THE DANGER OF THE "ESSENTIAL FUNCTIONS" REQUIREMENT OF THE ADA: WHY THE INTERACTIVE PROCESS SHOULD BE MANDATED

ABSTRACT

The 1990 passage of the Americans with Disabilities Act (ADA) was met with resistance from both courts and employers. This resistance took the form of a screening mechanism that restrictively interpreted the definition of "disability." To rectify the narrowed interpretation of disability, Congress passed the Americans with Disabilities Amendments Act of 2008 (ADAAA), which expanded the definition. Although the ADAAA has increased the number of individuals covered by the ADA, the other elements of a plaintiff's prima facie claim for employment discrimination under Title I of the ADA remain the same. Because most pre-ADAAA disability discrimination litigation concerned whether an individual had a disability, jurisprudence about the other elements of a prima facie claim is relatively undeveloped. This lack of jurisprudence as well as continued judicial resistance to the ADA raises concerns about the emergence of a new screening mechanism available to courts: the "essential functions" requirement of the ADA, which mandates that an employee be able to perform the essential functions of her job. If the essential functions requirement were used as a gatekeeper, it would undermine the goals of the ADA. To prevent such abuse, a certain kind of interactive employer–employee mediation process should be mandated. Additionally, an employer should be independently liable for failure to participate in the interactive process.

TABLE OF CONTENTS

INTRODUCTION

Following the passage of the Americans with Disabilities Act of 1990 (ADA), plaintiffs bringing disability-based employment discrimination claims under the ADA faced a disproportionate number of summary judgments.[1] The disability rights movement, which helped to enact the ADA, saw the need to amend the ADA because it was not fulfilling the goals it was meant to achieve—to end the paternalism of, and to foster integration into everyday life for, people with disabilities.[2] The purpose of the ADA Amendment Act of 2008 (ADAAA) was to broaden the definition of disability because the definition in the original ADA was somewhat ambiguous, and consequently courts were able to narrow it significantly in their interpretation of the ADA.[3] Because the ADAAA did expand the definition of "disability," other elements of a plaintiff's prima facie claim for disability discrimination under the ADA remained the same, including the requirement that an individual be "qualified" (i.e., able to perform) with or without reasonable accommodations, the "essential functions" of a job.[4] The requirement that the employee be able to perform the essential functions of a job could become an attractive gatekeeper for courts to continue to block potential plaintiffs from bringing or prevailing in employment discrimination suits under the

1. *See* Adrien Katherine Wing, *Examining the Correlation Between Disability and Poverty: A Comment from a Critical Race Feminist Perspective—Helping the Joneses to Keep Up!*, 8 J. GENDER RACE & JUST. 655, 656–57 (2005) ("[O]nly 2.7% of plaintiffs prevailed in Title I ADA filed cases, as opposed to 17.2% of plaintiffs in nonemployment ADA cases." (footnote omitted)).

2. Throughout this Comment, I use the phrase "people with disabilities" or "individuals with disabilities" because politically active Americans with disabilities think that these phrases are more reverent and less degrading than "the disabled." SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW CASES AND MATERIALS 1 (2010).

3. *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, 199−200 (2010).

4. *See id.* at 204.

ADA. The recent Tenth Circuit case of *EEOC v. Picture People, Inc.*[5] shows how this requirement could be used as a screening mechanism.

This Comment argues that the use of the essential functions requirement as a screening mechanism would be especially dangerous for the goals of the disability rights movement. Continually dismissing cases because the plaintiff could not perform the essential functions of her job would reinforce the stereotypes the ADA was enacted to combat: 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.[6] To combat the use of the essential functions requirement as a possible screening mechanism, this Comment suggests that a particular kind of interactive employer–employee mediation process be mandated by the ADA.

To contextualize the language of the ADA and the ADAAA, Part I of this Comment provides a brief background of the ADA's enactment and its subsequent amendments. Part II shows how the essential functions requirement could be used to block potential plaintiffs from bringing or prevailing in employment discrimination suits under the ADA as was done in *EEOC v. Picture People, Inc*. Part III argues that the use of the essential functions requirement as a screening mechanism would be especially damaging to the goals of disability rights advocates. Moreover, this Comment argues that an interactive employer–employee mediation process focusing on the essential functions of a job should be mandated to keep the essential functions requirement from becoming such a screening mechanism.

I. BACKGROUND

To help contextualize the ADA and its subsequent amendments, subpart A explains the goals of the disability rights movement. Subpart B explains the uniqueness of the original ADA as it encompassed aspects of both a civil rights statute and welfare legislation.[7] Subpart C explains why and what kind of backlash the original ADA received, and subpart D introduces the ADAAA—the legislative response to the ADA backlash.[8] Finally, subpart E explains why it is important to look to post-ADAAA disability discrimination litigation to determine whether and what kind of screening mechanisms could be used by the courts.

A. Goals of the Disability Rights Movement

The ADA, signed into law on July 26, 1990, by President George H.W. Bush, was heralded as a remarkable step toward rectifying the dis-

5. 684 F.3d 981 (10th Cir. 2012).
6. *See* BAGENSTOS, *supra* note 2, at 4.
7. *See id.*
8. *Id.* at 52.

crimination faced by millions of Americans with disabilities.[9] The purpose of the ADA was "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]."[10] The ADA's articulation of this goal was largely the result of the efforts of advocates in the disability rights movement, which began in the 1970s.[11] Truly understanding the goals and hopes of the ADA requires first examining the forces behind its enactment.[12]

Throughout the disability rights movement, the advocates championed two major theoretical concepts: anti-paternalism and the social model of disability.[13] The first concept, anti-paternalism, was lifted from two articles written by Jacobus tenBroek in 1966.[14] Professor tenBroek argued that society's common perceptions and stereotypes about people with disabilities, much more than any physical impairment itself, creates substantial limitations on people with disabilities to interact with the world.[15] These limitations manifest as a "custodial attitude [that] is typically expressed in policies of segregation and shelter, of special treatment and separate institutions."[16] To combat this, tenBroek argued that disability law should focus on integration.[17] His recommendation largely influenced the goals of the disability rights movement, as seen by the movement's challenge to society's common response of pitying people with disabilities.[18] Advocates wanted people with disabilities to be seen as autonomous individuals capable of conducting their own lives.[19]

The second concept behind the disability rights movement, the social model of disability, challenged the typical medical definition of the word "disability."[20] The social model theorizes that the norms of society determine who is and who is not disabled.[21] Viewing people with disabilities as different from the majority has created a world that caters to the

9. 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, 473 (2011); Maureen R. Walsh, Note, *What Constitutes a "Disability" Under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 918 (1998).

10. 42 U.S.C. § 12101(a)(7) (2012).

11. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1409 (1999); *see also* BAGENSTOS, *supra* note 2, at 2.

12. Eichhorn, *supra* note 11.

13. BAGENSTOS, *supra* note 2, at 4.

14. *See id.* at 2, 4.

15. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 842 (1966).

16. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 816 (1966).

17. tenBroek, *supra* note 15, at 843.

18. *See* BAGENSTOS, *supra* note 2, at 4.

19. *See id.*

20. *See* Eichhorn, *supra* note 11, at 1414–15.

21. *See id.*

majority and ignores the needs of people with disabilities.[22] Disability results from the various barriers that society constructs—physical, social, and attitudinal—which obstruct an individual's ability to truly partake in society.[23] For example, a person in a wheelchair experiences disability because society has chosen to design buildings with steps and narrow doorways instead of ramps and wider doorways, even though it would not have been more expensive to construct the building in an accessible way.[24] Thus, a disability is not an innate condition; rather, it is a social construction resulting from society's preference for the majority.[25] By challenging the common perception of disability as a problem that needs to be cured or as a condition that requires pity or charity and instead positing that society itself perpetuates disabilities, the disability rights movement hoped that "the proper response [to disability would be] one that requires *society* to change its aspects that make some mental or physical conditions disabling."[26]

The goals of the disability rights movement, and subsequently of the ADA, reflect these two major concepts.[27] These goals stress integration into society by effectuating change in societal attitudes.[28] It is important to disability rights advocates to accomplish these goals in a manner that stresses the recognition of rights over charity.[29] Thus, disability rights advocates desired civil rights legislation as opposed to welfare legislation to prohibit discrimination against people with disabilities.[30]

B. The ADA as a Hybrid of a Civil Rights Statute and Welfare Legislation

The ADA recognized the disability rights advocates' desire for a civil rights statute while acknowledging the unique circumstances of individuals with disabilities.[31] In some instances, individuals with disabilities need different treatment in order to be treated equally.[32] Therefore, unlike other civil rights statutes, the ADA is unique because it

22. *See id.*

23. Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 428 (2011).

24. *See* Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 181–84 (2002).

25. Eichhorn, *supra* note 11, at 1415 ("Disabled people are not inherently disabled, but are instead actively disabled by a discriminatory society.").

26. BAGENSTOS, *supra* note 2, at 4.

27. *See id.*

28. Eichhorn, *supra* note 11, at 1418 ("Among the chief goals of the movement, which continues today, are recognition of disabled people as full human beings and elimination of physical and attitudinal barriers to their full participation in society." (footnote omitted)).

29. *Id.*; *see also* BAGENSTOS, *supra* note 2, at 4.

30. BAGENSTOS, *supra* note 2, at 4.

31. *See id.* at 7–8; Eichhorn, *supra* note 11, at 1419.

32. *See* BAGENSTOS, *supra* note 2, at 7–8.

"does not simply require equal treatment of similarly situated individuals."[33] Instead, the ADA

> [r]equir[es] both less and more. The ADA requires more because not only does it require that individuals with disabilities be treated no worse than nondisabled individuals with whom they are similarly situated, but, in certain contexts, it requires that they be treated differently, some might say better, to achieve equal footing. The ADA arguably requires less because, if the disabled individual cannot do the job, even with reasonable assistance, the employer is not obligated to employ that individual.[34]

The ADA was initially celebrated for its unique approach to combating disability discrimination; however, the Act was met with substantial backlash not only from employers[35] but also from the judiciary.[36] This resistance stemmed from a fear that the ADA provided claimants with preferential treatment, and it was often characterized as an affirmative action statute.[37] The judicial backlash manifested in a disproportionate number of summary judgments for defendants due to claimants' failure to qualify as disabled under the ADA definition of "disability."[38] A more detailed account of the nature and extent of the backlash is discussed below.

C. Judicial Backlash

To establish a prima facie case for disability discrimination under the original ADA, a plaintiff must show that (1) she is disabled within the meaning of the ADA; (2) she is qualified (with or without a reasonable accommodation) to perform the essential functions of the position she has or desires; and (3) the employer took an adverse employment action against an employee with a disability because of her disability.[39] The definition of "disability" under the original ADA was as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[40] In the

33. Collins & Phillips, *supra* note 9, at 471.

34. *Id.*

35. 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 (2009).

36. *Id.*; *see also* Collins & Phillips, *supra* note 9; Scott Johnson, *The ADAAA: Congress Breathes New Life into the Americans with Disabilities Act*, 81 J. KAN. B. ASS'N 22, 23 (2012).

37. Johnson, *supra* note 36 ("Many courts characterized it as an affirmative action program for the disabled, rather than as an antidiscrimination statute. Even the U.S. Supreme Court explicitly referred to certain accommodations as 'preferences for individuals with disabilities.'" (footnote omitted) (quoting Travis, *supra* note 35, at 318)).

38. Valderrama, *supra* note 3, at 204.

39. 42 U.S.C. §§ 12111–12112 (2012).

40. 42 U.S.C. § 12102(2) (2012).

following two cases, the Supreme Court significantly narrowed the ADA definition of "disability."

In *Sutton v. United States Air Lines, Inc.*,[41] the Supreme Court substantially narrowed the definition of "disability," making it more difficult for claimants to overcome defendant employers' motions for summary judgment.[42] In an opinion delivered by Justice O'Connor, the *Sutton* Court affirmed the judgment of the Tenth Circuit,[43] holding that courts should consider mitigating measures, such as an individual's medications or treatments, when determining whether one has a disability for purposes of the ADA.[44] Additionally, the *Sutton* Court's opinion highlighted the demanding nature of fulfilling a "regarded as [disabled]" claim under the ADA.[45] Under a regarded as disabled claim, a plaintiff must show not only that the employer held a misconception about the plaintiff's impairment but also that the employer believed that the plaintiff's impairment substantially limited a major life activity.[46]

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[47] the Supreme Court defined "major life activities" as "those activities that are of central importance to daily life."[48] To support this definition, the *Toyota* Court declared that the ADA's definition of disability "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled,"[49] further narrowing the definition of disability under the ADA.

D. Result of Sutton *and* Toyota*: The Americans with Disabilities Amendments Act*

Sutton and *Toyota* made it extremely difficult to prevail with an employment discrimination claim under the ADA.[50] Research showed that only 2.7% of plaintiffs prevailed in employment discrimination cases filed under the ADA, as opposed to 17.2% of plaintiffs in non-employment ADA cases[51] and 58.0% of plaintiffs in all federal civil cases—an enormous disparity.[52] The rulings in *Sutton* and *Toyota* left plaintiffs in a catch-22 situation in which they either were not "disabled enough" to warrant protection under the Act or were "too disabled" to qualify for the jobs they desired.[53] One scholar noted that the "judicial

41. 527 U.S. 471 (1999).
42. *See* Johnson, *supra* note 36, at 24.
43. *Id.*
44. *Sutton*, 527 U.S. at 475.
45. *Id.* at 489.
46. *Id.*
47. 534 U.S. 184 (2002).
48. *Id.* at 185.
49. *Id.* at 197.
50. *See* Johnson, *supra* note 36, at 25.
51. Wing, *supra* note 1, at 656.
52. *Id.* at 656–57.
53. Johnson, *supra* note 36, at 25–26; Valderrama, *supra* note 3, at 198.

hostility to the ADA ran so deep that Congressional response seemed inevitable."[54] Disability rights advocates persuaded "members of the business community to negotiate a compromise bill to restore the ADA's protected class to the scope originally intended by Congress, in exchange for several provisions that precluded the potential expansion of rights and coverage under other disputed sections of the original ADA."[55] On September 25, 2008, President George W. Bush signed the ADAAA.[56] The ADAAA sought to correct the narrow interpretation of "disability" that resulted from *Sutton* and *Toyota*.[57]

The ADAAA made several changes to the ADA. First, with regard to mitigating measures, the ADAAA affirmatively states that they should not be considered when determining if an individual has a disability.[58] This provision directly addressed the Supreme Court's ruling in *Sutton* that mitigating measures should be considered in assessing whether a plaintiff has a disability.[59] Second the ADAAA made proving a regarded as disabled claim easier for employees, as the employee only has "to show an adverse employment action was taken because the employer 'perceived' an impairment—which can be any condition with an expected duration of more than six months."[60] The plaintiff no longer must show that her employer believed that the impairment substantially limited a major life activity.[61] Third, in response to the Supreme Court's definition of "major life activities" in *Toyota*, the ADAAA expanded what constitutes a major life activity, including such things as "standing, lifting, bending, reading and concentrating, along with performing manual tasks, thinking, eating, sleeping and communicating."[62] Additionally, the ADAAA states that major life activities include "the operation of a major bodily function."[63] "Further broadening the coverage of the [A]ct, the ADAAA makes clear that impairments that are episodic or in remission are still protected disabilities if they would substantially limit a major life activity when active."[64] Fourth, the ADAAA also states that the term "substantially limits" should not mean "significantly restricted" as some courts had held because that was "too high a standard."[65]

54. Travis, *supra* note 35, at 319.
55. *Id.*
56. BAGENSTOS, *supra* note 2, at 52.
57. *Id.*
58. 42 U.S.C. § 12102(4)(E)(ii) (2012).
59. Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. LAW., Feb. 2009, at 37, 39.
60. *Id.* at 38.
61. *See id.*
62. Wilson & Krulewicz, *supra* note 59, at 38 (citing 42 U.S.C. § 12102(2)(A)).
63. 42 U.S.C. § 12102(2)(B).
64. Wilson & Krulewicz, *supra* note 59, at 38 (citing 42 U.S.C. 12102(4)(D)); *see also* BAGENSTOS, *supra* note 2, at 53.
65. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–3554.

One major component of the Act remained unchanged.[66] To establish a prima facie claim for discrimination, a plaintiff must still prove that she was qualified, either with or without reasonable accommodations.[67] A "qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[68] Thus, an individual must still show that she can perform the essential functions of the position and that her accommodations were reasonable.[69]

E. Litigation After the ADAAA Enactment

The ADAAA took effect on January 1, 2009,[70] and it did not apply retroactively.[71] Therefore, the volume of litigation applying the new aspects of the ADAAA is relatively limited. Because cases prior to the ADA dealt exclusively with the definition of "disability" and did not develop the other elements of a prima facie case,[72] it is important to look at whether the ADAAA is receiving the same kind of backlash as did the original ADA and whether a new screening mechanism has been erected by the courts, resulting in a disproportionate number of summary judgments for defendants. This prospect seems likely, considering the ADAAA has been criticized for opening the floodgates of litigation by expanding the definition of "disability."[73]

II. *EEOC V. PICTURE PEOPLE, INC.*

In *EEOC v. Picture People, Inc.*, the Tenth Circuit recently demonstrated that an employee's ability to meet the essential functions of a job could potentially be used as a gatekeeping mechanism for employment discrimination claims brought under the ADAAA. An analysis of the case and its potential impact on the future of disability discrimination litigation under the ADAAA follows.

66. *See* Valderrama, *supra* note 3, at 204.
67. *See id.*
68. 42 U.S.C. § 12111(8) (2012).
69. *See id.*
70. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–3554.
71. Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 514 (2011).
72. *See* Valderrama, *supra* note 3, at 204.
73. Amelia Michelle Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 366 (2010) ("[T]he enactment of the ADAAA . . . '[could] open a 'Pandora's Box' of claims by people who do not have a disability under any rational interpretation of that term.'" (second alteration in original) (quoting *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 34 (2007) (statement of Camille A. Olson, Partner, Seyfarth Shaw, LLP))).

A. Facts

The plaintiff, Jessica Chrysler, was an employee at Picture People, Inc., a photography studio in Littleton, Colorado.[74] She was "profoundly deaf," but she could communicate through "writing notes, gesturing, pointing, and miming. She [could] also type, text message, and use body language."[75] Jessica could also use American Sign Language (ASL), but according to Picture People, she could not read lips or speak many words.[76]

Jessica was hired as a "performer" for the photography studio, which entailed "customer intake, sales, portrait photography, and laboratory duties."[77] Another performer usually aided Jessica when she shot photographs in the studio, but she was occasionally able to shoot by herself.[78] On such occasions, Jessica would communicate with her photography subjects, who were usually children, "by writing notes, gesturing, and miming."[79]

In November 2007, Master Photographer Libby Johnston was sent to Picture People "to improve photography quality and sales in anticipation of the holidays."[80] Jessica claimed that she requested an ASL interpreter for a training session held by Johnston, but Picture People was unable to provide one.[81] Johnston's evaluation of Jessica focused on Jessica's communication skills, which Johnston maintained were "awkward, cumbersome, and *impractical*."[82] After conferring with Johnston, Picture People's district manager recommended and Picture People agreed that Jessica be "almost exclusively" relocated to the photography lab.[83]

Jessica was relocated and her hours were cut, after which she requested more hours.[84] Jessica was denied more hours, and management reported that she was "angry" and less productive at work.[85] After the 2007 holiday season, Jessica remained an employee but was not allotted work hours at the photography studio.[86] She was officially terminated in October 2008.[87]

74. EEOC v. Picture People, Inc., 684 F.3d 981, 983–84 (10th Cir. 2012).
75. *Id.* at 983.
76. *Id.* at 983–84.
77. *Id.* at 984.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 984–85.
86. *Id.* at 985.
87. *Id.*

B. Procedural History

The Equal Employment Opportunity Commission (EEOC) sued under Title I of the ADA on Jessica's behalf, claiming employment discrimination on the basis of a disability.[88] The district court granted summary judgment in favor of the employer.[89] The district court determined that Jessica could not meet a prima facie case for discrimination under the ADAAA because she could not perform the essential functions of the job with or without reasonable accommodations.[90]

C. Majority Opinion

The Tenth Circuit reviewed the district court's ruling de novo and affirmed.[91] The court stated the elements needed to show a prima facie case for discrimination under the ADAAA—that the employee "(1) be a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability."[92] The parties agreed that Jessica was disabled, so the opinion hinged on the second element of disability discrimination.[93]

The issue concerned whether verbal communication skills constituted an essential function of the job of performer.[94] The majority emphasized the need to first inquire as to whether the employer required all performers to have strong verbal communication skills.[95] If so, the court must next inquire as to "whether verbal communication skills are fundamental to the performer position."[96] This inquiry considers the following factors:

> (i) [t]he employer's judgment as to which functions are essential;
>
> (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) [t]he amount of time spent on the job performing the function;
>
> (iv) [t]he consequences of not requiring the incumbent to perform the function;
>
> (v) [t]he terms of a collective bargaining agreement;

88. *See id.*
89. *Id.*
90. *Id.* at 983.
91. *Id.* at 983, 985.
92. *Id.* at 985.
93. *Id.*
94. *Id.*
95. *Id.* at 985–86.
96. *Id.*

> (vi) [t]he work experience of past incumbents in the job; and/or
>
> (vii) [t]he current work experience of incumbents in similar jobs.[97]

The court concluded that Jessica was "unable to fully perform three of the four duties of a performer."[98] Although she could perform in the lab, she did not possess the ability to proficiently register and recruit customers, instruct children while taking their pictures, or sell photo packages by addressing customer issues.[99] Her limited abilities, the court reasoned, were problematic, especially because Picture People allowed only twenty minutes for each photo shoot.[100]

Because the court determined that Jessica was unable to perform the essential functions of the job, the court considered whether there were reasonable accommodations that the employer could provide that would enable her to perform those essential functions.[101] The court defined reasonable accommodations as

> "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position" or "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[102]

The majority opinion first stated that a reasonable accommodation could not consist of allowing Jessica to communicate non-verbally because it could not require an employer to eliminate an essential function of the job.[103] The majority opinion then stated that providing Jessica with an ASL interpreter at staff meetings would not allow her to perform the essential functions of her job because verbal communication needed to occur during photo sessions.[104] In light of these circumstances, the court concluded that no reasonable accommodation could have allowed Jessica to perform the essential functions of her job.[105]

97. *Id.* at 986.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 987.
102. *Id.* (alterations in original) (quoting 29 C.F.R. § 1630.2(o)(1)(ii)–(iii) (2012)).
103. *Id.*
104. *Id.* at 987–88.
105. *Id.* at 988.

D. Dissenting Opinion

Judge Holloway offered a dissent that began by presenting a more detailed account of the facts of the case.[106] The dissent pointed out that Picture People had hired Jessica knowing she was deaf and knowing the duties of a performer.[107]

The dissent also noted that Jessica's start time had been delayed three weeks because Picture People failed to provide an interpreter for her training session.[108] The manager of the studio contacted Picture People's human resources department but was told that Picture People did not provide those services in an e-mail stating that "hiring an interpreter 'to be around the studio while this employee is working . . . seems like an expense we would like to do without.'"[109] Eventually, Jessica found her own interpreter to aid her during her job training session.[110]

The dissent emphasized that Jessica had received highly favorable reviews for her photography sessions with children and there was no evidence that her sessions were unsuccessful.[111] In fact, just days after her training session, Jessica had a photo shoot with a family who was so pleased with her performance, it purchased more photos than it had originally planned.[112] Consequently, the family returned to the studio the next month for another photo shoot with Jessica, but Picture People falsely informed the family that Jessica was unavailable when, in fact, Jessica was working in the lab at the time.[113]

The dissent noted that despite Jessica's positive performance, Picture People reassigned Jessica to the lab following a staff training session for which she requested but was not provided an interpreter.[114] Following this reassignment, Picture People cut her hours significantly.[115] She requested more hours and was promised an increase; eventually Picture People cut her hours altogether.[116] Finally, Picture People terminated Jessica after months of waiting to see if she would get more hours.[117] On top of everything, the dissent concluded, Picture People reprimanded Jessica when she complained about her hour reduction.[118]

106. *Id.* at 992 (Holloway, J., dissenting).
107. *Id.*
108. *Id.* at 994.
109. *Id.* (alteration in original).
110. *Id.*
111. *Id.* at 992.
112. *Id.* at 994–95.
113. *Id.*
114. *Id.* at 995.
115. *See id.* at 996.
116. *Id.* at 996–97
117. *Id.* at 997.
118. *Id.* at 992–93.

The dissent reasoned that summary judgment for the defendant employer was inappropriate. There was substantial evidence from which a jury could decide that verbal communications skills were not an essential function of the job but instead were a method used to perform an essential function of the job, which was communication in general.[119] The dissent stated that none of the descriptions of the job, either written by Picture People before Jessica's employment or given from witnesses during trial, stated that verbal communication was an essential function of the job.[120]Thus, there was enough evidence to preclude summary judgment.[121]

Additionally, the dissent disagreed with the court's holding that Jessica's written communication and gestures were less effective than was oral communication.[122] Jessica received no negative feedback from customers about her performance while photographing children.[123] On the contrary, Jessica showed that she could communicate effectively by receiving positive feedback about her performance.[124] The dissent stated that "[o]nly by ignoring this clear example of [Jessica's] ability to perform the essential functions of photo shooting and sales can the majority find that 'nothing suggests' that she could do that which she had in fact already done."[125]

Finally, the dissent remarked that the determination of whether something is an essential function of a job is a question for the jury.[126] The dissent emphasized that "[a] jury could determine that the Employer's decisions were based on exactly the kind of stereotypes that the ADA was enacted to combat."[127]

III. ANALYSIS

The majority opinion in *EEOC v. Picture People, Inc*. is illustrative of the dangerous potential of judicial backlash towards the ADAAA in the form of granting summary judgment for employer defendants on the basis of employees lacking the ability to perform an essential job function. The essential functions requirement could be a new screening mechanism courts employ to combat the "flood of litigation" the ADAAA arguably unleashes.[128] As the dissent in *Picture People* conveyed, the grant of summary judgment for the defendant was unwarrant-

119. *Id.* at 999.
120. *Id.* at 998.
121. *See id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1000.
127. *Id.*
128. Joiner, *supra* note 73, at 336.

ed.[129] Even if summary judgment were warranted, the problems Jessica experienced at her job highlight the failure or lack of an interactive process through which the employer and employee discuss what the essential functions of the job will be and what, if any, reasonable accommodations the employee will need to perform the job's duties.

This Comment argues that a mandated interactive process should be implemented as part of establishing a prima facie case for disability discrimination. First, subpart A explains why judicial backlash to the original ADA occurred, and predicts why a similar backlash in the form of using the essential job functions requirement as a gatekeeper is a real possibility. Second, subpart B discusses the dangers of using the essential job functions requirement as gatekeeper because it would seriously undermine the goals of the ADAAA. Subpart C explains the interactive employer–employee mediation process and suggests that it should be mandated for employers to participate in such a process with an employee if the employer knows or should know that the employee has a disability. If an employer does not participate in an interactive process, the employee's claim should prevail. Finally, subpart D outlines what an effective interactive process should look like.

A. Explaining the Judicial Backlash

Although the ADAAA was signed into law in September 2008, it only applies to adverse employment actions taken after the effective date of January 1, 2009.[130] Therefore, the first cases interpreting the ADAAA have taken some time to surface.[131] Consequently, any meaningful trends regarding the judicial reaction to the ADAAA are limited.[132] Whether a new screening mechanism will emerge remains to be seen; however, there is reason to believe that a similar form of judicial backlash will occur.[133] Because ADA jurisprudence is wrought with ambiguities and the ADAAA will likely result in more disability-based employment discrimination litigation, it is also likely that judicial backlash will again take the form of a screening mechanism to control the increased volume of cases.[134]

A new gatekeeping mechanism could potentially develop via the other prima facie elements of a plaintiff's employment discrimination claim: the essential functions requirement and the reasonable accommodation requirement.[135] Because so many cases under the original ADA

129. *Picture People*, 684 F.3d at 1000.

130. Jana K. Terry, *The ADA Amendment Acts Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last*, FED. LAW., Nov.–Dec. 2011, at 49, 49.

131. *Id.*

132. *Id.*

133. *See* Valderrama, *supra* note 3, at 202–03.

134. *Id.*

135. *See id.* at 204.

focused on whether a plaintiff had a disability, case law concerning whether a plaintiff can perform the essential functions of a job, or whether a requested accommodation is reasonable, is less developed.[136] Because these areas of law are less developed, courts still have latitude in "end[ing] the inquiry at the coverage stage based on the plaintiff's qualifications (including whether she can perform essential job functions or whether the accommodation was reasonable), achieving the same result as the restrictive definition of disability."[137]

In any case, it is important to understand why courts would implement such a mechanism. Understanding the judicial backlash helps predict the form said mechanism could take and helps in the development of a solution. There are several explanations for the judicial resistance to the original ADA (and the consequent reaction of the restrictive definition of disability).[138] First, courts may have been reacting to the special nature of the ADA as a blended civil rights and welfare statute.[139] Other civil rights statutes prohibit employers from discriminating against an employee based on that employee's protected status.[140] The protected status, such as race, gender, age, or religion, is generally irrelevant to an employee's ability to perform a job.[141] The ADA concerns and protects individuals whose disabilities may legitimately impact job performance and requires that employers accommodate those individuals at the employer's own expense.[142] Thus, courts may have viewed claimants as underserving, or even worse, as "really just lazy, malingerers, or whiners."[143] Second, courts may have been reluctant to impose costs on employers.[144] After all, employers are not responsible for plaintiffs' disabilities, and "it might thus seem unreasonable to require them to absorb costs associated with these conditions."[145]

136. *See id.*
137. *Id.* (footnote omitted).
138. *See* Hickox, *supra* note 23, at 426–28.
139. *See id.* at 426–27 ("Some experts attribute ADA plaintiffs' lack of success in workplace discrimination claims to a lack of acceptance of the ADA's protections among the courts, employers, and other members of society, and an unwillingness to accept the disabled or 'the notion that the ADA is about rights and equality.'" (quoting Sharona Hoffman et al., *The Definition of Disability in the Americans with Disabilities Act: Its Successes and Shortcomings: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Sections on Employment Discrimination Law; Labor Relations and Employment Law; and Law, Medicine and Health Care*, 9 EMP. RTS. & EMP. POL'Y J. 473, 494 (2005) (comments of Chai R. Feldblum))); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 326–27, (2008) [hereinafter Hoffman, *Settling the Matter*].
140. *See* Hoffman, *Settling the Matter*, *supra* note 139, at 327.
141. *Id.*
142. *Id.*
143. Hickox, *supra* note 23, at 427.
144. Hoffman, *Settling the Matter*, *supra* note 139, at 327.
145. *Id.*

On a theoretical level, courts' resistance to the ADA may have stemmed from the prevailing medical definition of the word "disability."[146] As discussed in Part I.A, the medical model of disability treats disability not as a social problem but as an individual medical problem with only a medical solution.[147] Thus, courts may have viewed discrimination against individuals with disabilities as rational "'[because it results from] their own bodies' deficiencies,' unlike discrimination against other groups," which results from animus.[148]

The reason for the judicial backlash appears to be more than just an unwillingness to impose costs on employers. Rather, the courts' main concern about enforcing the ADA seems to be that individuals with disabilities do not deserve protection because (1) their disabilities actually can affect job performance and (2) they are not being discriminated against in the typical sense, as there is not always animus behind adverse employment actions.

Given these concerns, courts are likely to see the essential functions requirement as an attractive candidate for a new screening mechanism. If courts do use the essential functions requirement as a screening mechanism, it would put the focus of litigation on the individual with a disability's perceived shortcomings rather than on how employers can change their practices to better integrate employees with disabilities into the workplace. This focus on the individual with a disability 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. Therefore, the reasoning of the courts goes, it is unfair to place financial burdens on employers because they act rationally and without animus.

B. Using the "Essential Functions" Requirement as a Gatekeeper Would Undermine the Goals of the ADAAA

If the essential functions requirement were systematically used as a screening device, the goals of disability rights advocates would be seriously undermined. The chilling effect on the ability of disability discrimination litigants to bring successful claims would be similar to that which the judicial interpretation of the definition of "disability" had on litigants pre-ADAAA. As one scholar noted:

> [T]he specific wording of the ADA's definition of "disability," borrowed from the earlier Rehabilitation Act, has undercut the statute's goal of fostering greater participation in society on the part of people

146. Hickox, *supra* note 23, at 427–28.

147. *Id.*

148. *Id.* (alteration in original) (quoting Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 181–82 (2008)).

> with disabilities. The problematic language in the definition fails to reflect the congressional intent to cover people with a broad range of physical and mental impairments, and it actually cuts against several of the theoretical underpinnings of the disability rights movement.[149]

If the essential functions requirement of the ADAAA is used as a gatekeeper for disability discrimination claims, it, like the gatekeeping that occurred pursuant to the ADA's definition of "disability,"[150] could undermine the disability rights movement.

The disability rights movement sought to integrate individuals with disabilities into society and end paternalism toward them.[151] The essential functions requirement to block potential plaintiffs would seriously undermine those goals because it requires making a judgment about those individuals' abilities. As highlighted by the dissent in *Picture People*,[152] an employer's assessment of the capacities of an individual with a disability can reflect common stereotypes about people with disabilities.[153]

Furthermore, focusing on the employee's limitations themselves—as opposed to focusing on whether an accommodation is reasonable or on whether an employer participated in an interactive process—reinforces the common stereotype that individuals with disabilities are lesser human beings.[154] The focus on limitations ignores that society needs to change, which is a major goal of the disability rights movement. Rather, it emphasizes the shortcomings of the individual herself (whether those shortcomings are real or assumed based on stereotypes). Thus, the real or perceived limitations of plaintiffs with disabilities would be systematically scrutinized. Again, the focus of disability discrimination cases should be on how society should change,[155] not on how an individual's disability makes her unqualified for a position.

---

149. Eichhorn, *supra* note 11, at 1408.

150. *See id.*

151. BAGENSTOS, *supra* note 2, at 4–6.

152. EEOC v. Picture People, Inc., 684 F.3d 981, 1000 (10th Cir. 2012) (Holloway, J., dissenting).

153. *See* Eichhorn, *supra* note 11, at 1416 ("[N]on-disabled people find it difficult to understand how people can live full, satisfying lives despite mental and physical impairments . . . ."); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 423 (2000) ("[P]eople with disabilities may be deprived of opportunities because of stereotypes—overbroad generalizations about the limiting effects of their impairments.").

154. *See* Eichhorn, *supra* note 11, at 1411–12 ("Those who wish to draw lines—to reify disability—are simply trying to ensure their own place on the correct, 'normal' side. They can then assume that those on the other side are somehow lesser humans, whose primary need in life is a cure that will allow them to join the ranks of the normal." (footnotes omitted)); *see also* Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1343 (1993) ("Frequently, people with disabilities are stigmatized as less than human . . . .").

155. This is not to say that there should be or is no limit to what employers are obliged to accommodate. The ADA provides an "undue hardship" defense to an accommodation request, even

C. The Interactive Process

Mandating that employers participate in an interactive employer–employee mediation process and be subject to liability for failure to do so could refocus employment discrimination cases back onto how society needs to change. Courts disagree as to whether the interactive process is required.[156] Many courts only require that an employer participate in an interactive process if an employee has requested such an accommodation.[157] Courts also disagree about the consequences an employer faces for failure to participate in the interactive process.[158] The EEOC regulations provide that in the interactive process, the employer and employee should

> (1) [a]nalyze the particular job involved and determine its purpose and essential functions; (2) [c]onsult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) [i]n consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) [c]onsider the

---

if that request is reasonable. 42 U.S.C. § 12111(10) (2012) ("The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of [several] factors[, including] (i) the nature and cost of the accommodation needed . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.").

156. *See, e.g.*, John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No,"* 79 CHI.-KENT L. REV. 665, 677–685 (2004); Alysa M. Barancik, Comment, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process,"* 30 LOY. U. CHI. L.J. 513, 527 (1999); Valderrama, *supra* note 3, at 206. *Compare* Picard v. St. Tammany Parish Hosp., 423 F. App'x 467, 470 (5th Cir. 2011) (holding that the district court did not abuse its discretion in refusing requested jury instruction in ADA case that failure to engage in the interactive process once accommodation was requested constituted per se violation of the ADA), *with* Livingston v. Fred Meyer Stores, Inc., 388 F. App'x 738, 741 (9th Cir. 2010) (holding that employers are required to engage in an interactive process with employees to identify and implement appropriate reasonable accommodations).

157. Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 287 (1998).

158. Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 627–28 (2004) ("While at least one circuit court decision has suggested that independent liability may exist under the ADA for a party who fails to participate in the interactive process, most courts hold that liability will arise only where an employer has failed to implement a reasonable accommodation that would enable a disabled employee to perform adequately in the workplace. Taking a somewhat different tack, a growing number of circuit courts have ruled that an employer's failure to engage in the interactive process ordinarily should warrant a trial court's refusal to grant an employer's motion for summary judgment." (footnote omitted)).

> preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[159]

1. The Benefits of an Interactive Process

A requirement that an employer participate in an interactive process in good faith with the risk that failure to participate will result in independent liability could potentially decrease litigation,[160] benefit employers financially,[161] and reinforce the notion that society needs to change, not the individual with a disability.

A mandated interactive process would allow employees to determine what kind of accommodations an employer could provide.[162] In turn, the employee would have the opportunity to suggest alternatives, which might be less costly for the employer.[163] Along the same lines, an employer could "overestimate the costs of an accommodation without input from the employee."[164] Furthermore, "the interactive process has many of the same benefits as mediated settlements; it is 'cheaper than litigation, [and] can help preserve confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's initially hostile responses to requests for accommodations.'"[165]

Finally, mandating an interactive process would reinforce the idea that society needs to change because it requires slightly more from an employer. For people with disabilities to be truly given an equal opportunity to succeed in the workplace and beyond, the goal should continue to be integrating individuals with disabilities into society as much as possible.

2. The Kind of Interactive Process to Mandate

The Third Circuit requires participation in the interactive process.[166] To prove that an employer violated the requirement to participate, the Third Circuit provides that a plaintiff needs to show:

> "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could

159. Valderrama, *supra* note 3, at 208.
160. *See id.* at 206.
161. *See id.*
162. *See id.*
163. *See id.*
164. *Id.* (footnote omitted) (quoting Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 154 (2003)) (internal quotation mark omitted).
165. *Id.* (alteration in original) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 n.6 (3d Cir. 1999)).
166. *Taylor*, 184 F.3d at 317.

> have been reasonably accommodated" had the employer made a good faith effort to do so.[167]

The interactive process should focus less on whether a reasonable accommodation existed and more on whether the employer made a good faith effort to discuss with the employee the essential job functions.[168] Additionally, the employee should not be required to request an accommodation in order to trigger a required interactive process.

a. An Employer Should Communicate with the Employee About the Essential Job Functions

The determination of whether an employee could be reasonably accommodated depends on the essential functions of the job. If the employer does not communicate these functions to the employee, then it is unfair to protect an employer from liability when no reasonable accommodation could have been provided because, in some cases, the essential functions of the job are decided only after a claim is brought.

The facts from *Picture People* exemplify this unfairness. The employer clearly knew about Jessica's disability, and Jessica asked for a reasonable accommodation by requesting an ASL interpreter. At this point, an interactive process should have occurred, in which the employer could have articulated to Jessica that verbal communication was an essential function of the job of performer and that there was no reasonable accommodation available. However, no interactive process occurred, and the verbal communication essential job function was only declared after the plaintiff filed her claim. As a result, before the claim was filed, the plaintiff did not know what the essential functions of her job were and thus could not know whether a reasonable accommodation existed. Additionally, it seems that Picture People decided that verbal communication was an essential job function *after* Jessica brought her claim. Had Jessica claimed that Picture People should have been liable because it did not in good faith participate in an interactive process, Jessica would have been awarded no remedy because no reasonable accommodation was available. This result is unfair given that Jessica did not know while employed what the essential functions of her job were, or consequently, whether a reasonable accommodation would have allowed her to perform those essential functions.

---

167. Valderrama, *supra* note 3, at 209 (quoting Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 165 (3d Cir. 1999), *vacated on reh'g on other grounds*, 184 F.3d 296 (1999).

168. These two inquiries (whether a reasonable accommodation exists and whether an employee can perform the essential functions of a job) are separate inquires. 42 U.S.C. § 12111(8) (2012) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

Therefore, an employee should not be required to show that she could have been reasonably accommodated unless the employer participated in an interactive process in which the essential functions of the job were discussed.

b. An Employee Should Not Have to Request a Reasonable Accommodation to Trigger the Interactive Process

If an employer knows or should know that an employee has a disability, the interactive process should take place regardless of whether the employee has requested a reasonable accommodation. It would be in both parties' best interest to discuss the essential functions of the job and what reasonable accommodations might be available.[169] Additionally, employees might not know that they can request accommodations. Employers are likely to know of their obligations due to licenses they obtain to do business in the state. Thus, there should be no obligation that an employee ask for reasonable accommodations to trigger the requirement for an interactive process.

c. What the Interactive Process Mandate Should Look Like

Although *Picture People* was not decided on the issue of a required interactive process, I believe that it should have. A plaintiff should prove the following elements to show that an employer violated the ADA requirement to participate in the interactive process: (1) the employer knew or should have known about the employee's disability; (2) the employer did not make a good faith effort to discuss with the employee the essential functions of the job and to assist the employee in seeking accommodations; and (3) the employee could have been reasonably accommodated had the employer made a good faith effort to do so. Thus, if an employer failed to communicate to the employee the essential functions of her job, the employer would be in violation of the ADA and would be independently liable.

By mandating an interactive process like the one described, employment discrimination claims brought under Title I of the ADA would focus more on how society can help stop discrimination against individuals with disabilities, rather than on the limitations of these individuals. This process would be more consistent with the goals of the ADA and would offer other benefits to both employees and employers; it could potentially avert subsequent lawsuits, saving employers the time and expense of litigation, and reinforce the notion that society needs to change, not the individual with a disability.

169. *See supra* notes 160–65 and accompanying text.

CONCLUSION

Picture People shows that the essential function requirement of the ADA could be used as a screening mechanism in employment discrimination cases based on disability. Permitting courts to systematically use this requirement to screen out cases would undermine the goals of the ADA. To prevent this outcome, the ADA should mandate that employers participate in an interactive process that focuses not only on reasonable accommodations but also on the essential job functions. This mandate would remove the focus from the real or perceived shortcomings of an individual with a disability, place the focus back onto society, and serve to better integrate individuals with disabilities into the workplace.

Amy Knapp[*]

* J.D. Candidate, 2014. I would like to thank the *Denver University Law Review* Board members and editors, as well as Professor Nicole B. Porter for her inspiring and insightful class, which led me to write this Comment. I also want to thank my friends and family, especially my parents, my sister, Kelley, and my brother, Brady, for their love and support.