of individuals with disabilities."[217] That purpose, the court concluded, would not be advanced by deferring to employers' judgment on the essential functions of a job.[218]

The Sixth Circuit applied similar scrutiny in *Rorrer v. City of Stow*, in which the court held that the fact-specific nature of determining essential job functions typically renders resolution improper at the summary judgment stage.[219] The court adopted the EEOC's entire, multi-factor approach and held that neither "the employer's judgment" nor "[w]ritten job descriptions" will "be dispositive on whether a function is essential."[220] The court emphasized that the ADA only requires "consideration" of an employer's assessment, but not "deference," which would "incorrectly imply[] that the employer's position creates a strong presumption in its favor."[221] "If an employer's judgment about what qualifies as an essential task were conclusive," explained the court, "an employer that did not wish to be inconvenienced by making a reasonable accommodation could, simply by asserting that the function is essential, avoid the clear congressional mandate" for reasonable accommodations.[222]

Unfortunately, the Sixth Circuit back-pedaled on this position in its en banc decision in *EEOC v. Ford Motor Co*., in which it deferred to an employer's characterization of full-time, on-site presence as an essential job function.[223] This contrary approach reveals courts' particular willingness to empower employers to define structural and organizational norms as essential job functions, even when courts are willing to scrutinize an employer's judgment about the necessity of specific job tasks, as was the case in *Rorrer*. The thoughtful dissent in *Ford Motor*, however, offers an encouraging model for litigants in other jurisdictions by correctly recognizing that *Rorrer*'s individualized, fact-intensive, case-specific

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216. *See id.* (citing 42 U.S.C. § 12101(b)(3) (2006)).
217. 42 U.S.C. § 12101(b)(3).
218. *See Thomas*, 2011 WL 4915776, at *6.
219. 743 F.3d 1025, 1039 (6th Cir. 2014).
220. *Id.* at 1039-40 (citation omitted).
221. *Id.* at 1042 (citing 42 U.S.C. § 12111(8) (2012); Feldman v. Olin Corp., 692 F.3d 748, 755 (7th Cir. 2012)).
222. *Id.* at 1039 (emphasis and citation omitted).
223. 782 F.3d 753, 763 (6th Cir. 2015) (en banc).

analysis should be applied with equal vigor to organizational structures and conventional time norms.[224] The dissent would have adopted the Sixth Circuit's panel decision that was vacated by the en banc review.[225] The panel decision had emphasized that a court's inquiry on essential job functions "does not end simply because [the employer] has expressed [its] business judgment."[226] "[If] we allow employers to redefine the essential functions of an employee's position to serve their own interests," the panel opinion explained, "[then we would] abdicate our responsibility as a court to company personnel boards."[227]

In addition to these positive opinions that may help weaken the reflexive judicial presumption of employer deference, a few litigants have gotten courts to question employers' characterization of structural norms as essential job functions, unlike in *Ford Motor*.[228] In *Shelton v. Price Waterhouse Coopers, LLP*, for example, the employer sought summary judgment on an ADAAA claim by arguing that the employee's poor attendance record rendered her unqualified to perform the essential job function of "regular, on-site attendance."[229] The district court correctly focused on the job's actual tasks and found a triable issue as to whether the employee could perform those tasks remotely by working periodically from home.[230] By refusing to defer unquestioningly to the employer's characterization of a structural norm as an essential job function, the

224. *Id.* at 770-77 (Moore, J., dissenting).

225. *See id.*

226. EEOC v. Ford Motor Co., 752 F.3d 634, 642 (6th Cir. 2014), *reh'g en banc granted*, *opinion vacated* (Aug. 29, 2014).

227. *Id.*

228. *See, e.g.*, Thomas v. Bala Nursing Ret. Ctr., No. 11-5771, 2012 WL 2581057, at *7 (E.D. Pa. July 3, 2012) (denying employer summary judgment by correctly treating plaintiff's tardiness not as an inability to perform the essential function of attendance but as an asserted reason for termination subject to pretext analysis); Peirano v. Momentive Specialty Chems., Inc., No. 2:11-CV-00281, 2012 WL 4959429, at *11 (S.D. Ohio Oct. 17, 2012) (finding triable issue on whether "punctuality" was essential job function); Fleck v. Wilmac Corp., No. 10-05562, 2012 WL 1033472, at *8-10 (E.D. Pa. Mar. 27, 2012) (denying employer summary judgment by correctly analyzing plaintiff's need for modified work schedule as a potential accommodation that would enable performance of actual job functions); Munoz v. Nutrisystem, Inc., No. 13-4416, 2014 WL 3765498, at *3-10 (E.D. Pa. July 30, 2014) (finding triable issue on whether employee with sleep apnea was qualified despite violating attendance policy because her request for "short breaks, opportunities to stand and stretch, and periodic days off" might be a reasonable accommodation).

229. No. 8:12-cv-02757, 2014 WL 2581348, at *5 (M.D. Fla. May 2, 2014).

230. *Id.* at *6.

court denied the employer's motion and allowed the case to proceed.[231]

Plaintiffs have also made some headway in getting courts to understand that an employer's demand for uninterrupted attendance is not a job function, essential or otherwise, despite employers' use of the essential function label.[232] Some courts are recognizing that an employee's need for a finite, unpaid leave to get medical treatment, rehabilitation, or otherwise address an illness or injury may be a reasonable accommodation that could enable an employee to perform the *actual* essential job functions upon the employee's return.[233] As a result, some courts are denying motions to dismiss on qualifications grounds when a triable issue exists on whether an employer's denial of short-term, unpaid leave constitutes a failure to accommodate.[234] These cases may be opening a window for the ADAAA to begin dismantling the disability-based stereotypes that have become entrenched in the definition of "work."

While plaintiffs' lawyers are beginning to educate courts on the important difference between structural norms and job functions, the EEOC may be starting a similar education role on the distinction between essential functions and qualification standards. In one recent case, the EEOC brought an ADAAA claim on behalf of a class of employees challenging United Parcel Service's rule limiting medical leaves to twelve months.[235] UPS moved to dismiss, arguing that the ability to return to work after a multiple-month absence was "an essential job function," which rendered the employees unqualified.[236]

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231. *Id.* at *6-7.

232. *See infra* note 233.

233. *See, e.g.*, Hutchinson v. Ecolab, Inc., No. 3:09cv1848(JBA), 2011 WL 4542957, at *9-10 (D. Conn. Sept. 28, 2011) (finding triable issue on whether "medical leave of absence" was a reasonable accommodation); Coffman v. Robert J. Young Co., 871 F. Supp. 2d 703, 715 (M.D. Tenn. 2012) (finding triable issue on whether "additional unpaid leave" was a reasonable accommodation); Negron v. City of New York, No. 10 CV 2757(RRM)(LB), 2011 WL 4737068, at *12-14 (E.D.N.Y. Sept. 14, 2011) (finding triable issue on whether "additional leave" was a reasonable accommodation); Kesecker v. Marin Cmty. Coll. Dist., No. C-11-4048 JSC, 2012 WL 6738759, at *6-9 (N.D. Cal. Dec. 31, 2012) (finding triable issue on whether "finite leave of absence" was a reasonable accommodation); Martin v. Yokohama Tire Corp., Nos. 7:11-CV-00244, 7:11-CV-00467, 2013 WL 6002344, at *12-14 (W.D. Va. Nov. 12, 2013) (finding triable issue on whether "medical leave on a short-term basis" was a reasonable accommodation).

234. *See supra* note 233.

235. EEOC v. UPS, Inc., No. 09 C 5291, 2014 WL 538577, at *1 (N.D. Ill. Feb. 11, 2014).

236. *Id.* at *2.

Rather than arguing about the essential or non-essential nature of the function as many plaintiffs' lawyers get trapped into doing, the EEOC rejected the employer's characterization of the rule as a job function altogether.

The EEOC argued that limiting medical leaves to a maximum of twelve months was actually a "qualification standard" that screened out individuals with disabilities without considering accommodations.[237] Re-characterizing the rule as a qualification standard rather than a job function triggered the employer's burden to prove the business necessity of its use, which is difficult to meet at a pretrial motion stage.[238] The district court agreed with the EEOC.[239] Although the court noted that regular attendance may sometimes be an essential job function, the court held that UPS's twelve-month medical leave policy was a qualification standard—i.e., "a medical requirement that an individual must meet in order to maintain his or her position with UPS."[240] The court therefore denied the employer's motion to dismiss.[241]

This small set of cases in which courts are engaging in a meaningful essential functions inquiry provides some optimism that the disqualification strategy has not yet become so successful as to preclude judicial re-education. These cases suggest that proactive litigants may be able to steer judges away from their mistaken assumptions about what counts as a job function and who gets to decide a function's essential or nonessential nature. But if litigants assume that the ADAAA's success in broadening the disability definition will automatically lead to analysis on the real issues of discriminatory intent, reasonable accommodations, and undue hardship, the concerning trends described above are likely to become entrenched in ADAAA case law. Courts' early receptiveness to employers' new disqualification strategy under the ADAAA should prompt plaintiffs' attorneys to actively engage in the disqualification battle and educate courts on the correct interpretation and use of the

237. *Id.*

238. *See* Ryan v. City of Highland Heights, No. 1:93CV2593, 1995 WL 584733, at *3 (N.D. Ohio July 19, 1995) (stating that "in the absence of evidence demonstrating conclusively that [an employer's] test is job-related and consistent with business necessity," the court must deny an employer's summary judgment motion in a disability discrimination case challenging a job criteria).

239. *UPS, Inc.*, 2014 WL 538577, at *2.

240. *Id.*

241. *Id.* at *3.

essential functions component of the qualified individual requirement.

If plaintiffs' attorneys can get courts to engage in a meaningful essential functions inquiry, that will help circumscribe its proper role to defining the boundary of an employer's accommodation obligation in claims alleging an actual disability. It will not, however, address the more fundamental problem with the role that the essential functions concept is playing in claims brought under the ADA's "regarded as" prong. Under the ADAAA's new approach to the "regarded as" prong—which establishes a legal prohibition against impairment-based discrimination without a right to accommodation—the essential functions inquiry should play no role at all.[242] Part III explains why the essential functions inquiry is incompatible with Congress's intent to add impairment to the list of other protected statuses that are found in Title VII.

III. UNDERMINING UNIVERSAL IMPAIRMENT-BASED ANTIDISCRIMINATION PROTECTION

Using the "qualified individual" requirement as a new ADA gatekeeper is particularly problematic in cases involving the "regarded as" prong, under which the "essential functions" concept should be irrelevant in post-ADAAA litigation. Section A explains why applying the "essential functions" concept to post-ADAAA "regarded as" claims adds an unwarranted hurdle to an employee's *prima facie* case. Section B demonstrates how this hurdle misaligns the ADA's "regarded as" prong from Title VII doctrine and thereby undermines Congress's intent to create universal impairment-based antidiscrimination protection. Section B also reveals the pernicious effects of this subtle doctrinal move by embedding disability and impairment-based stereotypes into ADA doctrine and reinforcing the view that impairments diminish work ability unless proven otherwise, rather than endorsing the opposite assumption as is done with all other protected statuses.[243]

242. *See infra* Section III.A.

243. *Cf.* Knapp, *supra* note 77, at 717 (arguing that using the essential functions concept as a screening device would "reinforce the stereotypes . . . that people with disabilities are less worthy than are able-bodied individuals and thus should not be integrated into the world or seen as fully capable persons").

A. The Inappropriate Use of Essential Functions in "Regarded As" Claims

While commentators rightfully applaud the ADAAA as having restored the protected class of individuals with disabilities to the broad scope that Congress originally intended,[244] the ADAAA accomplished something even more profound. Through its amendments, Congress extricated "disability" from the broader concept of "impairment" and bestowed upon impairment the status of an independent protected class for purposes of conventional antidiscrimination law.[245] This accomplishment is the result of two major components of the ADAAA. First, the ADAAA established that only individuals who fall under the statute's "actual" or "record of" disability definitions are entitled to workplace accommodations.[246] In other words, only individuals whose impairments are or have been substantially limiting of a major life activity—i.e., only individuals with *disabilities*—have the right to reasonable workplace accommodations. Second, the ADAAA dramatically expanded the definition of the "regarded as" prong to cover individuals with nearly all real or perceived physical or mental impairments, regardless of whether the impairment results in any functional limitations or stems from any disability-based stereotype or prejudice.[247] As a result of these two changes, the "regarded as" prong is best understood as a source of nearly universal impairment-based antidiscrimination protection, while the "actual" and "record of" prongs are best understood as establishing disability-based accommodation rights.

In making this bifurcation, Congress intended to align the ADA's "regarded as" prong with conventional antidiscrimination doctrine under Title VII.[248] Just as Title VII prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin, the ADA's "regarded as" prong now prohibits employers from discriminating on the basis of real or perceived physical or mental impairments.[249]

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244. *See* Travis, *Impairment*, *supra* note 9, at 938.

245. *See id.* at 938, 943-55.

246. *See* 42 U.S.C. § 12102(1) (2012).

247. *See supra* note 23 (describing narrow exclusion of "transitory and minor" impairments).

248. *See* Travis, *Impairment*, *supra* note 9, at 949-55.

249. *See* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L.

Unlike the ADA, Title VII has never had an "essential functions" component in its antidiscrimination doctrine. The reason that Congress added the "essential functions" concept to the ADA—although the ADA's language otherwise largely tracks Title VII's language[250]—was because of the ADA's reasonable accommodation mandate. In establishing the broad new right of individuals with disabilities to receive affirmative workplace modifications, Congress was also compelled to place limits on employers' obligations. Congress limited the ADA's accommodation mandate in three ways: (1) only requiring accommodations that are "reasonable"; (2) lifting the accommodation requirement when it imposes an "undue hardship" on an employer; and (3) using the "essential functions" concept to define which aspects of the workplace must be modified.[251]

With regard to the third limit, Congress established that employers are only required to modify the workplace in ways that enable employees to still perform a job's "essential functions." In other words, an employer may be required to accommodate an individual with a disability by eliminating a job's marginal functions, but not by eliminating performance of an essential function of the job. At the same time, to prevent employers from invoking marginal job tasks to disqualify individuals with disabilities, the "essential functions" concept effectively defines the elimination of marginal

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203, 278 (2010) (arguing that the ADAAA's expanded regarded as "prong harmonizes the concept of impairment with race, sex, and other protected characteristics"); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 622 (2004) (describing "regarded as" plaintiffs as "virtually indistinguishable from plaintiffs who seek relief from discrimination under Title VII"); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 189, 204 (2010) ("To a significant degree, the ADAAA may be read as aligning the ADA with Title VII.").

250. *See* Cox, *supra* note 249, at 189-90 (explaining that "the ADA is patterned on Title VII" (citing 135 CONG. REC. 8,518 (1989) (statement of Sen. Lieberman)).

251. *See* 42 U.S.C. § 12112(b)(5) (2012) (establishing obligation to provide "reasonable accommodations to . . . an otherwise qualified individual with a disability" unless it poses "an undue hardship"); *id.* § 12111(8) (defining a qualified individual as one "who, with or without reasonable accommodation, can perform the essential functions of the [job]"); *id.* § 12111(10) (defining undue hardship). Title VII contains a much more limited accommodation obligation for religion, *see id.* § 2000e(j), but its scope is limited by the Equal Protection Clause of the U.S. Constitution, which does not constrain the scope of the mandate under the ADA. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 5-8 (1996).

job tasks as a per se reasonable accommodation. In this way, the essential functions component of the ADA's "qualified individual" requirement was intended to focus the accommodation inquiry on parts of the job that really matter.

The "essential functions" concept is thus inextricably linked to and dependent upon the right to accommodations.[252] Since the ADAAA severed the accommodation right from the "regarded as" prong, the "essential functions" concept has no appropriate role to play in assessing "regarded as" claims—just as the "essential functions" concept is absent from Title VII. Congress did not make this clear in the ADA's amended language, however, which still contains a singular definition of a "qualified individual" as someone who can perform the essential job functions with or without accommodations.[253] Although individuals alleging impairment-based discrimination under the "regarded as" prong are no longer eligible for accommodations, courts have mechanically continued to apply the same "qualified individual" requirement for claims under all three prongs.

This is not to say that an employee's qualifications and job performance are irrelevant to a "regarded as" claim. Rather, an employee's qualifications and job performance should be assessed in the same way in ADA "regarded as" claims alleging impairment-based discrimination as they are assessed in Title VII claims alleging discrimination on the basis of other protected statuses. Inserting the "essential functions" concept into an employee's *prima facie* case in an ADA "regarded as" claim erects an unnecessary hurdle that does not exist for employees in Title VII discrimination claims. Section B reveals the significant impact that this is having on ADA "regarded as" claimants and how this is undermining Congress's goal of establishing universal impairment-based antidiscrimination protection.

B. How the Essential Functions Concept Undermines Universalism

As explained above, one of Congress's objectives with the ADAAA was to establish the "regarded as" prong as a source of impairment-based antidiscrimination protection that parallels Title VII's antidiscrimination protection on the basis of race, color,

252. *Cf.* Porter, *Backlash*, *supra* note 25, at 69 (explaining that "the qualified inquiry is tied up with the reasonable accommodation inquiry").

253. *See* 42 U.S.C. § 12111(8).

religion, sex, and national origin. Comparing the doctrinal approach that courts use to assess ADA "regarded as" claims with the approach used to assess Title VII claims at the pretrial motion stage provides a revealing picture about the extent to which that objective is being met. This comparison shows that incorporating the ADA's "essential function" component from the accommodation analysis into "regarded as" claims is adding a significant hurdle where no similar hurdle exists under Title VII. As a result, employers' new disqualification strategy is making it harder for plaintiffs to bring a claim of impairment discrimination than it is to bring a claim of discrimination on the basis of any other protected status.

Revealing the role that the "essential functions" concept is playing in ratcheting up an employee's burden in ADA "regarded as" cases does not require resolving the thorny questions about which doctrinal framework should apply when. Many scholars have analyzed the growing confusion in both Title VII and ADA cases regarding the appropriate use of the *McDonald Douglas* framework (which traditionally has been applied to single-motive cases) versus the mixed-motive framework.[254] Courts in different jurisdictions use varying approaches to decide which framework should apply.[255] This confusion is compounded in ADA cases because of an additional jurisdictional split over which of three distinct versions of the mixed-motive framework should apply to the ADA.[256] Regardless of the

254. *See, e.g.*, Nancy L. Zisk, *What Is Old Is New Again: Understanding* Gross v. FBL Financial Services, Inc. *and the Case Law that Has Saved Age Discrimination Law*, 58 LOY. L. REV. 795, 805 (2012) (describing courts' difficulty in deciding "whether a claim is a mixed-motives case or a single-motive, pretext case"); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 490 (2013) (observing "great uncertainty and confusion about the types of cases to which the *McDonnell Douglas* analysis applies").

255. *See* David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 916-19 (2010) (describing courts' varied approaches on when to use the *McDonnell Douglas* or the mixed-motive framework); Barrett S. Moore, *Shifting the Burden: Genuine Disputes and Employment Discrimination Standards of Proof*, 35 U. ARK. LITTLE ROCK L. REV. 113, 123-29 (2012) (same).

256. Specifically, courts have split on whether ADA mixed-motive claims should use the "motivating factor" approach from the Civil Rights Act of 1991, the approach articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which applied to Title VII before the 1991 Act, or the approach in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), which adopted "but for" causation under the ADEA. *See* Widiss, *supra* note 26, at 912-13 (describing circuit court split on whether ADA recognizes mixed-motive claims and, if so, what framework applies);

framework or approach, however, the essential functions component of the "qualified individual" requirement in the *prima facie* case sets ADA "regarded as" claims apart from their Title VII analogues by raising the bar for getting an impairment discrimination claim past the motion stage.

Although scholars have raised serious questions about the continued viability and value of the *McDonnell Douglas* burden-shifting framework,[257] federal district courts continue to invoke it frequently at the pretrial motion stage.[258] Comparing how courts apply the *McDonnell Douglas* framework to Title VII claims versus ADA "regarded as" claims reveals a misalignment that disadvantages plaintiffs who allege impairment-based discrimination.[259]

Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 109 (2011) (noting uncertainty "whether the ADA will follow a Title VII model, an ADEA model, or yet another model" for mixed-motive cases).

257. Many commentators predicted the demise of the *McDonnell Douglas* framework after *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which held that direct evidence of discrimination is not needed to invoke a mixed-motive framework, *id.* at 92. *See, e.g.*, William R. Corbett, Note, McDonnell Douglas, *1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200, 212-14 (2003) (arguing that "the old *McDonnell Douglas* proof structure is as dead as a doornail"); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 935 (2005) (explaining that "*McDonnell Douglas* may be either doctrinally or functionally dead"). *But see* Christopher R. Hedican, Jason M. Hedican & Mark P.A. Hudson, McDonnell Douglas: *Alive and Well*, 52 DRAKE L. REV. 383, 395-402 (2004) (arguing that *Desert Palace* did not overrule *McDonnell Douglas*); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1922-33 (2004) (analyzing the role for *McDonnell Douglas* after *Desert Palace*). Others have urged eliminating the *McDonnell Douglas* framework on various grounds. *See, e.g.*, Corbett, *supra* note 254, at 450-51; Kenneth R. Davis, *The Stumbling Three-Step Burden Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 761 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236 (1995); Sperino, *supra* note 256, at 115-24.

258. *See* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 114-15, 120 (2007) [hereinafter Katz, *Reclaiming*] (stating that "*McDonnell Douglas* remains firmly entrenched in disparate treatment law"); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1281-82 (2008) (arguing that *McDonnell Douglas* "remain[s] a vibrant and useful way to prove discrimination"); Sherwyn & Heise, *supra* note 255, at 916 ("Reports of *McDonnell Douglas*'s death . . . were greatly exaggerated."); Corbett, *supra* note 254, at 505 (noting that *McDonnell Douglas* continues to "flourish[]").

259. *See* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 858 (2010) (arguing that uniformity across federal antidiscrimination laws "is desirable,

In a Title VII case using the *McDonnell Douglas* framework to prove discrimination on the basis of race, color, religion, sex, or national origin, an employee first must prove a *prima facie* case, which requires four elements:

> (1) that she is a member of a protected class; (2) that she was qualified for the position sought; (3) she was subject to an adverse employment action; and (4) she was replaced by someone outside her protected class or was treated less favorably than other similarly situated employees outside her class.[260]

If the employee proves a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason (LNDR) for the adverse employment action.[261] If the employer proffers an LNDR, the burden returns to the employee to persuade the fact-finder that the employer's proffered reason is a pretext for discrimination on the basis of the employee's protected status.[262] Although the Supreme Court originally articulated this framework in the context of a hiring decision, courts have applied it to other adverse employment actions, including failure-to-promote and discharge decisions.[263]

In Title VII cases, the overall *prima facie* case—and the "qualified" element in particular—were designed and are applied to

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both as a matter of efficient legal administration and as an assumption about Congressional intent").

260. Haire v. Bd. of Supervisors of La. St. Univ. Agric. & Mech. Coll., 719 F.3d 356, 363 (5th Cir. 2013).

261. *See id.* at 362-63. Several scholars have criticized courts' deference to employers' asserted LNDRs in Title VII cases, just as this Article criticizes courts' deference to employers' asserted essential functions in ADA cases. *See, e.g.*, Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 324-25, 355 (2010) (arguing that courts have "an ethos of deference to an employer's business judgment" and "hesitate to pass judgment on the employer's legitimate, non-discriminatory reasons"); Sperino, *supra* note 256, at 111 (arguing that "courts have broadly defined what constitutes a legitimate, nondiscriminatory reason" under Title VII and "largely defer to the business judgment of employers"). Employees in Title VII cases may at least challenge an LNDR as pretextual, however, while that opportunity is foreclosed to ADA plaintiffs if a court determines at the *prima facie* stage that they are unable to perform an essential job function, which ends the case even if the employer has articulated an LNDR.

262. *Haire*, 719 F.3d at 362-63.

263. *See* Sperino, *supra* note 256, at 76-77; *see also* Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000) (stating that the adverse action needed for a *McDonnell Douglas prima facie* case may include "discharges, demotions, refusals to hire, refusals to promote, and reprimands").

impose a very low burden on employees.[264] There is no detailed assessment of job functions, tasks, or skills—essential or otherwise—at the *prima facie* stage. To meet the "qualified" element in a Title VII *prima facie* case, an employee need only show that he or she meets the job's minimum, objectively measurable qualifications.[265] Courts do not even require a plaintiff to meet a job qualification if the person who got the job also did not meet that criterion.[266] Because the *prima facie* case focuses solely on "objectively verifiable" job requirements, an employee need not demonstrate that he or she has been or will be able to meet the employer's subjective performance criteria.[267] In a case involving discharge, an employee need not prove "perfect performance, or even average performance," to meet the qualification element of a Title VII *prima facie* case.[268] In a hiring or promotion case, an

264. *See* Katz, *Reclaiming*, *supra* note 258, at 124 n.63 (explaining that "the *prima facie* case is designed to set a fairly low threshold, which most plaintiffs are able to clear" (emphasis added)); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 377 (1997) ("The 'burden' of showing a *prima facie* case is commonly acknowledged to be extremely light." (emphasis added)); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The burden of establishing a *prima facie* case of disparate treatment is not onerous." (emphasis added)).

265. *See* Zimmer, *supra* note 258, at 1271 (describing the *prima facie* case as only requiring evidence that plaintiff has the "minimum qualifications necessary to perform the job[]"); Sherwyn & Heise, *supra* note 255, at 909 (describing the *prima facie* case as only requiring proof that plaintiff is "minimally qualified for the position"); Deborah M. Weiss, *The Impossibility of Agnostic Discrimination Law*, 2011 UTAH L. REV. 1677, 1725 (describing the *prima facie* case as only requiring proof that plaintiff "met the minimum qualifications").

266. *See* Michael J. Hayes, *That Pernicious Pop-Up, the Prima Facie Case*, 39 SUFFOLK U. L. REV. 343, 366-67 (2006) (describing cases in which Title VII plaintiffs need not meet a qualification when the person selected also lacked the qualification); Johnson v. Louisiana, 351 F.3d 616, 623-25 (5th Cir. 2003) (holding that Title VII plaintiffs need not prove they meet a job's stated qualification if the person hired also lacked the qualification); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 637, 643 (11th Cir. 1998) (reversing dismissal because plaintiff was improperly required to prove a qualification that the person hired for the job also lacked).

267. *See* Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 768-69 (11th Cir. 2005) (holding in Title VII cases that "subjective evaluations play no part in the plaintiff's *prima facie* case" (emphasis added)); Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1123 (9th Cir. 2009) (finding district court improperly considered subjective qualifications in plaintiff's *prima facie* Title VII case); Kulik v. Med. Imaging Res., Inc., 325 F. App'x 413, 414 (6th Cir. 2009) (same).

268. *See* 45B AM. JUR. 2D *Job Discrimination* § 938 (2012) (compiling Title VII cases showing that "the plaintiff need not show perfect performance, or even average performance," to state a *prima facie* case).

employee need not prove that he or she "is a strong or even plausible candidate" for the position being sought,[269] nor does the employee typically have to prove that he or she is more qualified than the individual who received the position.[270] If anything, the trend has been toward lowering the bar on the "qualified" element of a Title VII *prima facie* case, as courts have been "watering down" the requirement in recognition that performance criteria for many positions, particularly high level positions, are becoming less objectively measurable.[271] As a result, Title VII claims are rarely dismissed for an employee's failure to state a *prima facie* case, particularly for failure to establish the "qualified" element.[272]

The qualified element of a Title VII *prima facie* case is not only a low hurdle when it is applied, but in most cases it is irrelevant to a judge's assessment of a summary judgment motion.[273] The Supreme Court has clarified that once an employer has articulated an LNDR for the adverse action in a Title VII disparate treatment claim,

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269. *See* David N. Rosen & Jonathan M. Freiman, *Remodeling* McDonnell Douglas*:* Fisher v. Vassar College *and the Structure of Employment Discrimination Law*, 17 Q.L.R. 725, 752-53 (1998) (reviewing Title VII case law showing that "a plaintiff need make only a 'minimal showing of qualification,' and need not show that she is a strong or even plausible candidate" to state a *prima facie* case (citation omitted)).

270. *See* 45B AM. JUR. 2D *Job Discrimination* § 938 (2012) (compiling Title VII cases showing that "[t]he employee's performance . . . does not have to be compared with that of other employees" to state a *prima facie* case); Charlotte N. Sweeney, *Employment Law Survey*, 71 DENV. U. L. REV. 945, 951-53 (1994) (analyzing Title VII case law showing that a plaintiff's "relative qualifications" to the person selected "are best addressed at the pretext stage"); Rosen & Freiman, *supra* note 269, at 753 (explaining that a plaintiff does not need "to demonstrate that she was as fully qualified as the candidates selected for a noncompetitive position, or more qualified than those selected for a competitive position" to state a Title VII *prima facie* case).

271. *See* Rosen & Freiman, *supra* note 269, at 748-49, 752-53; Alisa D. Shudofsky, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553, 559 (1982) (noting courts' tendency to "reject[] arguments seeking to increase plaintiffs' *prima facie* burden" on the qualification element in Title VII cases (emphasis added)).

272. *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 668 (1998) (explaining that Title VII's "prima facie case has evolved into something of a formality," and "many courts simply presume" that it is met).

273. *See* Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 492 (D.C. Cir. 2008) ("[W]hether the plaintiff in a [Title VII] disparate-treatment discrimination suit actually made out a prima facie case is almost always irrelevant when the district court considers an employer's motion for summary judgment . . . .").

the question of whether the employee stated a *prima facie* case is "no longer relevant" and "drops out of the picture."[274] As one circuit court has explained, although "[m]uch ink has been spilled regarding the proper contours of the *prima-facie*-case aspect of *McDonnell Douglas*[,] . . . the *prima facie* case is a largely unnecessary sideshow."[275] Whenever an employer has asserted an LNDR—which occurs in nearly all claims that make it to summary judgment—the focus is entirely upon whether the employee has produced enough evidence for a fact-finder to find the LNDR pretextual for discrimination on the basis of race, color, religion, sex, or national origin.[276]

This does not mean that an employee's actual performance or ability to perform various job functions is irrelevant in Title VII cases; it just means that analysis of relevant qualification issues is housed in the pretext stage.[277] Assessing qualifications in the pretext rather than the *prima facie* stage has several important consequences. First, if an employee's ability to perform a particular job function was *not* raised as an LNDR, then no analysis is conducted about whether the employee can or cannot perform that function (or whether that function is or is not essential). An employee has no burden to establish the ability to perform job functions that the

274. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."); *Brady*, 520 F.3d at 494 ("In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.").

275. *Brady*, 520 F.3d at 494 (emphasis added).

276. *See id.* (citing *Hicks*, 509 U.S. at 507-08; *Aikens*, 460 U.S. at 714-16); Katz, *Reclaiming*, *supra* note 258, at 135 n.91 (arguing that "courts should never dismiss cases for failure to state a prima facie case where the defendant nonetheless proffers a reason for its action and the plaintiff has evidence tending to show that the proffered reason is pretext").

277. *See* Rosen & Freiman, *supra* note 269, at 752-54 (stating that "real analysis and evaluation of evidence" of a plaintiff's qualifications is "reserved for the [pretext] stage" of Title VII cases); *see also* Russell G. Donaldson, Annotation, *Consideration of Work Performance or Production Records as Pretext for Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.)*, 32 A.L.R. Fed. 7, § 2[a] (1977) (stating that employee performance issues should be raised by the employer as an LNDR and analyzed in the pretext stage).

employer does not assert as an LNDR for the adverse employment action.

Second, if an employee's ability to perform a particular job function *is* raised as an LNDR, there is no deference given to an employer's statement as to whether that job function is essential, which is a concept foreign to Title VII analysis. The focus in assessing pretext is on what role, if any, either the employer's stated LNDR or the employee's protected status played in the adverse employment decision. When an employer does raise an employee's qualifications or ability to perform aspects of the job as an LNDR, the employee is then able to submit all evidence relevant to the accuracy, legitimacy, and motives underlying the asserted LNDR as part of the pretext analysis. As long as the employee can raise a genuine issue regarding pretext, the Title VII case will proceed past summary judgment.

Housing the analysis of job qualification issues in the pretext rather than the *prima facie* stage of a Title VII case ensures that only qualification issues that may relate to the adverse employment action are considered at summary judgment, and it allows full assessment of all contextual facts regarding the qualifications criteria. The employee may challenge the asserted qualification or performance issues as untrue, inaccurate, or not causally linked to the adverse action.[278] The employee may show that the employer adopted the qualification criteria with a discriminatory motive or applied it in a discriminatory manner to members of the employee's class.[279] The employee may also show that his or her job performance record was itself the result of bias by showing discriminatory manipulation of job assignments, failure to provide protected class members with adequate training, or simply from conscious or unconscious stereotypes by the evaluating superiors, particularly when being assessed on subjective criteria.[280] As a result, the qualification element of a Title VII *prima facie* case typically gets "subsumed into

278. *See* Donaldson, *supra* note 277, §§ 2[a], 7.

279. *See id.* §§ 2[a], 6; *see also* 45B AM. JUR. 2D *Job Discrimination* § 938 (2012); Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 17 (1996) ("[I]f a prima facie case suggests that a minority employee is not qualified for a promotion, but the majority race employee who received the promotion was even less qualified, intentional discrimination could be inferred . . . .").

280. *See* Donaldson, *supra* note 277, §§ 2-5.

one of establishing that the employer's alleged nondiscriminatory reason . . . was pretextual."[281]

This picture is quite different when courts analyze an ADA "regarded as" claim alleging impairment-based discrimination at a pretrial motion stage. Courts generally articulate the *prima facie* case with elements that closely mirror those in the standard *McDonnell Douglas* formulation, except that they replace the general "qualified element" with the ADA's more specific definition of a "qualified individual."[282] Rather than using the typical "qualified for the position" language in the *McDonnell Douglas* framework, courts use the definition of a "qualified individual with a disability" who must be able to "perform the essential functions of the job with or without reasonable accommodation."[283] Courts acknowledge that the ADAAA severed the accommodation right from the "regarded as" prong, but rather than concluding that the essential functions concept is therefore irrelevant, courts instead conclude that the employee must prove his or her ability to perform all essential job functions *without* accommodations in order to state a *prima facie* case of impairment-based discrimination.[284] This subtle move generally goes

281. *See* 45B AM. JUR. 2D *Job Discrimination* § 938 (2012).

282. *See, e.g.*, Wurzel v. Whirlpool Corp., 482 F. App'x 1, 9 (6th Cir. 2012) (describing a *prima facie* case under the ADAAA's "regarded as" prong); Kiniropoulos v. Northampton Cty. Child Welfare Serv., 917 F. Supp. 2d 377, 383-84 (E.D. Pa. 2013) (same); *see also* Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 658 (W.D. Ky. 2012) (listing elements of a *prima facie* ADA case); Fleck v. Wilmac Corp., No. 10-05562, 2012 WL 1033472, at *5-6 (E.D. Pa. Mar. 27, 2012) (applying *McDonnell Douglas* to an ADAAA claim).

283. *See, e.g.*, EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007) (applying *McDonnell Douglas* to ADA claims lacking direct evidence, but replacing general qualification element with specific requirement that plaintiff be "qualified to perform the essential functions of his position, with or without a reasonable accommodation" (citation omitted)); Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 86-87 (1st Cir. 2012) (same); Olsen v. Capital Region Med. Ctr., 713 F.3d 1149, 1153-54 (8th Cir. 2013) (same).

284. *See, e.g.*, *Wurzel*, 482 F. App'x at 11 & n.13 (explaining that because an ADAAA "regarded as" plaintiff "would not be entitled to the benefit of a reasonable accommodation[,] . . . the question of [the employee's] qualification must be decided without regard to any potential accommodation"); Jennings v. Dow Corning Corp., No. 12-12227, 2013 WL 1962333, at *1, *9 (E.D. Mich. May 10, 2013) (holding that an ADAAA "regarded as" plaintiff must prove the ability to perform the essential job functions without accommodation); Hoback v. City of Chattanooga, No. 1:10-CV-74, 2012 WL 3834828, at *4-5 (E.D. Tenn. Sept. 4, 2012) (holding that an ADAAA plaintiff "who is only 'regarded as' disabled must be able to perform the essential functions of the job without reasonable accommodation" to "show he is a qualified individual"). Courts that had not applied the accommodation

unchallenged because it appears to be a rational, statute-specific application of *McDonnell Douglas* to the disability context. However, significant consequences flow from this maneuver, which ultimately makes stating an impairment discrimination claim more difficult than stating a claim for discrimination on the basis of race, sex, or Title VII's other protected statuses.

Inserting the essential functions requirement into the qualification element of a *prima facie* ADA "regarded as" claim would not be particularly problematic if courts treated the *prima facie* case as irrelevant whenever an employer proffers an LNDR, as courts do with Title VII claims. Unfortunately, most courts do not allow the *prima facie* case to "drop out of the picture" when an employer asserts an LNDR in an ADA "regarded as" case, but instead treat the "qualified individual" requirement as an enduring threshold hurdle that an employee must overcome before the court will assess any asserted LNDRs for pretext.[285] Thus, unlike in Title VII claims where the *prima facie* case is almost always irrelevant at the summary judgment stage where employers routinely assert one or more LNDRs, the *prima facie* case becomes the central focus of many ADA "regarded as" claims. More specifically, the central focus often becomes the employee's ability to perform all essential job functions, whether or not the employer asserted the employee's inability to perform any such function as an LNDR for the adverse employment action in the case.[286]

That also would not be particularly problematic if courts treated the "qualified individual" requirement in a *prima facie* ADA "regarded as" claim as the same minimal hurdle that they do in a Title VII *prima facie* case. Unfortunately, as described above, courts often treat the "qualified individual" requirement as a very high hurdle. Moreover, by deferring to an employer's definition of a job's

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mandate to "regarded as" claims under pre-ADAAA law had used the same approach to the qualified element. *See, e.g.*, Balliett v. Heydt, Nos. Civ.A. 95-5184, Civ.A. 95-7182, 1997 WL 611609, at *6 (E.D. Pa. Sept. 25, 1997) (explaining that an ADA "regarded as" plaintiff "must still identify all of the essential job functions, but is required to produce evidence that he is capable of performing all such duties *without accommodation*").

285. EEOC v. Amego, Inc., 110 F.3d 135, 145 (1st Cir. 1997) (stating that in ADA claims, "showing 'qualifications' has substance, notwithstanding the frequent leapfrogging of that analysis to get to the pretext issue under *McDonnell Douglas*").

286. *See, e.g.*, *Jennings*, 2013 WL 1962333, at *1, *9-12 (extensively analyzing the "qualified individual" requirement and dismissing ADAAA "regarded as" claim because plaintiff was unable to perform all essential functions of a "Loss Prevention Officer" job).

essential functions—which employers have diligently been enshrining in new and expansive job descriptions—courts allow the height of this hurdle to be controlled to a very large degree by employers themselves. Unlike in Title VII cases where an employee need only show minimal, objective qualifications to meet the *prima facie* case, an ADA "regarded as" plaintiff must show the ability to perform every function that an employer deems to be essential to the job. This creates some striking differences in the content of the *prima facie* case analysis under Title VII and the ADA's "regarded as" prong.

Subjective qualifications offer one illustration of this difference. While courts deem subjective assessments irrelevant to a Title VII *prima facie* case,[287] employers may assert subjective qualifications as essential job functions that an employee must meet to state a *prima facie* ADA "regarded as" claim. In a Title VII case, an employer must assert purported issues with an employee's "attitude," "interpersonal skills," "personality," or "relations with coemployees" as an LNDR to explain the adverse employment action.[288] The employee may then challenge whether those subjective job requirements played a role in the adverse action, or whether the plaintiff's protected status played a role in the selection, evaluation, or application of those subjective job requirements.[289] In an ADA "regarded as" claim, in contrast, an employer may assert a wide range of subjective attitude, personality, or interpersonal qualities as essential job functions,[290] which then requires the employee to demonstrate the ability to perform those functions to state a *prima facie* case, regardless of whether the alleged inability played a role in the adverse employment action or whether the criteria were adopted

287. *See supra* note 267 and accompanying text.

288. *See* 45B AM. JUR. 2D *Job Discrimination* § 948 (2012) (compiling Title VII cases).

289. *See* Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769 (11th Cir. 2005) (holding that "subjective evaluations . . . are properly articulated as part of the employer's burden to produce [an LNDR] . . . then subsequently evaluated as part of the court's pretext inquiry").

290. *See Who Is Qualified Individual*, *supra* note 81, §§ 2[a], 40-41 (summarizing pre-ADAAA cases showing that mere employer expectations, such as the "acceptance of supervision" and "the ability to get along with others," have been deemed essential functions of all or most jobs); *see also* Kinghorn v. Gen. Hosp. Corp., No. 11-12078-DPW, 2014 WL 3058291, at *6, *9 (D. Mass. July 1, 2014) (relying on the employer's job description to conclude that "strong communication skills" and "the ability to 'work independently on projects with limited supervision'" and to "[w]ork collaboratively" were essential functions of a Bioinformatics Specialist position).

or applied in a discriminatory manner. The gap between the treatment of subjective qualifications in a Title VII claim versus an ADA "regarded as" claim is even wider in many jurisdictions where courts are reluctant to permit employers to raise subjective reasons as an LNDR at all in Title VII cases, or where courts at least subject them to heightened scrutiny.[291]

The Eleventh Circuit explained the risks from allowing evaluations of subjective qualifications to play a role in the *prima facie* case when it prohibited such an approach under Title VII.[292] "If we were to hold an employer's subjective evaluations sufficient to defeat the *prima facie* case," the court explained, "plaintiff would be given no opportunity to demonstrate that the subjective evaluation was pretextual."[293] The court recognized that "[s]uch a blind acceptance of subjective evaluations" would seriously undermine antidiscrimination law because "subjective criteria can be a ready vehicle for race-based decisions."[294]

The same rationale should be compelling in the disability context, as social scientists have documented that implicit biases related to disability are particularly robust and widespread.[295] Implicit disability-based bias is not only shared "across genders, ethnicities, age groups, and political orientations,"[296] but is also *stronger* than

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291. *See* Katz, *Reclaiming*, *supra* note 258, at 172 (explaining that some courts prohibit employers from invoking subjective reasons, "such as 'personality conflicts,'" as LNDRs because they "are difficult to disprove" and "[t]he point of *McDonnell Douglas* is to require employers to provide a reason that can be tested"); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1298 (D.C. Cir. 1998) (stating that courts "treat explanations that rely heavily on subjective considerations with caution"); Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 370-71 (explaining that some courts apply heightened scrutiny when employers articulate subjective reasons as LNDRs); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 767 (2005) (arguing that courts are rightfully suspicious when employers articulate subjective reasons as LNDRs).

292. *See Vessels*, 408 F.3d at 768-69.

293. *See id.* (emphasis added).

294. *Id.* at 769.

295. *See* Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 475-78 (2008) (summarizing social science research documenting implicit disability-based biases).

296. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. SOC. PSYCHOL. 36, 40, 54-55 (2007) (aggregating 2.5 million responses to the Implicit Association Test). Implicit

implicit biases based on gender, race, religion, and sexuality.[297] Disability bias is also particularly difficult to disrupt because implicit and explicit attitudes about disability are more weakly correlated than for most other protected statuses,[298] which means that "people are particularly unwilling to admit—or more likely, are unaware of—their implicit bias against individuals with disabilities."[299] By allowing employers to assert subjective qualifications as essential job functions, courts are allowing these disability biases to go unscrutinized by enabling employers to obtain dismissals of ADA cases at the *prima facie* stage—exactly the concern that lead the Eleventh Circuit and other courts to reject such an approach under Title VII.

Another example of the difference between the *prima facie* case for Title VII versus ADA "regarded as" claims involves structural workplace norms. As explained above, courts have allowed employers to assert structural norms as essential job functions, for which an employee must demonstrate compliance to state a *prima facie* ADA claim. In Title VII cases, in contrast, employers must raise issues of absenteeism, attendance, or tardiness as LNDRs for the adverse employment action, which then permits the employee to challenge the credibility and application of those structural norms in the pretext stage.[300] For example, a Title VII plaintiff could show in the pretext analysis that a similarly situated employee outside the plaintiff's protected class was not fired for the same attendance record.[301] In an ADA case, in contrast, once a court deems regular attendance to be an "essential function"—often largely if not entirely because the employer's job description declares it so—the employee is deemed unqualified, and the court

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disability-based bias even exists among individuals with disabilities, although to a lesser degree than for the nondisabled. *Id.* at 54-55.

297. *See id.* Implicit bias is also stronger for disability than for political orientation. *Id.* Only age-based bias appeared stronger than disability-based bias. *Id.*

298. *See id.* (finding a weaker correlation between implicit and explicit attitudes about disability than for other protected statuses except age); *see also* Steven R. Pruett & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 REHABILITATION PSYCHOL. 202, 207 (2006) (finding no significant correlation between implicit and explicit disability bias in a study of 223 subjects).

299. *See* Larson, *supra* note 295, at 477.

300. *See* 45B AM. JUR. 2D *Job Discrimination* § 950 (2012) (compiling Title VII cases).

301. *See id.*

typically does not proceed to analyzing the potential pretextual nature of the attendance requirement.

As these examples illustrate, courts' refusal to allow the "qualified individual" requirement to drop out of the case when an employer proffers an LNDR, along with courts' deference to employers' asserted essential job functions, means that ADA "regarded as" plaintiffs may never receive meaningful assessment of whether impairment discrimination played a role in an adverse employment action. Some employers have won on summary judgment based on a finding that the employee was unable to perform an asserted essential function and was therefore unqualified, without the court ever considering evidence that the inability was not the real motive for the adverse action or that the employer adopted or applied the criteria in a discriminatory manner.[302] Some employers have even won on summary judgment based on a finding that the employee was unable to perform an asserted essential function and was therefore unqualified when the employer did not even assert that the alleged inability motivated the adverse action at issue.[303]

The district court decision in *Azzam v. Baptist Healthcare Affiliates, Inc*. illustrates the heightened role that the qualified element of the *prima facie* case is playing in ADA "regarded as" claims.[304] Azzam was a registered nurse (RN) who suffered a stroke

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302. *See supra* notes 288-301; *infra* notes 304-05. A few district courts have approached ADA "regarded as" claims correctly by analyzing alleged performance issues not under the qualifications element of the *prima facie* case but as an asserted LNDR that is scrutinized for pretext, just as *McDonnell Douglas* works in Title VII cases. *See, e.g.*, Cohen v. CHLN, Inc., No. 10-00514, 2011 WL 2713737, at *6-9 (E.D. Pa. July 13, 2011) (finding triable issue in ADA "regarded as" claim as to whether discharge was based on performance or on employee's impairment); Meinelt v. P.F. Chang's China Bistro, Inc., 787 F. Supp. 2d 643, 645-47, 651-53 (S.D. Tex. 2011) (same). In those cases, the employee had been performing satisfactorily, informed the employer of an impairment, and was promptly fired for alleged performance issues that appeared contrived. *See Cohen*, 2011 WL 2713737, at *9; *Meinelt*, 787 F. Supp. 2d at 646.

303. *See infra* notes 304-22 and accompanying text.

304. 855 F. Supp. 2d 653 (W.D. Ky. 2012). In some cases, courts improperly treated the "essential functions" component of the qualifications element of the *prima facie* case as a high and non-disappearing hurdle, but the employee nevertheless created a triable issue on his or her qualifications. *See, e.g.*, Chamberlain v. Valley Health Sys., Inc., 781 F. Supp. 2d 305, 310-11 (W.D. Va. 2011) (finding triable issue in ADAAA "regarded as" claim as to whether plaintiff with a visual impairment could perform the essential functions of a pharmacy technician); Gaus v. Norfolk S. Ry. Co., No. 09-1698, 2011 WL 4527359, at *20-29 (W.D. Pa. Sept. 28, 2011) (finding triable issue in ADAAA "regarded as" claim as

or cardiovascular incident.[305] Pursuant to her doctor's direction, she returned to work on light duty and was then allowed to work for four months on a five-hour per day schedule without "on-call" responsibilities on evenings or weekends.[306] After co-workers complained about Azzam not taking on-call time, the employer demanded that she return to eight-hour days and take on-call responsibilities.[307] Azzam said that she was not medically cleared for longer shifts or on-call hours, so her employer fired her.[308] Azzam brought an ADA "regarded as" claim, and the employer sought summary judgment.[309] The court held that although Azzam had created a triable issue on her protected status under the ADAAA's "broadened standards," she failed to show that she could perform the essential functions of an RN job.[310] The court therefore granted the employer summary judgment on the ground that the employee had failed to prove the "qualified individual" element of her *prima facie* case.[311]

In reaching that conclusion, the court accepted the employer's assertion that working eight-hour shifts and taking on-call time were essential functions of a surgical RN job, in large part because a personnel policy listed on-call responsibilities as a requirement and the job description listed "adhering to departmental policies . . . as a principal duty" of a surgical RN.[312] Because the court concluded that the employee was unqualified and therefore failed to state her *prima facie* case, the court did not address whether the employer had proffered an LNDR for her discharge or whether the employee had created a triable issue that the LNDR was a pretext for impairment discrimination.

Unlike in a Title VII case, the *Azzam* court analyzed the qualification element of the ADA *prima facie* case at length and used it to dismiss the employee's claim, even though the employer had proffered two LNDRs for the discharge. The employer's written "Separation Report" stated that the reasons for Azzam's termination

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to whether plaintiff with a "chronic pain condition" could perform the essential functions of an electrician).

305. *Azzam*, 855 F. Supp. 2d at 655.
306. *Id.* at 656.
307. *Id.* at 655-56.
308. *Id.* at 656.
309. *Id.* at 657.
310. *Id.* at 661-62.
311. *Id.* at 655, 662.
312. *Id.* at 661.

were her being "[d]issatisfied w[ith] [s]chedule" and being "unable to take call which is a requirement for staff RN's in surgery."[313] In a Title VII case, those articulated LNDRs would have rendered the *prima facie* case irrelevant and shifted analysis exclusively to pretext. The *Azzam* court, in contrast, never analyzed pretext because it granted summary judgment based on the employee's failure to state a *prima facie* case. As a result, the court never discussed potential inferences that a jury might draw about a discriminatory motive from the fact that Azzam successfully performed as a surgical RN on her reduced-hour schedule for four months without any negative feedback, and the employer only demanded the hour change and on-call responsibilities after other RNs complained.[314] One of the employer's asserted essential functions—the purported need to work eight-hour shifts—was not even stated in the Separation Report as a reason for her termination or as a requirement for an RN position, yet the employer nonetheless was permitted to raise the employee's inability to meet that requirement as a basis for disqualifying her from ADA coverage.

This latter issue is illustrated even more strikingly in the district court case of *Kiniropoulos v. Northampton County Child Welfare Service*.[315] The plaintiff was a child welfare services caseworker who had received "satisfactory or commendable" performance evaluations.[316] The plaintiff injured his leg, which affected his mobility and made it difficult for him to attend hearings, so he asked his employer for a temporary medical leave.[317] His employer never responded to the request, but instead promptly informed the plaintiff that it had discovered "an issue with the [p]laintiff['s] work documentation . . . [and] several alleged infractions and alleged misconduct regarding the [p]laintiff's cases," for which the plaintiff was suspended and then fired.[318]

The employee filed a complaint alleging an ADA "regarded as" claim, and the employer filed a motion to dismiss.[319] The court held that the employee's allegations supported protected class status, which is just as Congress intended under the ADAAA.[320] But the

313. *Id.* at 657.
314. *See id.* at 655-56.
315. 917 F. Supp. 2d 377 (E.D. Pa. 2013).
316. *Id.* at 381.
317. *Id.* at 381-82.
318. *Id.* at 382.
319. *Id.* at 382-83.
320. *See id.* at 386-87.

court also held that the employee had not sufficiently pled the "qualified individual" element of his *prima facie* case.[321] The court concluded that because the employee had asked for leave, "he could not perform the essential functions of the job as he could not perform any job functions and he is not a qualified individual under the act."[322] This was despite the fact that the employer had not claimed to have suspended and fired the plaintiff for requesting or needing a temporary leave, but rather for alleged issues with his work documentation and case misconduct.[323] The employee never had an opportunity to litigate whether those asserted LNDRs were the real reason for him losing his job, although the timing of his termination suggests that the LNDRs may have been a pretext for impairment discrimination. The "qualified individual" requirement not only remained in the case even though the employer had stated an LNDR, but it secured the employer a dismissal even though the basis for disqualification was not the reason the employer gave for the employee's termination.

The plaintiff also brought a Title VII national origin discrimination claim in the same complaint based on the same factual allegations, which the employer also moved to dismiss.[324] The court began by reciting the standard elements of a *prima facie* case under the *McDonnell Douglas* framework, including that the plaintiff must be "qualified for the position."[325] Although the court's opinion had just analyzed the ADA "regarded as" claim and dismissed it for failure to plead the "qualified individual" requirement of the *prima facie* case, the court did not analyze the "qualified" element in the Title VII *prima facie* case at all, other than noting in passing that the plaintiff had alleged "he was qualified for the position he held."[326] The court ultimately dismissed the national origin claim as well, but it did so on the fourth element because the plaintiff had failed to plead any facts in the complaint alleging "that the action occurred under circumstances that give rise to an inference of unlawful discrimination."[327]

In cases like *Kiniropoulus*, in which an employer obtains a dismissal of an ADA "regarded as" claim on the ground that the

321. *See id.* at 387.
322. *Id.*
323. *See id.* at 382.
324. *Id.* at 381, 388.
325. *Id.* at 388.
326. *Id.* at 389.
327. *Id.* at 388-90.

employee is unqualified even though the employer did not assert the qualification issue as the reason for the adverse employment action, the *prima facie* case is playing a very different role than it does in Title VII claims. In Title VII cases, the *prima facie* case is designed simply to compel the employer to produce a reason for its adverse action.[328] That reason, in turn, gives the employee a target when trying to make the often difficult circumstantial showing that a discriminatory motive played a role in the decision.[329] That is why the *prima facie* case drops out once an employer proffers an LNDR to explain its decision. In an ADA "regarded as" case, in contrast, an employee may be required to prove the ability to perform all job functions that the employer deems essential as a threshold to having his or her discrimination claim considered, even if the employer has asserted a reason other than the alleged inability to perform a job function as the basis for the adverse employment action.

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328. *See* Hayes, *supra* note 266, at 375 (explaining that the *prima facie* case exists "to force the employer to produce a reason for its action"); Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 706 (2000) (explaining that *McDonnell Douglas* "creat[es] a rebuttable presumption of liability to force the employer to come forward with the nondiscriminatory reason it claims justified its decision"); Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 561 (2001) (describing the *prima facie* case as "merely a vehicle to coax an [LNDR] from the employer"); Katz, *Reclaiming*, *supra* note 258, at 135 n.91 (describing the *prima facie* case as merely "a trigger for forcing an at-will employer to proffer a reason for its action").

329. *See* Katz, *Reclaiming*, *supra* note 258, at 124-25 (explaining that the *prima facie* case "provid[es] the victims of discrimination with a target," which "allows the victim to shoot at this target, to attempt to attack the employer's explanation"). Others describe the purpose of Title VII's *prima facie* case as eliminating the most common nondiscriminatory reasons for an adverse employment action—i.e., lack of qualification or lack of an available position—which creates an inference of a discriminatory motive. *See, e.g.*, Hayes, *supra* note 266, at 377; Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). The strength of that rationale rests upon the validity of the underlying assumption that discrimination is more likely than not the cause of an adverse employment action when those common legitimate reasons are eliminated. *Compare Burdine*, 450 U.S. at 254 ("[T]he prima facie case raises an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."), *and* Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997-98, 1025-36 (1994) (defending the *McDonnell Douglas* assumption that, "absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination"), *with* Malamud, *supra* note 257, at 2254-62 (arguing that the *McDonnell Douglas* assumption lacks empirical support).

Scholars have roundly criticized courts that have occasionally made this error in Title VII cases. Professor Michael Hayes has used the term "pernicious pop-up" to describe such cases in which a court inappropriately dismisses a case for failure to prove an element of the *prima facie* case that the employer did not raise as an LNDR—i.e., cases in which an element of the *prima facie* case is allowed to "pop-up" as a hurdle for an employee even after the employer has proffered an LNDR, which should render the *prima facie* case irrelevant.[330] "[W]hen an element of the *prima facie* case has not been identified by the employer as one of the true reasons for its action," explains Hayes, "then there is no basis for finding that element to have any connection with the employer's motivation."[331] Accordingly, Hayes and others have denounced cases in which courts have erred by dismissing a Title VII claim based on an insufficient showing of qualifications to meet the *prima facie* case, "even when the employer never claimed insufficient qualifications as the reason for its decision."[332] When this error periodically shows up in Title VII cases, scholars agree that the *prima facie* case inappropriately "operates as an artificial obstacle the plaintiff must overcome" and "imposes an arbitrary condition the plaintiff must satisfy," which is inconsistent with Title VII's proof structure for assessing discrimination claims.[333]

Yet despite widespread agreement that such an approach is erroneous under Title VII—where it has become the maligned exception rather than the accepted norm—scholars have not

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330. *See* Hayes, *supra* note 266, at 343, 375-76.

331. *Id.* at 376 (emphasis added).

332. *Id.*; *see* Davis, *supra* note 257, at 707-08, 751, 753, 756 (arguing that if a Title VII plaintiff "proves that discrimination motivated the employer's decision to reject, demote or fire," the case should not be dismissed on *prima facie* case grounds because an "unqualified" plaintiff may still suffer actionable discrimination); Sperino, *supra* note 256, at 94-95 (arguing that "when the employer's reasons for an employment decision do not relate to the employee's qualifications," the employee's qualifications should be irrelevant to a Title VII *prima facie* case).

333. Hayes, *supra* note 266, at 376; *see* Davis, *supra* note 257, at 753, 756 (arguing that strict application of the qualification element of a Title VII *prima facie* case "doom[s] otherwise valid discrimination claims," such as "where a defendant summarily rejects an unqualified applicant for an illegal discriminatory reason"); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 230-31, 230 n.125 (1993) (criticizing old Title VII cases in which courts required plaintiffs to prove more than objective minimum qualifications because courts were collapsing pretext into the *prima facie* stage and forcing the plaintiff to rebut the employer's defense to avoid dismissal).

recognized that the "essential functions" component of the ADA's qualification requirement can play the same pernicious pop-up role. When a court requires an employee to prove the ability to perform all job functions that the employer deems essential to state a *prima facie* ADA "regarded as" case, even when the employer has asserted a different LNDR for its adverse employment action, the *prima facie* case is not serving as a triggering mechanism to focus the case on facts relevant to the employer's motive. The *prima facie* case is instead acting as a gatekeeper to legal protection against impairment-based discrimination. In these cases, the essential functions component of the qualifications element effectively determines which employees are and are not worthy of the law's protection from impairment-based employment decision-making.

While some may argue that such a gate-keeping role is defensible in ADA claims under the "actual" or "record of" prongs in which the employee is asking for an accommodation, its application to the "regarded as" prong serves only to undermine the universal antidiscrimination protection that Congress intended with the ADAAA. The "essential functions" component of the qualifications element is being used to indirectly police the boundary of the ADA's protected class, just as courts did directly in pre-ADAAA cases by narrowly defining the class of individuals with disabilities. This disqualification approach, while more subtle, still reflects the entrenched view that the ADA is not a civil rights law but is instead a welfare statute that provides special benefits to a minority group.[334] Its effect is to embed disability-based stereotypes into ADA doctrine itself by reinforcing the assumption that impairments *do* affect performance unless the employee proves otherwise, rather than the other way around as Title VII doctrine presumes with other protected statuses.[335]

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334. *Cf.* Anderson, *supra* note 8, at 71 ("Courts have been slow to embrace disability as a matter of civil rights, instead taking more of a welfare-benefits approach to interpreting the rights granted under the Act."); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (arguing that pre-ADAAA case law reveals that "courts do not fully grasp, let alone accept, the [ADA's] reliance on a civil rights model"); Cox, *supra* note 249, at 189, 193 (arguing that pre-ADAAA courts viewed the law "through the lens of welfare reform" rather than "the lens of civil rights").

335. *Cf.* Sperino, *supra* note 256, at 94-95 (arguing that if courts consider a Title VII plaintiff's qualifications after an employer proffers a non-qualifications-related LNDR, the *prima facie* case would "sidetrack[] courts into thinking about whether the plaintiff is a 'bad' employee . . . instead of whether discrimination occurred").

Although this analysis has focused on circumstantial evidence cases using a burden-shifting framework, the same embedded stereotypes also exist in ADA cases that courts characterize as direct evidence or mixed-motive cases. Regardless of the framework that a court invokes to analyze an ADA claim at a motion stage—which is done inconsistently in different jurisdictions[336]—the "qualified individual" requirement is treated as an enduring threshold requirement that precedes inquiry into the employer's motivations. As the Sixth Circuit stated in a recent ADA case, "[u]nder either a circumstantial-evidence analysis (requiring application of the *McDonnell Douglas* burden-shifting framework) or a direct-evidence analysis (not requiring the burden-shifting framework), a plaintiff must show that he is otherwise qualified for the position."[337] As a result, courts often avoid deciding contested issues about which framework applies by dismissing the case on a threshold conclusion that the employee failed to show the ability to perform all essential job functions.[338] Plaintiffs can therefore find their ADA "regarded as" cases derailed at the *prima facie* stage even when there is direct evidence of an impairment-based motive for an adverse employment action, which often occurs because the employer expressly stated that it refused to hire, fired, or did not promote the individual because of a real or perceived impairment.[339]

In a Title VII case involving direct evidence of a status-based motive, an employer is not barred from raising qualifications issues that are not causally related to the adverse employment decision, but the employer must do so as an affirmative defense alleging that it would have made the same decision anyway based on non-

336. *See supra* note 255 and accompanying text.

337. Wurzel v. Whirlpool Corp., No. 10-3629, 482 F. App'x 1, 10 n.10 (6th Cir. 2012); *see* Mashek v. Soo Line R.R. Co, No. 11-487(MJD/JJG), 2012 WL 6552795, at *5-6 (D. Minn. Dec. 14, 2012) (stating that "[w]hether or not the *McDonnell Douglas* burden shifting analysis applies," an ADA plaintiff must prove she "is qualified to perform the essential functions of [the] job, with or without reasonable accommodation").

338. *See, e.g.*, *Wurzel*, 482 F. App'x at 10 n.10 ("Because th[e] case turns on the issue of [the employee's] qualifications, the question whether [the employee] has raised a direct-evidence argument or a circumstantial-evidence argument is not outcome determinative.").

339. *See, e.g.*, Cleveland v. Mueller Copper Tube Co., No. 1:10CV307-SA-SAA, 2012 WL 1192125, at *4-7 (N.D. Miss. Apr. 10, 2012) (requiring employee to prove she could perform all essential job functions to state a *prima facie* ADA "regarded as" case, even though "direct evidence" of impairment-based discrimination existed, and dismissing the case on the qualifications element).

discriminatory grounds.[340] Such a defense, however, only limits the remedies that a Title VII plaintiff may receive and does not negate the employer's liability for engaging in a discriminatory employment action.[341] In an ADA case, in contrast, qualifications issues that are not causally related to the adverse employment decision may be raised by an employer to obtain dismissal on the ground that the employee failed to meet the "qualified individual" requirement, which precludes a finding of liability. Once again, the qualifications requirement ends up playing a very different role in ADA claims than it does in claims under Title VII. While invoking a disqualification strategy to defend a status-based decision affects the scope of the remedy when race, sex, or other protected statuses under Title VII are involved, the disqualification strategy serves as a gatekeeper to legal protection under the ADA.

In order to resist these effects that the new disqualification strategy is having on the "regarded as" prong, disability advocates will need to do more than just seek out and bring to courts' attention the few cases that properly have embraced the EEOC's multi-factor, fact-specific inquiry of essential job functions. Getting courts to replace reflexive employer deference with meaningful job assessment will be a start and will help broaden access to workplace accommodations as Congress intended under the ADAAA's "actual" disability prong. But for the ADAAA to achieve its goal of universal impairment-based antidiscrimination under the "regarded as" prong, attorneys must begin convincing courts to treat the "regarded as" prong more like Title VII discrimination claims and less like ADA claims for accommodation. Because virtually all members of the workforce do or will have some type of impairment during their workings lives, this is an outcome for which we all have a shared interest.

CONCLUSION

Although this Article reveals a significant risk that might once again undermine the ADA's full potential, it does not bring solely bad news for disability rights. Through the ADAAA, Congress has successfully overridden federal courts' narrow interpretation of

340. *See* Davis, *supra* note 257, at 707-08, 751, 761 (arguing that lack of qualifications does not negate Title VII liability if the plaintiff "proves that discrimination motivated the employer's decision to reject, demote or fire him," but the lack of qualifications may support a "same decision anyway" defense).

341. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

disability, which is no longer being used to routinely remove individuals from ADA protection. By shifting focus away from policing the boundaries of protected class status, the ADAAA has laid the foundation for universalizing and destigmatizing disability. By largely eliminating disability status as a gatekeeper for ADA protection, Congress has moved courts a step closer to confronting the real issues underlying impairment-based discrimination and exclusionary workplace design.

To realize the ADAAA's full potential, however, disability rights advocates must proactively confront the ADA's qualifications requirement and the essential functions inquiry. By getting courts to distinguish job functions from qualification standards, organizational norms, and subjective expectations, and by pushing courts to engage in a meaningful fact-specific inquiry on the essential nature of job tasks, advocates may help ensure the broad access to workplace accommodations that Congress intended. Without such efforts, employers' new disqualification strategy could enable courts to simply deflect disability-based stereotypes and assumptions away from individuals with disabilities and onto workplaces that are built upon unscrutinized able-bodied norms. The risk that the disqualification strategy poses to Congress's goal of providing universal impairment-based antidiscrimination protection is even higher, as the "essential functions" inquiry has marked impairment as a second-class protected class status. By pressing courts to fully implement Congress's intent to align the ADA's "regarded as" prong with Title VII doctrine, advocates may help ensure that the ADA retains its stature as a core piece of civil rights legislation.