*MARTIN*IZING TITLE I OF THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

The Americans with Disabilities Act,[1] enacted in 1990, requires an employer to provide "reasonable accommodations" to the known disabilities of its employees.[2] Perhaps because the Supreme Court has only decided one employment case involving the reasonable accommodation provision,[3] lower courts have struggled with some of the most vexing reasonable accommodation issues.[4] For instance, is allowing an employee with a disability to work at home a reasonable accommodation?[5] If an individual with a disability needs a transfer to a vacant position because the disability precludes performance of the individual's current position (even with a reasonable accommodation), is the employer obligated to transfer the individual if there are other, more qualified employees?[6] Should an individual with a disability be allowed a waiver from a rotating-shift policy or a rotating-production-line policy, even though granting such a waiver would likely mean that other employees might have to rotate through an undesirable shift or production line more often?[7] And more generally, how far does an employer's obligation to provide reasonable accommodations reach? While courts have been struggling with these and other issues since the ADA's passage, there are still relatively few cases discussing the reasonable accommodation provision and, as stated above, only one final

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[1] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 29 U.S.C. § 705; 42 U.S.C. §§ 12101–12103; 47 U.S.C. §§ 152, 221, 225, 611 (2006 & Supp. III 2010)).

[2] 42 U.S.C. § 12112(b)(5)(A).

[3] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002) (holding that ordinarily the ADA will not require a proposed accommodation that conflicts with an employer's seniority system).

[4] *See* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 222 (2010) (stating that "the question of what makes a requested accommodation reasonable . . . remains unsettled and hotly contested").

[5] *See* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Addressing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 229 (2008) (raising the question).

[6] *See id.*

[7] *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, 803–04 (2011) ("Many individuals with disabilities find it difficult to work rotating shifts.").

resolution by the Supreme Court of any issue arising under the reasonable accommodation provision. But the ADA Amendments Act of 2008[8] (ADAAA or Amendments) will significantly increase the number of these cases in the future.

Prior to the ADAAA, the vast majority of disability discrimination cases did not survive summary judgment. In what has been called a "backlash" against the ADA, the courts narrowly interpreted the definition of disability, causing most cases to be dismissed at the initial stage of determining whether an individual has a disability.[9] Accordingly, very few cases ever reached the merits, which often involved whether the employer was obligated to provide a reasonable accommodation to an employee with a disability. By virtually all accounts, the Amendments have made it much easier for individuals with disabilities to prove that they are disabled,[10] and therefore, presumably many more cases will finally address the reasonable accommodation issue.[11] More generally, more courts will have to grapple with the task of giving meaning to the word "reasonable" in the reasonable accommodation provision.

Despite the robust field of disability scholarship,[12] relatively little attention has been devoted to the meaning and application of the reasonable accommodation provision,[13] and even less attention has been devoted to providing any kind of unified approach to

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[8] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified at 42 U.S.C. §§ 12101–12213 (Supp. III 2010)).

[9] *See infra* notes 73–77 and accompanying text.

[10] *E.g.*, Cox, *supra* note 4, at 188; Long, *supra* note 5, at 228; Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1123 (2010).

[11] *E.g.*, Cox, *supra* note 4, at 188; Long, *supra* note 5, at 228; Porter, *supra* note 7, at 795–96; Weber, *supra* note 10, at 1123.

[12] It is impossible to provide a comprehensive list of all disability scholarship. It would even be difficult to provide a representative sample in this footnote, without it spanning several pages. Instead, I opt to provide a list of scholars who write or have written in the disability area. They are, in no particular order: Samuel Bagenstos, Mary Crossley, Mark Weber, Alex Long, Michael Waterstone, Michael Ashley Stein, Anita Silvers, Chai Feldblum, Ruth Colker, Michelle Travis, the late Harlan Hahn, Ann Hubbard, Ani B. Satz, Jill Anderson, Robert Burgdorf Jr., Carlos Ball, Christine Jolls, George Rutherglen, and many others. There are some relatively new scholars in disability law as well, and I imagine they will continue to influence our thinking in this area. Jeannette Cox and Bradley A. Areheart are two.

[13] Weber, *supra* note 10, at 1122–23.

address these vexing reasonable accommodation issues.[14] One recent effort, by Professor Mark Weber, suggests that the "reasonable" in reasonable accommodation has no independent meaning and can only be understood in light of the statutory limitation on the reasonable accommodation provision: the undue hardship defense.[15] In other words, Weber suggests that "[r]easonable accommodation and undue hardship are two sides of the same coin."[16] While I agree with Weber that many (if not most) reasonable accommodation issues can be resolved using his interpretation, I do not believe it resolves *all* reasonable accommodation issues. I argue that "reasonable" has some independent meaning aside from not causing an undue hardship. In other words, some accommodations are unreasonable even if they do not cause an undue hardship. For instance, allowing an employee with a disability to bump another employee out of a job would be an "unreasonable" accommodation even if it cost the employer nothing[17] and therefore would not meet the statutory definition of "undue hardship."[18] Accordingly, because I do not completely agree with Weber's interpretation of the reasonable accommodation provision, this Article proposes an alternative approach to defining the scope of an employer's obligation to reasonably accommodate its employees.

Accommodations for employees with disabilities generally cause burdens on either employers or co-employees, and occasionally both. The difficulty in interpreting the reasonable accommodation provision is that only financial burdens on employers are

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[14] For sources discussing the reasonable accommodation provision, see *infra* note 93.

[15] Weber, *supra* note 10, at 1124.

[16] *Id.*

[17] Courts have consistently stated that employers are not required to bump other employees from their jobs in order to accommodate disabled employees. *See, e.g.*, White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996); *see also* 29 C.F.R. § 1630.2(o)(2)(ii) (2011) (requiring only "reassignment to a vacant position" as a reasonable accommodation); EQUAL EMP'T OPPORTUNITY COMM'N, *Types of Reasonable Accommodations Related to Job Performance*, *in* ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *available at* http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter EEOC ENFORCEMENT GUIDANCE] ("The employer does not have to bump an employee from a job in order to create a vacancy. . . .").

[18] *See* 42 U.S.C. § 12111(10) (2006) (requiring accommodation to impose "significant difficulty or expense").

specifically mentioned in the statute, under the "undue hardship" defense.[19] Burdens on co-employees and nonfinancial burdens on employers are not explicitly mentioned in the statute,[20] and the only way some of these accommodations will be denied is if courts use the vague standard of reasonableness. Because of the vagueness of "reasonable," the case law is a random mix of cases where courts have held that accommodations are always unreasonable, sometimes unreasonable, or reasonable.[21] This Article seeks to make sense of the chaos in the case law and proposes a unified approach to address all reasonable accommodation issues.

In identifying such an approach, I am drawn to an analogous case under Title III, the public accommodations title of the ADA. The case is *PGA Tour, Inc. v. Martin*.[22] As many know, this case involved professional golfer Casey Martin's request to use a golf cart during professional golf tournaments because of a disability that made walking any distance painful, with severe risks of complications, blood clots, and even possible amputation.[23] Under Title III, the appropriate statutory inquiry is whether there is a reasonable modification to the rules or policies of the public accommodation that would allow an individual with a disability to enjoy the privileges of the public accommodation—in Casey Martin's case, he sought a waiver of the no-golf-cart-during-competition rule.[24] In determining whether the golf cart was a "reasonable modification," the Court considered whether use of the golf cart by Martin would fundamentally alter the nature of the public accommodation.[25] According to the Court, this inquiry involved two issues: (1) whether the modification sought would "alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally," and (2)

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[19] *Id.* § 12111(10)(B).

[20] Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers,* 34 FLA. ST. U. L. REV. 313, 326 (2007).

[21] *See infra* Part II.D.*2*.

[22] 532 U.S. 661 (2001).

[23] *Id.* at 668–69.

[24] *Id.* at 669.

[25] *Id.* at 682.

even if a less substantial modification, whether it would give an unfair advantage to the individual with the disability.[26]

Certainly, the workplace is not a golf tournament,[27] but borrowing the "fundamental alteration" inquiry under Title III can help to make sense of the vague and confusing body of case law under Title I, the employment discrimination title.[28] The first inquiry, whether the accommodation would fundamentally alter an essential aspect of the public accommodation, is analogous to accommodations that affect employers. The second inquiry, whether the accommodation gives the individual with a disability an unfair advantage, can be analogized to accommodations that burden other employees. I will discuss these in turn.

With respect to accommodations that burden employers but do not rise to the level of an "undue hardship," courts have found some accommodations unreasonable even though they might not be prohibitively expensive. One example of an accommodation that is always unreasonable is an auxiliary aid, such as a hearing aid, that helps an employee with a disability not just in the workplace, but outside of the workplace as well.[29] Courts have also held that employers are not required to monitor an employee's medication.[30] In both cases, even though undue hardship would be very difficult to prove, I will argue that the accommodation would fundamentally alter the nature of the employer's relationship with its employees and therefore does not have to be provided.

With respect to accommodations that burden other employees, I argue that most of these accommodations do not give the disabled employee an unfair advantage. Most accommodations place only reasonable burdens on other employees and allow the disabled employee to be on equal footing with nondisabled coworkers.[31]

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[26] *Id.* at 682–83.

[27] I recognize that professional sports, like the golf tournament at issue in *Martin*, create a unique situation not present in the workplace. *See* Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 2000 BYU L. REV. 1489, 1490 (recognizing the unique qualities of professional sports that make applying the ADA difficult).

[28] *See* Weber, *supra* note 10, at 1166 (noting that while the requirements of Title I are not the same as Title III, they are "closely comparable").

[29] *General Principles*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17.

[30] *E.g.*, Hogarth v. Thornburgh, 833 F. Supp. 1077, 1088 (S.D.N.Y. 1993).

[31] I recognize that the preferred language when referring to individuals with disabilities

When an accommodation burdens other employees, courts should determine if the accommodation causes an *unreasonable* burden by asking the analogous question from *Martin*: whether the accommodation would give the employee with a disability an unfair competitive advantage. As I discuss below,[32] because most accommodations place minimal burdens on other employees, they do not give an unfair competitive advantage to the disabled employee. Thus, although not a perfect fit, *Martin*izing Title I provides a helpful structure for a coherent, unified approach to the reasonable accommodation provision.

Part II provides the necessary background and history of the reasonable accommodation provision. It briefly outlines the statutory structure of the ADA and the reasonable accommodation provision. It then turns to the only Supreme Court case decided under the reasonable accommodation provision, *U.S. Airways, Inc. v. Barnett*.[33] Part II next provides a brief discussion of the recent ADA Amendments Act, which has made it much easier to prove that an individual has a disability. Thus, the ADAAA will make it much more likely that courts will begin seeing and deciding more disability cases focusing on the employer's obligation to provide a reasonable accommodation. Part II then turns to a description of the cases under the reasonable accommodation provision, demonstrating the chaos of the case law.

Part III provides this Article's thesis. I demonstrate that *Martin*izing Title I by borrowing from *PGA Tour, Inc. v. Martin* provides the most sensible way out of the reasonable accommodation chaos. The framework in *Martin* not only explains what appears to be a chaotic body of case law, but it also helps decide future cases in a coherent way. Part III first describes the *Martin* case, its facts, and its holding. Part III then turns to describing how the first prong of the fundamental alteration test in *Martin* can be analogized to accommodations that affect employers in a financially insignificant way. Part III then

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is "people first" language, which means recognizing that individuals with disabilities are people who happen to have a disability, rather than referring to them in a way that uses their disability to define them. I have tried to follow that principle in this Article, except in the rare cases where its use was cumbersome in the sentence.

[32] *See infra* Part III.B.*2*.

[33] 535 U.S. 391 (2002).

explains how the second prong of the fundamental alteration test in *Martin* provides a helpful analogy for analyzing reasonable accommodation cases where the accommodation primarily affects only co-employees of the individual with a disability. Part IV anticipates and responds to criticisms of this Article's thesis. Part V concludes.

II. THE REASONABLE ACCOMMODATION OBLIGATION

A. THE STATUTORY STRUCTURE OF THE ADA

The ADA[34] was enacted in 1990 to help individuals with disabilities achieve equal opportunity in the workplace and society.[35] The ADA is divided into various titles. Title I covers private employers with fifteen or more employees.[36] Title II governs governmental entities.[37] Title III applies to public accommodations—private businesses open to the public, such as restaurants, hotels, retail stores, movie theaters, golf courses, and more.[38]

Unlike many other antidiscrimination statutes (such as Title VII),[39] which protect individuals regardless of their sex, race, or national origin, the ADA defines very narrowly the class of persons who can sue under the statute. In order to state a prima facie claim of discrimination, plaintiffs must prove that they have a disability, which is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[40] This coverage requirement is unique because it precludes individuals

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[34] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 29 U.S.C. § 705; 42 U.S.C. §§ 12101–12103; 47 U.S.C. §§ 152, 221, 225, 611 (2006 & Supp. III 2010)).

[35] 42 U.S.C. § 12101(b) (2006).

[36] *Id.* § 12111(5)(A) (defining employer to include "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day").

[37] *See id.* § 12131(1) (defining public entity).

[38] *Id.* § 12181(7).

[39] Civil Rights Act of 1964, tit.VII, 42 U.S.C. §§ 2000e–2000e-17 (2006).

[40] 42 U.S.C. § 12102(2) (2006).

without disabilities from bringing "reverse discrimination" claims under the statute.[41]

The other unique provision of the ADA (and the one that is the subject of this Article) is the reasonable accommodation provision. Under Title I, employers are required to give a qualified employee with a disability a reasonable accommodation that will allow the employee to perform the essential functions of the job.[42] The purpose of the reasonable accommodation provision is to afford individuals with disabilities the same opportunities as nondisabled individuals, recognizing that in order to be treated equally, individuals with disabilities must sometimes be treated differently.[43] Consider this simple example: If a person who uses a wheelchair wants to apply for a job in an office building that is inaccessible for wheelchairs, and this individual has the same qualifications as other candidates without disabilities, the individual with the disability "will not even get his foot in the door, literally or figuratively."[44] Accordingly, the ADA drafters determined that the only way individuals with disabilities can have an equal opportunity to compete for, and work in, the same jobs as nondisabled employees is if some mechanism places disabled individuals on an equal footing with nondisabled employees. That mechanism is the reasonable accommodation provision.[45]

The ADA specifically defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business."[46] Congress did not define reasonable accommodation, but it did provide a non-exhaustive list of examples:

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[41] Porter, *supra* note 20, at 316.

[42] *See* 42 U.S.C. § 12112(b)(5)(A) (2006) (defining failure to provide reasonable accommodation as discrimination).

[43] Porter, *supra* note 20, at 316.

[44] *Id.*

[45] *Id.*

[46] 42 U.S.C. § 12112(b)(5)(A).

> (A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and
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> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[47]

The only statutory limit to an employer's duty to accommodate an individual with a disability is the undue hardship provision.[48] The statute defines undue hardship as "an action requiring significant difficulty or expense, when considered in light of the factors set forth [below]."[49] This standard varies with the size of the employer's operations. Small employers might not have to expend very significant sums of money to accommodate an employee, but a large school district might have to hire a teacher's aide for a blind employee or an interpreter for a deaf employee, both of which are likely to be expensive.[50] The factors to be considered when deciding if an accommodation creates an undue burden include:

> (i) the nature and cost of the accommodation needed under this chapter;
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> (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

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[47] *Id.* § 12111(9).
[48] *Id.* § 12112(b)(5)(A); Porter, *supra* note 20, at 317; Weber, *supra* note 10, at 1124.
[49] 42 U.S.C. § 12111(10).
[50] Weber, *supra* note 10, at 1135.

> 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
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> (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.[51]

As should be obvious from this list, the undue hardship provision is most concerned with financial burdens on employers, rather than other kinds of burdens on employers or burdens on co-employees.[52] While there is some argument that these factors should include more than financial burdens on employers,[53] courts generally have not interpreted the undue hardship defense to encompass more than financial burdens on employers.[54]

B. THE SUPREME COURT: *BARNETT* AND *HUBER*

The only Supreme Court case addressing the reasonable accommodation provision is *U.S. Airways, Inc. v. Barnett*. In this case, the plaintiff, Robert Barnett, was employed as a cargo handler when he injured his back on the job. His injury precluded

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[51] 42 U.S.C. § 12111(10)(B).

[52] Porter, *supra* note 20, at 326.

[53] *See General Principles*, *supra* note 29 ("Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.").

[54] The Supreme Court in the *Barnett* case, discussed below in Part II.B, acknowledged that undue hardship does not include burdens placed on other employees. This is why the Court had to decide that case under the "reasonable" inquiry of the reasonable accommodation provision. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002).

him from continuing in his job as a cargo handler.[55] Accordingly, he used his seniority under a unilaterally imposed seniority system[56] to transfer to a less strenuous position in the mailroom, which he could perform despite his back injury.[57] After Barnett had been in the mailroom position for about two years, the company opened the position to seniority bidding, and at least two employees with more seniority than Barnett applied for it.[58] Barnett asked to remain in the mailroom position as a reasonable accommodation, but the company eventually refused Barnett's request and terminated him.[59]

Balancing the interests of employees with disabilities and their coworkers, the Court held that the rights of nondisabled employees under a seniority system ordinarily should trump a disabled employee's right to a reasonable accommodation.[60] The Court concluded that a proposed accommodation is not reasonable if it violates a seniority system. Furthermore, the Court held that the ADA does not require the employer to prove that the seniority system should prevail.[61] The Court gave several reasons for its decision, placing particular emphasis on the importance of seniority systems to employer–employee relations.[62] The Court concluded that Congress did not intend to undermine seniority systems, which were created to ensure consistent, uniform

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[55] *Id.* at 394.

[56] Most seniority systems are bargained for between an employer and a union. Virtually all collective bargaining agreements contain a seniority system. These seniority rules provide a fair, efficient, and uniform way of both providing benefits and determining who has superior rights to bid on things such as positions, shifts, avoiding layoffs, or being recalled from layoffs first. *Id.* at 404. In *Barnett*, there was no union, yet the employer established a seniority system on its own. *Id.* Therefore, the employer was free to make deviations from the seniority system at any time, and employees did not have a right to challenge such departures, even though they would have had that right if the seniority system were part of a collective bargaining agreement.

[57] *Id.* at 394.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 406. The Court left open the possibility that the employee could show "special circumstances" making a seniority-rule exception reasonable and thus defeat an employer's demand for summary judgment. *Id.*

[61] *Id.* at 403.

[62] *Id.*

treatment of employees, and the success of seniority systems depends on this consistent treatment.[63]

The Supreme Court did not grant certiorari on another reasonable accommodation case until 2007, in the case of *Huber v. Wal-Mart Stores, Inc.*[64] The issue in *Huber* was whether an employer had to accommodate a qualified disabled employee by transferring her to a vacant position when other, more qualified employees applied for the position.[65] The Eighth Circuit held that Wal-mart's best-qualified policy trumped its obligation to provide a reasonable accommodation.[66] This result was influenced by the Seventh Circuit's decision in *EEOC v. Humiston–Keeling, Inc.*, which held that giving the position to the employee with the disability over more qualified applicants would "convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[67]

But the circuits have not unanimously reached this result. Other courts have held that "as long as an employee with a disability is qualified for a vacant position to which he seeks to transfer because he can no longer perform the essential functions of his current position, the employer is obligated to provide the accommodation."[68] For instance, the Tenth Circuit in *Smith v. Midland Brake, Inc.* stated: "[I]f the reassignment language merely requires employers to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant."[69] Accordingly, in the Tenth Circuit, an

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[63] *Id.* at 404–05.

[64] 486 F.3d 480 (8th Cir.), *cert. granted in part*, 552 U.S. 1074 (2007), *cert. dismissed*, 552 U.S. 1136 (2008).

[65] 486 F.3d at 481.

[66] Porter, *supra* note 7, at 798.

[67] 227 F.3d 1024, 1028 (7th Cir. 2000), *overruled by* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012); *Huber*, 486 F.3d at 483 (quoting *Humiston–Keeling*, 227 F.3d at 1024).

[68] Porter, *supra* note 7, at 798.

[69] 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc).

employer must automatically award a qualified disabled employee a position even if other, more qualified employees apply.[70] Because of this circuit split, the Supreme Court granted certiorari in *Huber* but then dismissed it when the parties settled.[71] As will be obvious from what follows, many reasonable accommodation issues are complicated and unclear,[72] yet most have not been decided by the Supreme Court.

C. EFFECT OF THE ADA AMENDMENTS ACT ON THE REASONABLE ACCOMMODATION PROVISION

Even though the Supreme Court has decided only one reasonable accommodation case, it has decided several cases interpreting the definition of "disability" under the ADA.[73] Prior to the ADAAA,[74] the Supreme Court had taken a very restrictive approach to defining the protected class under the ADA.[75] These cases have led lower courts to conclude that numerous impairments are not disabilities, such as cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, and intellectual disabilities, among others.[76] Some scholars have

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[70] Porter, *supra* note 7, at 799. An argument can be made that the D.C. Circuit would reach a similar conclusion. In *Aka v. Washington Hospital Center*, the court rejected an "interpretation of the reassignment provision as mandating nothing more than that the employer allow the disabled employee to submit his application along with all of the other candidates." 156 F.3d 1284, 1305 (D.C. Cir. 1998).

[71] Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008).

[72] *See infra* Part II.D.*2*.

[73] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999) (holding that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment"); Murphy v. United Parcel Serv., 527 U.S. 516, 519 (1999) (finding that hypertension was not a disability); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999) (requiring individuals with monocular vision to establish their disability by offering evidence that their limitations are substantial); *see also* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187 (2002) (reversing the court of appeals for not considering whether respondent's impairment prevented the performance of daily tasks of central importance). The first three cases cited here (known as the *Sutton* trilogy) have had a dramatic effect on how many cases proceed past the initial inquiry of proving that a person has a disability. *See* Porter, *supra* note 7, at 770–71 (discussing the Supreme Court's strict interpretation of disability in these cases).

[74] ADA Amendments Act of 2008, Pub. L. No. 110-325, 22 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (Supp. III 2010)).

[75] Cox, *supra* note 4, at 199; Porter, *supra* note 7, at 771.

[76] Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*,

convincingly argued that there has been a "backlash" by the courts against the ADA.[77] In fact, I have often thought that courts used the restrictive definition of disability as a way to avoid thorny reasonable accommodation issues.[78]

However, as I have argued before, several provisions in the ADAAA will make it much easier for individuals to prove that they meet the ADA's definition of disability and therefore fall under the protection of the Act.[79] First, the Amendments make clear that courts should not use "demanding standards" when deciding whether an individual is disabled under the Act.[80] The Amendments include a rule of construction that states: "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[81] Second, the Amendments make it much easier to prove that an impairment "substantially limits" a major life activity,[82] and the Amendments expand the list of major life activities.[83] Finally, the Amendments require that courts determining whether someone is disabled ignore mitigating measures (for example, medication or assistive devices) that help to ameliorate the symptoms of the impairment.[84]

These changes will undoubtedly make it easier for individuals to prove that they have a disability as defined by the Act.[85] Once past this initial inquiry, an individual's case will often turn on

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13 TEX. J. C.L. & C.R. 187, 192 (2008); *see* Cox, *supra* note 4, at 200–01 (citing cases where lower courts held that cerebral palsy and mental retardation were not disabilities and stating that the "federal courts had effectively limited the ADA's protected class to a category of persons that would have extreme difficulty demonstrating that they are qualified to work, even with the provision of ADA accommodations").

[77] *See* Porter, *supra* note 20, at 356–58 (discussing and collecting sources regarding the backlash issue).

[78] Porter, *supra* note 7, at 796; *see* Long, *supra* note 5, at 228 (calling this "[o]ne of the more persuasive explanations").

[79] Porter, *supra* note 7, at 795–96.

[80] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 22 Stat. 3553, 3554.

[81] *Id.* § 4(a)(4)(A).

[82] *Id.* §§ 2(b)(5), 4(a); Cox, *supra* note 4, at 202.

[83] ADA Amendments Act § 4(a); Long, *supra* note 5, at 221–23; Cox, *supra* note 4, at 202.

[84] ADA Amendments Act § 4(a)(4)(E); Long, *supra* note 5, at 220; Cox, *supra* note 4, at 202.

[85] *See* Cox, *supra* note 4, at 204 (discussing the broadening of the ADA's protected class); Long, *supra* note 5, at 228 (arguing that "[b]y amending the ADA's definition of disability, Congress has assured that more individuals will qualify as having disabilities").

whether the individual is qualified for the position at issue, which the Act defines as able to perform the essential functions of the job "with or without reasonable accommodation."[86] Some cases will turn on whether the employer is required to provide a reasonable accommodation to an employee with a disability.[87] Accordingly, because more cases will proceed past the initial inquiry into whether an individual has a disability, more courts will have to determine what constitutes a reasonable accommodation.[88] As will be discussed below, this issue is in a state of chaos.

D. THE CHAOS OF THE INTERPRETATION OF THE REASONABLE ACCOMMODATION PROVISION

1. Meaning of "Reasonable." The ADA requires employers to provide "reasonable" accommodations to allow employees with disabilities to perform the essential functions of their positions.[89] "Reasonable," under the ADA, has no specific definition in the statute or its accompanying regulations.[90] It is an ambiguous word with different meanings in different areas of law[91] but no

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[86] 42 U.S.C. § 12111(8) (2006).

[87] Porter, *supra* note 7, at 796.

[88] *Id.*; *see* Cox, *supra* note 4, at 188 ("[T]he amendments will require courts to address many important interpretive questions raised by the original statutory text, such as the scope of the amorphous term 'reasonable accommodation.' "); *id.* at 222 ("[T]he ADAAA will likely require courts to tackle the difficult task of articulating criteria for distinguishing 'reasonable' accommodations from 'unreasonable' accommodations.").

[89] 42 U.S.C. § 12112 (2006).

[90] Furthermore, even the ADAAA "is conspicuously silent about the meaning of this amorphous term, providing the courts no guidance about its definition." Cox, *supra* note 4, at 222. The only possible definition is the EEOC's definition in its regulations. The EEOC previously defined reasonable accommodation as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Interpretive Guidance on Title I of the Americans with Disability Act Introduction, 29 C.F.R. § 1630, App. (2012). This is a broad definition but not one that gives any indication of its limitations.

[91] For instance, tort law uses a "reasonable" person in the negligence context; criminal law uses "reasonable" in the self-defense context, etc. At least one court, the Seventh Circuit, has held that "reasonable" should be analyzed using the cost–benefit analysis seen in tort law.

> "[R]easonable" may be intended to qualify (in the sense of weaken) "accommodation," in just the same way that if one requires a "reasonable effort" of someone this means less than the maximum possible effort, or in law that the duty of "reasonable care," the cornerstone of the law of negligence, requires something less than the maximum possible care. It is

discernible meaning in disability law.[92] Furthermore, scholars in the disability-law area spent so much time discussing the definition of disability before the ADA was amended that there is relatively little scholarship discussing the reasonable accommodation provision.[93] There is only one article that puts forth a broad theory of the reasonable accommodation provision. Professor Mark Weber, in *Unreasonable Accommodation and Due*

> understood in that law that in deciding what care is reasonable the court considers the cost of increased care. (This is explicit in Judge Learned Hand's famous formula for negligence.) Similar reasoning could be used to flesh out the meaning of the word "reasonable" in the term "reasonable accommodations." It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.

Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (citation omitted).

[92] *Cf.* Weber, *supra* note 10, at 1149 (stating as a backup argument to his main argument that "reasonable" in the ADA's reasonable accommodation provision is ambiguous).

[93] I do not mean to suggest that there are no articles discussing the reasonable accommodation provision. Of course, there are. But compared to other disability-law scholarship, the articles discussing the reasonable accommodation provision are relatively few in number. For a sampling of articles that do discuss the reasonable accommodation provision, see generally Weber, *supra* note 10; Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951 (2004); Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA,* 29 BERKELEY J. EMP. & LAB. L. 59 (2008); Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931 (2003); Stephen F. Befort & Tracey Homes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045 (2000); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project,* 35 RUTGERS L.J. 861 (2004); Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863 (2003); John E. Matejkovic & Margaret E. Matejkovic, *What is Reasonable Accommodation Under the ADA? Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67 (2009); Porter, *supra* note 20; Anita Silvers, *Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition for Disabled People in the Workforce*, 8 J. GENDER RACE & JUST. 561 (2005); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004); *see also* Porter, *supra* note 20, at 332 n.116 (citing several articles that discussed the reassignment accommodation after *U.S. Airways v. Barnett*).

Hardship, argues that reasonable accommodation and undue hardship are simply "two sides of the same coin" and that the only limit on an employer's obligation to provide a reasonable accommodation is if the accommodation causes an undue hardship.[94] In other words, Weber argues that there is "no such thing as an 'unreasonable accommodation.' "[95]

Weber makes a very convincing argument based on the statutory language, the legislative history, and case law that "reasonable" has no independent meaning other than as the flip-side of the coin of the "undue hardship" provision.[96] For instance, Weber quotes legislative history stating: "As set forth in the substantive section of the Act . . . the legal obligation of an entity to provide such an accommodation is depending on whether the accommodation would impose an undue hardship on the entity's business."[97] He also points to Congress's reliance on cases interpreting Section 504 of the Rehabilitation Act, which indicates a belief that reasonable accommodation and undue hardship were two sides of the same coin.[98]

While I agree with Weber that the accommodation obligation should be construed broadly, I believe that there is *some* limitation to an employer's obligation to provide a reasonable accommodation besides the undue hardship limit. In other words, some accommodations are "unreasonable" even though they do not cause an undue hardship to the employer. For instance, employers

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[94] Weber, *supra* note 10, at 1124.

[95] *Id.*

[96] *Id.* I also agree with Weber that the reasonable accommodation provision should not involve a cost–benefit analysis. Any cost analysis should be left to the undue hardship provision. *See id.* at 1150 (stating that the cost–benefit analysis should only be made with the employer's operating resources and not with the benefit of the accommodation).

[97] *Id.* at 1133 (quoting H.R. REP. NO. 101-485(II), at 57–58, *reprinted in* 1990 U.S.C.C.A.N. 303, 339–40) (internal quotation marks omitted).

[98] *Id.* at 1134 (citing Prewitt v. U.S. Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981)). The court in *Prewitt* stated:

> If the issue of reasonable accommodation is raised, the agency must then be prepared to make a further showing that accommodation cannot reasonably be made that would enable the . . . applicant to perform the essentials of the job adequately and safely; in this regard, the postal service must "demonstrate that the accommodation would impose an undue hardship on the operation of its program."

Id. (quoting *Prewitt*, 662 F.2d at 310).

should not have to monitor their employees' medications or pay for their employees' hearing aids, nor should employers be required to bump current employees out of their jobs in order to accommodate disabled employees. These accommodations are all "unreasonable." While I disagree with Weber that "reasonable" has no meaning independent of the undue hardship defense,[99] the case law demonstrates that trying to predict whether an accommodation will be deemed reasonable is difficult.

2. The Reasonable Accommodation Cases. The following discussion of lower court cases and EEOC rules,[100] examining unreasonable accommodations, reveals the chaos of the reasonable accommodation provision.

a. Per Se Unreasonable. There are several accommodations that courts, the EEOC, or both have said are always unreasonable. Many of these have to do with reassigning an individual with a disability. For instance, employers do not have to create a position if there is no position for which the employee is qualified even with a reasonable accommodation.[101] Yet this rule is derived from more than case law. The statute itself implies such a rule, stating that one of the possible reasonable accommodations is "reassignment to a *vacant* position."[102] The word "vacant" implies that the position must already be in existence. The "vacant" requirement also means that an employer is not required to bump a current employee out of his job in order to reassign an employee with a disability.[103] Likewise, the employer does not have to turn a temporary or part-time position into a permanent or full-time position in order to provide a job for a disabled employee.[104] The final per se rule regarding reassignment is that an employer does

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[99] For a further discussion of my response to Weber's proposal, see *infra* Part IV.B.

[100] *See generally* EEOC ENFORCEMENT GUIDANCE, *supra* note 17.

[101] *E.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 614 (3d Cir. 2006); Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000); Moore v. Hexacomb Corp., 670 F. Supp. 2d 621, 628 (W.D. Mich. 2009); Smith v. United Parcel Serv., 50 F. Supp. 2d 649, 653 (S.D. Texas 1999); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996); McDonald v. Kansas, 880 F. Supp. 1416, 1423 (D. Kan. 1995).

[102] 42 U.S.C. § 12111(9)(B) (2006) (emphasis added); EEOC ENFORCEMENT GUIDANCE, *supra* note 17.

[103] *Types of Reasonable Accommodations Related to Job Performance*, *supra* note 17; *see Leslie*, 916 F. Supp. at 886.

[104] *Turner*, 440 F.3d at 614; *Hoskins*, 227 F.3d at 730.

not have to promote an employee with a disability in order to reassign him.[105]

Courts, the EEOC, or both have held that accommodations involving an employer providing items of a personal nature are also per se unreasonable. Thus, employers never have to provide medications or other assistive devices that employees use in their personal life, such as eyeglasses, hearing aids, wheelchairs, etc.[106] Similarly, employers never have to monitor an employee taking medications[107] or otherwise monitor an employee's health condition.[108]

b. Sometimes Unreasonable. Some accommodations are less certain. This is because courts have sometimes held they are reasonable and sometimes held they are not reasonable. Worse still, an examination of these cases does not reveal any consistent test or framework for determining whether the accommodation is reasonable or not.

One of the most muddled accommodation issues is whether an employer has to provide transportation as an accommodation. For instance, in one case, an employee had a night-vision disability that precluded driving to his shift at night.[109] The Sixth Circuit held that the employer was under no obligation to provide an accommodation that would allow the employee to work the night shift.[110] Yet, in another case with similar facts (and a similar disability), the Third Circuit held that it was reasonable for the employer to change the employee's shift to allow the employee to get to work.[111] Citing a Second Circuit decision, *Lyons v. Legal Aid*

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[105] McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 98 n.4 (2d Cir. 2009); *Leslie*, 914 F. Supp. at 887.

[106] *General Principles*, *supra* note 29.

[107] Hogarth v. Thornburgh, 833 F. Supp. 1077, 1088 (S.D.N.Y. 1993); *Other Reasonable Accommodation Issues*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17.

[108] For instance, in *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 1004–05 (S.D. Ind. 2000), the court said that the employer is under no obligation to make a doctor's appointment for an employee. *See also Other Reasonable Accommodation Issues*, *supra* note 107 (stating that an employer is not responsible for monitoring an employee's medical treatment or ensuring that the employee is receiving appropriate treatment).

[109] Wade v. Gen. Motors Corp., 165 F.3d 29, at *1 (6th Cir. 1998) (unpublished table decision).

[110] *Id.* at *2.

[111] Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010).

Society,[112] the court stated that there is nothing inherently unreasonable in requiring employers to furnish an employee with assistance in getting to work.[113] The court held that under certain circumstances, the ADA could obligate an employer to accommodate an employee's disability-related difficulties in getting to work.[114]

In *Lyons*, the employee with a disability was an attorney at the Legal Aid Office in Manhattan.[115] She became disabled when a car hit her.[116] She could only walk using walking devices, could not stand for extended periods, could not climb or go down stairs, and could not walk for long periods of time.[117] She asked her employer to pay for a parking space near her work and near the courts she often visited.[118] She could not take public transportation because she could not stand or climb stairs.[119] Without the accommodation, she was spending 15%–26% of her net salary on parking.[120] The court first cited the familiar rule that employers generally do not have to provide an accommodation that is primarily for the individual's personal benefit, such as an item that assists the individual throughout his daily activities, on and off the job.[121] Yet, in response to the employer's argument that the plaintiff's requested accommodation was personal in nature and therefore outside the scope of its obligation, the court stated that Congress envisioned that employer assistance with transportation to and from work might be covered.[122] The court held that while this is a question of fact,[123] "there is nothing inherently

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[112] 68 F.3d 1512 (2d Cir. 1995).
[113] *Colwell*, 602 F.3d at 505.
[114] *Id.*
[115] *Lyons*, 68 F.3d at 1513.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 1513–14.
[120] *Id.* at 1514.
[121] *Id.* at 1516.
[122] *Id.*
[123] *Id.* Although it is true that many of these issues are factual questions and therefore should be decided by a jury, the reality is that courts often decide these issues against plaintiffs on summary judgment. If these cases were allowed to proceed to the jury, some variation in their outcome would be expected. But courts have been making categorical judgments with respect to reasonable accommodation issues, often finding that the

unreasonable, given the stated views of Congress and the agencies responsible for overseeing the federal disability statutes, in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work."[124]

In a recent case, the Second Circuit considered whether an employee's request for help commuting to work was reasonable.[125] The employee had been transferred to a location much farther from her home, creating difficulties in her ability to commute to work because of her disability.[126] Relying on *Lyons*, the court stated that this issue was fact-sensitive and could not be decided on summary judgment, as the district court had done.[127] The court suggested several possible accommodations, including transferring her back to her previous, closer location, finding "another closer location, allowing her to work from home, or providing a car or parking permit."[128]

Another hopelessly muddled accommodation involves an employee who requests to work from home.[129] As stated in the EEOC Enforcement Guidance: "An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue

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accommodation is unreasonable as a matter of law; therefore, the case does not proceed to a jury.

[124] *Id.* at 1517.

[125] Nixon–Tinkelman v. N.Y.C. Dep't of Health & Mental Hygiene, 434 F. App'x 17, 19 (2d Cir. 2011).

[126] *Id.* at 20.

[127] *Id.* at 19.

[128] *Id.* at 20.

[129] *Compare* Carr v. Reno, 23 F.3d 525, 530 (D.D. Cir. 1994) (stating that working from home is sometimes a reasonable accommodation, but it was not in this case because the plaintiff was a coding clerk with tight deadlines), Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1060 (D.C. Cir. 1992) (holding that an agency must consider accommodating a computer programmer with multiple sclerosis by allowing her to work from home), and Anzalone v. Allstate Ins. Co., No. 93-2248, 1995 WL 21672, at *4 (E.D. La. Jan. 19, 1995) (finding a disabled employee's request to work at home not unreasonable as a matter of law), *with* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (stating that working from home is generally not a reasonable accommodation); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 213–14 (4th Cir. 1994) (holding that working from home is not a required accommodation). Although, considering that the plaintiff in *Tyndall* was a teacher, it is easy to see why working from home was considered an unreasonable accommodation.

hardship."[130] To some extent, these cases turn on a common-sense inquiry of whether it is possible to perform the essential functions of the job at home. Thus, it is easy to see why some employees, such as food servers, cashiers, hotel housekeepers, and factory-line workers, could not perform their jobs at home. Such positions require personal contact or presence, interaction with others, and supervision.[131] In some cases, the court does not analyze the issue in any depth but rather simply claims that working from home generally is not a reasonable accommodation.[132] In other cases, it seems at least plausible that the employee could work from home, but the employer has taken a rigid view of what the essential functions of the job are and whether they can be performed at home.[133] For instance, in one case, the court held that a claims adjudicator whose main duties included interviewing individuals on the phone, conducting research, and writing reports could not work at home when getting to work proved difficult and painful.[134] In another case, *Vande Zande v. Wisconsin Department of Administration,*[135] the court stated:

> Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision

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[130] *Other Reasonable Accommodation Issues*, *supra* note 107.

[131] *See, e.g.*, Rauen v. U.S. Tobacco Mfg. Ltd. P'ship, 319 F.3d 891, 897 (7th Cir. 2003) (stating that it was not a reasonable accommodation to allow employee to work from home because her job "requires teamwork, interaction, and coordination of the type that requires being in the work place"); Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564 (N.D. Ga. 1995) (stating that "[t]he need for in person training, monitoring, evaluating, and counseling" requires reasonable attendance), *aff'd*, 86 F.3d 1171 (11th Cir. 1996); Misek–Falkoff v. IBM Corp., 854 F. Supp. 215, 227–28 (S.D.N.Y. 1994) ("An employer may certainly require an employee's presence at the workplace when interaction with others is essential to the task to be performed."), *aff'd*, 60 F.3d 811 (2d Cir. 1995).

[132] *See, e.g.*, Mobley v. Allstate Ins. Co., 531 F.3d 539, 547–48 (7th Cir. 2008) ("[A]s a general matter, working at home is not a reasonable accommodation.").

[133] *See, e.g.*, Mason v. Avaya Commc'ns, 357 F.3d 1114, 1122–24 (10th Cir. 2004) (stating that working at home is unreasonable if it requires the elimination of an essential function). In *Mason*, the essential function was the requirement to work as part of a team or to work under the supervision of another. *Id.*; *see also* Mulloy v. Acushnet Co., 460 F.3d 141, 153–54 (1st Cir. 2006) (holding that the employer is not required to allow the employee to work at home because doing so would eliminate an essential function).

[134] Kvorjak v. Maine, 259 F.3d 48, 54–57 (1st Cir. 2001).

[135] 44 F.3d 538 (7th Cir. 1995).

> generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.[136]

Thus, even though much of the plaintiff's job in *Vande Zande* could have been performed at home, the court held that the employer did not have to allow the employee to work at home as a reasonable accommodation.[137] This result, the court stated, was consistent with the majority of courts to have considered the issue.[138]

Some courts will at least consider whether working at home is a reasonable accommodation.[139] For instance, one case involved a plaintiff who was a medical transcriptionist with obsessive-compulsive disorder, which made it difficult for her to get out of the house in the morning.[140] The court was at least willing to consider whether it was possible for her to successfully work at home since her disability only created difficulties with leaving the house and not with her work.[141] While it is possible to draw some distinctions regarding which factual situations will lead to allowing a work-at-home accommodation and which will not, the case law still remains muddled.

Some accommodation issues surrounding reassignment are clear. As discussed above, the employer is not obligated to promote the disabled employee, bump an existing employee out of his job, create a new position, or turn a temporary or part-time

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[136] *Id.* at 544.

[137] *Id.* at 544–45.

[138] *Id.*

[139] *See, e.g.*, Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1060 (D.C. Cir. 1992) (noting that the plaintiff's working from home may have caused some difficulty but not necessarily undue hardship).

[140] Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136–37 (9th Cir. 2001) (holding that it was an issue of fact whether working at home would allow the plaintiff to perform the essential functions of the medical transcriptionist position).

[141] *Id.*

position into a permanent or full-time position.[142] However, some issues surrounding reassignment have not been affirmatively decided. Despite holding in *Barnett* that reassignment is generally not a reasonable accommodation when it would violate a seniority system, the Court left open a possible exception—when special circumstances indicate that a seniority-system exception should preclude granting the employer summary judgment.[143] Some commentators have argued that the rule announced in *Barnett* is standardless and leads to unpredictability in the law.[144] Furthermore, the issue in *Huber v. Wal-Mart Stores*, whether an employer is obligated to reassign an employee with a disability if there are other, more qualified employees, remains a circuit split.[145]

In addition to the reassignment accommodation, uncertainty exists when an accommodation burdens other employees. Some courts allow accommodations that affect other employees, such as not having to rotate through every shift or every line,[146] while others preclude any accommodation that burdens other employees.[147]

3. What Does Not Explain the Chaos. As should be obvious from the above, while one might be able to list several different rules with varying levels of certainty regarding accommodations that are always or sometimes unreasonable, there is no apparent unifying theme. So, what do these accommodations have in common? More specifically, what is it about "per se unreasonable" accommodations that makes courts and sometimes the EEOC conclude they are not required? And how do we more consistently predict the results in the cases that fall under the "sometimes unreasonable" category?[148] There are several possible answers. This sub-part will explore several possible theories or frameworks

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[142] *See supra* Part II.D.*2.a.*

[143] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002).

[144] *See, e.g.*, Porter, *supra* note 20, at 332–34 (citing sources critical of *Barnett* because of its lack of clarity).

[145] *See supra* notes 65–70 and accompanying text.

[146] *See, e.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 615 (3d Cir. 2006) (refusing to hold as a matter of law that exempting the plaintiff from a rotating-shift system was unreasonable).

[147] *See* Porter, *supra* note 7, at 799 (citing cases).

[148] *See supra* Part II.D.*2.b.*

that might be used to explain existing case law, but I will ultimately argue that none of the explanations can consistently explain the body of chaotic case law.

One proposed distinction compares the provision of personal items with job-related items. Employers must provide job-related assistive devices but not personal devices that will be used on and off the job.[149] This distinction explains why employers do not have to give some accommodations, such as transportation,[150] or assistive devices that employees can use in both their personal and professional lives. But it does not explain why employers do not have to create a new position for an individual with a disability, or why an employer is not required to bump another employee out of a job to accommodate a disabled employee. Furthermore, even for accommodations that ordinarily would be considered personal in nature, such as providing or monitoring medications, courts would likely hold that an employer is not obligated to provide such accommodations even if they were only needed at work. Imagine an employee with attention deficit disorder who needs medication to help concentrate. The medication might be needed only for long periods of concentration, such as at work, and not needed at all on the weekends or during other non-work times. Even though the medication would be job-related and not personal in nature, courts would still not require employers to provide it or monitor its administration. Accordingly, the personal/job-related distinction cannot explain all of the accommodations that courts have found unreasonable.

Alternatively, some might suggest that a cost–benefit analysis explains which accommodations should be granted and which are unreasonable.[151] Certainly, Judge Posner has suggested such an approach.[152] The cost–benefit analysis looks at whether the cost of an accommodation to an employer unreasonably exceeds the

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[149] SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 70 (2009); *General Principles*, *supra* note 29.

[150] In some cases, an employer must provide accommodations that allow an employee to get to work. Weber, *supra* note 10, at 1133.

[151] *Cf.* Cox, *supra* note 4, at 222 (stating that courts have struggled to find a criteria to define reasonable other than as a cost–benefit analysis, while recognizing that even a cost–benefit analysis creates uncertainty and debate).

[152] Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

benefit of the accommodation to the disabled employee.[153] Explaining the cost–benefit analysis, Judge Posner stated:

> It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.[154]

In *Vande Zande*, the plaintiff requested to have the kitchenette sink lowered so she could reach it from her wheelchair.[155] This expense was minimal: approximately $150 to lower the sink on her floor and less than $2,000 to lower the sinks on all of the floors in the building (in case she moved to another floor).[156] In response to the plaintiff's argument that "forcing her to use the bathroom sink for activities (such as washing out her coffee cup) . . . stigmatized her as different and inferior,"[157] Judge Posner stated:

> [W]e do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions "stigmatizing." That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the

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[153] *Id.* *But see* Weber, *supra* note 10, at 1124 (stating that the duty to accommodate is not subject to a cost–benefit analysis but to a "cost-resources balance that varies with the capacities of the employer").

[154] *Vande Zande*, 44 F.3d at 542.

[155] *Id.* at 545.

[156] *Id.* at 546.

[157] *Id.*

> employer does what is necessary to enable the disabled worker to work in reasonable comfort.[158]

Accordingly, Judge Posner concluded that the employer did not have to provide a lower sink in the kitchenette even though the cost was minimal because he perceived, in my view erroneously, that the benefit to the plaintiff was even smaller than the cost.[159]

Some have thus argued that the cost–benefit analysis is what explains and mandates results in reasonable accommodation cases. In other words, if the accommodation costs less than the benefit it provides, the employer should have to provide it. Conversely, if the accommodation costs more than the benefit it provides, the employer should not have to provide it. Certainly, this analysis explains the results in some accommodation cases. For instance, the cost of ramping a step is relatively minor, and the benefit of providing it—allowing the employee to get into the building—is significant. Thus, courts should require employers to provide such an accommodation.

Yet the cost–benefit analysis does not explain the result in all accommodation cases. For some accommodations deemed unreasonable, the benefit to the employee greatly outweighs the cost to the employer. For instance, suppose an employee, James, needs his employer to monitor his medications in order to successfully manage his disability at work. Although the cost to his employer is minimal compared to the benefit he receives by remaining employed, the accommodation would nevertheless be deemed unreasonable.[160] A contrasting example might be the provision of readers for blind persons and interpreters for deaf individuals. One might argue that the costs of these accommodations will always exceed the benefit to the employee. Yet legislative history and case law indicate that these types of accommodations might be required.[161] Accordingly, the cost–

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[158] *Id.*

[159] *Id.*

[160] *See supra* notes 106–08 and accompanying text.

[161] Weber, *supra* note 10, at 1132. Furthermore, there is a persuasive argument that a cost–benefit analysis is inconsistent with the legislative history of the ADA. As Weber indicates, the ADA contains a cost-to-total-budget analysis under the undue hardship provision but does not contain a separate cost–benefit analysis. *Id.* at 1136.

benefit analysis does not explain all of the reasonable accommodation cases.

Another possible explanation for the difference between accommodations that courts do not require and accommodations that courts do require is that required accommodations are one-time purchases or modifications, whereas some accommodations are ongoing obligations for employers and therefore do not have to be provided. However, many accommodations have ongoing costs and expenses but are still considered reasonable. For instance, the ADA lists as possible accommodations readers and interpreters that employers would have to provide on an ongoing basis.[162] Accordingly, the distinction between one-time expenses and ongoing obligations cannot explain the courts' and the EEOC's rules on unreasonable accommodations.

Some argue that the difference between accommodations that employers have to give and ones that they do not is: employers need only provide exceptions for rules that the employee's disability makes impossible to follow.[163] Justice Scalia's dissent in *Barnett* is one example of this argument. To summarize, Justice Scalia believed it was a mistake for the Court to hold that "all employment rules and practices—even those which (like a seniority system) pose no *distinctive* obstacle to the disabled" are subject to accommodations or modifications.[164] Instead, he argued that the accommodation requirement only requires the suspension of those employment practices and rules "that the employee's disability prevents him from observing."[165] As an example, according to Justice Scalia's view, an employer would have to provide extra breaks to an individual with a disability if the disability prevents the employee from working long periods without interruptions.[166] But under this view, an employer would not have to reassign an employee with a disability if doing so violated a disability-neutral rule, such as a rule prohibiting

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[162] 42 U.S.C. § 12111(9) (2006); *see also* Weber, *supra* note 10, at 1135 (stating that the legislative history of the ADA indicates that some employers would be required to provide a teacher's aide for a blind teacher or an interpreter for a deaf employee).

[163] *E.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 412 (2002) (Scalia, J., dissenting).

[164] *Id.*

[165] *Id.*

[166] *Id.* at 413.

employees from transferring from one job to another.[167] This can be described as a causation problem, since it raises the question whether the individual's disability prevented the employee from complying with the workplace rule. Some disagree with Scalia's view. As Professor Weber has argued:

> There is no valid analytic distinction between a seniority system or other neutral employment rule that imposes a difficulty on an employee with a disability because the employee can do no other job and a neutral rule such as an office assignment policy that imposes a difficulty on an employee with a disability because the employee cannot use a particular work station.[168]

I agree with Weber that Justice Scalia's analysis is both descriptively inaccurate and normatively unsound.

Finally, some might argue that the types of accommodations that are deemed unreasonable are accommodations that interfere with employers' prerogative to run their businesses as they see fit. Certainly, a requirement to create a new position for an employee with a disability can be seen in this light. Even if it would not cost an employer very much in comparison to the entire budget, requiring an employer to create a position would interfere with that employer's prerogative to manage its business. But many accommodations interfere with employers' business prerogatives. For instance, requiring employers to modify a work schedule for an individual with a disability interferes with their ability to run their business as they see fit, but this has been considered a reasonable accommodation in some cases.[169] Accordingly, protecting employers' prerogatives cannot explain the chaos in the reasonable accommodation case law. Because none of these explanations satisfactorily explain the chaos that plagues the

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[167] *Id.*

[168] Weber, *supra* note 10, at 1165.

[169] In fact, "modified work schedules" is specifically listed as a reasonable accommodation in the statute. 42 U.S.C. § 12111(9)(B) (2006); *see also Modified or Part-Time Schedule*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17 ("Must an employer allow an employee with a disability to work a modified or part-time schedule . . . absent an undue hardship? Yes.").

reasonable accommodation provision, this Article proposes a unified approach to address these vexing reasonable accommodation issues.

III. *MARTIN*IZING TITLE I: BORROWING FROM *PGA TOUR, INC. V. MARTIN*

This Part will argue that the Title III case *PGA Tour, Inc. v. Martin*[170] is instructive for proposing a unified approach to the reasonable accommodation provision. Most accommodations affect either the employer or the co-employees of an employee with a disability, and sometimes the accommodations affect both. The ADA's reasonable accommodation provision explicitly deals only with financial burdens on employers. Yet courts frequently have held that some accommodations are unreasonable even when they impose only minimal or no financial burdens on the employer. To coherently address these reasonable accommodation issues, we must find a way to give meaning to the amorphous "reasonable" standard.[171] In this Part, I demonstrate how the *Martin* case provides a useful analogy for defining the scope of the reasonable accommodation obligation under Title I. To be clear, my approach is both descriptive and normative. I believe that the *Martin* framework can be used to explain much of the existing case law. But in some cases, I use the *Martin* framework to argue for a different result in cases that were, to my mind, decided incorrectly.[172]

A. THE *MARTIN* CASE

In *PGA Tour, Inc. v. Martin*, professional golfer Casey Martin requested the use of a golf cart during the final rounds of a professional golf tournament.[173] Golf carts are permitted during the first two qualifying stages of the tournament but not in the

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[170] 532 U.S. 661 (2001).

[171] *See* Waterstone, *supra* note 27, at 1531 (stating that "[n]o one's interests [are] served by a scattered body of case-law").

[172] *See infra* Part III.B.*2*.

[173] 532 U.S. at 669.

last stage.[174] The goal is to have everyone tee off on the first hole under exactly the same conditions and be tested under the same conditions over the entire event.[175] Casey Martin is a talented golfer with Klippel–Trenaunay–Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart.[176] The disease causes him severe pain and has atrophied his right leg.[177] During his college career, Martin could no longer walk an eighteen-hole golf course.[178] Walking caused him pain, fatigue, and anxiety, and also carried a significant risk of hemorrhaging, blood clots, and a tibia fracture so severe that amputation could be required.[179] In past tournaments, he had sought and received accommodations to waive the walking requirement and let him ride in a golf cart.[180] When Martin turned pro, he was allowed to use a golf cart during the initial rounds of the tournament and made a request to use a cart during the third stage.[181] PGA refused, and Martin filed suit.[182]

The case eventually made it to the Supreme Court, where the Court held in Martin's favor.[183] Under Title III, which applies to places of public accommodation,[184] the term "discrimination" includes

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can*

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[174] *Id.* at 666.
[175] *Id.* at 667.
[176] *Id.* at 667–68.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* at 609.
[182] *Id.*
[183] *Id.* at 690–91.
[184] The first issue in *Martin* was whether the PGA Tour was a public accommodation covered by the ADA. The Court held that it was, stating, "as a public accommodation during its tours and qualifying rounds, petitioner may not discriminate against either spectators or competitors on the basis of disability." *Id.* at 681.

> *demonstrate that making such modifications would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages, or accommodations.[185]

PGA did not argue that use of a golf cart was unnecessary for Martin to play in the tournament.[186] Instead, PGA argued that allowing Martin to use a golf cart would fundamentally alter the nature of golf tournaments.[187] A modification can fundamentally alter the nature of the public accommodation in two ways—either by altering an essential aspect of the game such that it would be unacceptable even if it affected all competitors equally (such as changing the diameter of the hole from three inches to six inches), or by giving an unfair competitive advantage to an individual with a disability.[188] The Court stated it was "not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense."[189]

First, the Court concluded that the use of a cart is not itself inconsistent with the fundamental character of the game of golf. Walking is not fundamental to golf; the essence of the game is shot-making—using clubs to move a ball from the tee to the hole in as few strokes as possible.[190] The Court also stated that the walking rule was not an indispensable feature of tournament golf, as PGA allowed golf carts on the senior tour, the qualifying rounds of the tournament, and the first two stages of the competition in which players compete to gain membership into the tours.[191] Despite PGA's argument that the walking rule was indispensible to the game of golf "at the highest level" because it "inject[s] the element of fatigue into the skill of shot-making," the Court disagreed, stating that the lower court's finding that the fatigue

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[185] 42 U.S.C. § 12182(b)(2)(A)(ii) (2006) (emphasis added).

[186] *Martin*, 532 U.S. at 682. Thus, the Court said that the case was different from one where a player has "less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity." In that case, "an accommodation might be reasonable but not necessary." *Id.*

[187] *Id.*

[188] *Id.* at 682–83.

[189] *Id.* at 683.

[190] *Id.* at 685.

[191] *Id.*

from walking the golf course is not significant undermined this argument.[192]

Furthermore, even if one accepted that the walking rule is outcome-affecting because of fatigue, the Court stated that PGA was still obligated to consider Martin's personal circumstances in deciding whether to accommodate him.[193] The ADA requires an individualized inquiry to determine whether a specific modification for a specific individual would be reasonable under the circumstances.[194] Because the walking rule is not essential to professional golf tournaments, it could be waived in individual cases without causing a fundamental alteration.[195] Even if the walking rule does serve the purpose of injecting fatigue, the evidence was clear that Martin endures greater fatigue even with a cart than his able-bodied competitors do walking.[196] Thus, the modification would not give Martin an unfair competitive advantage.[197] Accordingly, the Court held that the accommodation would not fundamentally alter the tournament, and Martin's request for a waiver of the no-golf-cart rule should have been granted.[198]

B. APPLYING *MARTIN* TO TITLE I REASONABLE ACCOMMODATION CASES

As stated above, the first inquiry in *Martin*—whether the accommodation would fundamentally alter an essential aspect of the game of golf—can be analogized to accommodations that affect the employer–employee relationship. And the second inquiry—

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[192] *Id.* at 686–87. The district court relied on the testimony of a physiology professor and expert on fatigue, who calculated that while walking a golf course—about five miles—expends approximately 500 calories. Further, the energy is expended over a five-hour period, during which golfers have numerous intervals for rest and refreshment. *Id.* at 687. In my reading of the case, I found compelling that even when given the option of using a cart, the vast majority of golfers in tournaments choose to walk to relieve stress or for other strategic reasons. *Id.* at 687–88; *accord* Waterstone, *supra* note 27, at 1544 (finding probative that most professional golfers choose to walk even when allowed to ride in a cart).

[193] *Martin*, 532 U.S. at 688.

[194] *Id.*

[195] *Id.* at 689.

[196] *Id.* at 690.

[197] *Id.*

[198] *Id.*

whether use of the golf cart would give Martin an unfair competitive advantage—can be analogized to accommodations that burden other employees. I will discuss each of these in turn.

1. Accommodations Are Unreasonable If They Fundamentally Alter the Employer–Employee Relationship. Many needed accommodations for individuals with disabilities affect employers in more than one way. If a requested accommodation is overly expensive, the undue hardship provision of the ADA provides a defense.[199] But what about cases where the accommodation burdens the employer, but not in a financially significant way? In those cases, courts will have to decide whether the accommodation is "reasonable." As noted above, because there is no clear definition of "reasonable," I argue that borrowing from the standard used in the *Martin* case helps explain the vast majority of the reasonable accommodation cases.[200] Under this framework, an accommodation is unreasonable if it fundamentally alters the nature of the employer–employee relationship.

a. Defining the Employer–Employee Relationship. Before discussing cases that would fundamentally alter essential aspects of the employer–employee relationship and are therefore unreasonable, we first need to figure out how to define the employer–employee relationship. Specifically, in the context of an employer's obligation to provide reasonable accommodations to its employees, what kinds of accommodations fall within the ambit of the employer–employee relationship?

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[199] 42 U.S.C. § 12111(10) (2006).

[200] One response to my proposal might be that the fundamental alteration inquiry is a defense in a Title III case, so it is strange to use this inquiry to inform the "reasonable" inquiry. There are two separate rejoinders to this critique. First, as the Court stated in *Martin*, it does not matter in which order courts analyze the three inquiries: whether the requested modification is a "reasonable modification," whether the modification is "necessary" for the disabled individual, and whether it would "fundamentally alter" the nature of the public accommodation. 532 U.S. at 682, n.38. Accordingly, this suggests that Title III contemplates a more fluid approach than a strict two-step analysis of reasonable modification and then fundamental alteration. Second, as stated below in Part IV.B, I recognize that the fundamental alteration standard could also modify "undue hardship" if Congress amended the undue hardship defense to include a fundamental alteration inquiry rather than just a financial inquiry. However, as stated below, the fundamental alteration standard better explains why courts have found some accommodations unreasonable.

First, it should be obvious that the employer–employee relationship includes the employer's responsibility for the physical structure of its building, which includes, of course, removing barriers to access for individuals who use wheelchairs or have other mobility impairments.[201]

Similarly, an employer is responsible for the work environment, providing the tools and equipment of the workplace. If those tools and equipment are inaccessible or unusable by individuals with disabilities, an accommodation is required.[202] For instance, an employer would be required to provide text-enhancing software for a visually impaired employee.[203]

Determining shifts and schedules is also an essential aspect of the employer's relationship with its employees. If these shifts and schedules make it impossible for an individual with a disability to work for the employer, the employer is obligated to modify them, absent an undue hardship.[204] For instance, if an employee who has diabetes requires blood-sugar testing, a strict diet regimen, and occasional insulin injections, the employee would need an accommodation from the employer's normal break rules if those breaks were not frequent enough to allow the employee to control his or her diabetes.[205] Such an accommodation is reasonable

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[201] *See* 42 U.S.C. § 12111(9)(A) ("The term 'reasonable accommodation' may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities"); *General Principles*, *supra* note 29 (listing "making existing facilities accessible" as a reasonable accommodation). *Cf.* Cox, *supra* note 4, at 212 (stating "that the purpose of the ADA's reasonable accommodation provision is to remove unnecessary workplace barriers").

[202] *See* 42 U.S.C. § 12111(9)(B) (listing "acquisition or modification of equipment or devices" as a reasonable accommodation); *General Principles*, *supra* note 29 (listing "acquiring or modifying equipment" as a reasonable accommodation).

[203] *See General Principles*, *supra* note 29 (using an example of an employee with a hearing disability who needs a TTY so that he can use the telephone).

[204] *See* 42 U.S.C. § 12111(9)(B) (listing "job restructuring" and "part-time or modified work schedules" as reasonable accommodations); *General Principles*, *supra* note 29 (giving an example of an employee whose mental illness makes rotating shifts or adjustments to the daily routine difficult, and suggesting that the employer allow the employee to stay on one floor permanently or give the employee a transition period to adjust to a change in floor assignments); *see also* Weber, *supra* note 10, at 1137 ("The House Committee on Education and Labor explained that variances from neutral rules, such as work schedules or rotations of day and night shifts . . . may be mandatory accommodations if they do not cause the employer undue hardship.").

[205] *See Types of Reasonable Accommodations Related to Job Performance*, *supra* note 17

because the scheduling of breaks is clearly part of the employer–employee relationship.

Finally, it is also an employer's responsibility to remedy the more subtle barriers in the workplace caused not by intentional discrimination but by benign neglect. Disability theorists have long argued that the purpose of the reasonable accommodation provision is to remedy barriers in the workplace caused by designing workplaces around the able-bodied,[206] even if done without any discriminatory intent.[207] For instance, if a deaf employee needs an occasional interpreter for meetings at work, an employer is obligated to provide one,[208] even though the employer did not intend to discriminate against the deaf employee by conducting its meetings verbally.[209] This is one example where the workplace has been structured around the able-bodied, and employers are responsible for remedying this structural bias against individuals with disabilities by providing the accommodation, assuming that doing so does not create an undue financial hardship.[210]

(using the example of an employee with HIV who must take medication on a strict schedule).

[206] *See, e.g.*, BAGENSTOS, *supra* note 7, at 55 ("[D]isability rights advocates urge that discrimination consists not just in overt unequal treatment but also in the failure to take account of people with disabilities in the design of the physical environment, social structures, and work routines."); Cox, *supra* note 4, at 213 (stating that "accommodations are needed to remediate socially constructed barriers embedded in the workplace").

[207] *See* Cox, *supra* note 4, at 192 (stating that the ongoing reluctance to eliminate barriers that "frustrate workplace participation by persons with disabilities" is not usually done with "overt animus").

[208] The ADA specifically lists "interpreters" as one example of a reasonable accommodation. 42 U.S.C. § 12111(9)(B); *see General Principles*, *supra* note 29 (listing interpreters as a reasonable accommodation).

[209] *See, e.g.*, *Reasonable Accommodation Related to the Benefits and Privileges of Employment*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17 (answering "yes" to the question whether an employer has "to provide a reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees").

[210] Cox, *supra* note 4, at 195 (discussing situations where courts refuse to recognize that "ADA accommodations appear to confer preferential treatment" only because we see individuals with disabilities as different from the nondisabled majority "and because most workplaces have not been constructed or managed with the needs of a broad range of individuals in mind"). *Cf. id.* at 221 (discussing how aggregating ADA claims "might encourage courts to focus not on the biological deficiencies . . . but on the workplace norms that unnecessarily exclude" individuals with disabilities).

In sum, as long as the accommodation remedies a socially or structurally imposed barrier, employers should provide it.[211] These accommodations are required because they remove barriers that the employer itself caused or is responsible for perpetuating.[212] On the other hand, as we will see below, many barriers are not created explicitly or implicitly by the employer, and requiring the removal of these barriers would fundamentally alter the nature of the employer–employee relationship.

b. Applying the Fundamental Alteration Standard. In some cases, the accommodation would or might fundamentally alter the nature of the employer–employee relationship. Suppose an employee requests an accommodation that does not burden other employees and is not very expensive, yet it burdens the employer in some other way. Some employers might have a visceral reaction against having to provide such an accommodation. The easiest example of this is an employee's request that the employer monitor the employee's medications as a reasonable accommodation for the employee's disability. For instance, in *Hogarth v. Thornburgh*, the plaintiff was an FBI employee who was diagnosed with manic-depressive disorder, had hallucinations, and other problems that affected his work and jeopardized the security of the information to which he had access.[213] The plaintiff filed suit when the FBI fired him.[214] The experts debated the likelihood of a recurrence of his symptoms, but the real issue involved whether there was a reasonable accommodation that would allow him to safely perform his duties.[215] One of the accommodations that the plaintiff requested was to have the employer monitor his medications to make sure that he was in compliance with his medication regimen,

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[211] *See id.* at 223 ("[T]he reasonableness assessment should include asking whether a requested accommodation will serve to remove a socially imposed barrier to a disabled person's equal employment opportunity." (quoting Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 865 (2004))).

[212] Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 52 (2004) (stating that "disability rights activists . . . might have an ideological interest in reading the accommodation requirement to mandate that an individual employer take steps to remove only those barriers that the employer itself played a part in creating").

[213] 833 F. Supp. 1077, 1081–82 (S.D.N.Y. 1993).

[214] *Id.* at 1079.

[215] *Id.* at 1082.

thereby reducing the possibility of a recurrence of his symptoms.[216] Interestingly, because this was a case brought under the Rehabilitation Act (enacted prior to the ADA), the standard the court used was the "fundamental alteration" standard used in the *Martin* case under Title III of the ADA.[217] While the employer acknowledged that it would not be unduly burdensome to monitor the plaintiff's medication, it did claim that it would go "beyond what an organization, an agency has to accept."[218] While the court did not ultimately decide the reasonableness of this accommodation because, even if reasonable, it would still not enable the plaintiff to perform the essential functions of the job,[219] other courts have made clear that employers are not required to monitor their employees' medication.[220]

Martin helps explain why this rule is sensible. This accommodation is unreasonable because it would fundamentally alter the nature of the employer–employee relationship. The normal employer–employee relationship does not involve monitoring the medications of its employees.[221] Similarly, this standard explains why an employer does not have to provide medications, wheelchairs, hearing aids, or other assistive devices that the employee uses both at home and at work. Requiring these things would fundamentally alter the nature of the employer–employee relationship because the normal employer–employee relationship does not involve the provision of personal assistive devices.

The *Martin* rule also helps illuminate other difficult accommodation issues. Before proceeding, one disclaimer is in order. For many of the accommodations discussed below, there might be a less onerous accommodation that would fully accommodate the employee's needs. Because an employer does not

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[216] *Id.* at 1087.

[217] *Id.* at 1088.

[218] *Id.*

[219] *Id.*

[220] *See, e.g.*, Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 1004 (S.D. Ind. 2000) (citing cases and passages from the EEOC Enforcement Guidance that state that medical monitoring is not a reasonable accommodation).

[221] *See, e.g.*, *Other Reasonable Accommodation Issues*, *supra* note 107 (stating that employers do not have to monitor medications or monitor an employee's medical treatment because doing so does not involve removing or modifying a workplace barrier).

have to provide an employee his preferred accommodation,[222] these more onerous or less conventional accommodations should only be considered if no other accommodation would effectively accommodate the employee with the disability.

As discussed above, the case law with regard to transportation varies widely.[223] For instance, for one employee who had a night-vision disability that precluded driving to his night shift, the court held that the employer was under no obligation to provide an accommodation that would allow the employee to get to work.[224] Yet, in another case with similar facts and a similar disability, the court said that it *was* reasonable for the employer to change the employee's shift to allow the employee to get to work.[225] How do we distinguish these cases? In the first case, it is not clear if a shift change was a possibility.[226] If not, the result can be explained using the fundamental alteration standard from *Martin*. Changing a shift for an employee with a disability would not fundamentally alter the nature of the employer–employee relationship. In fact, it is clearly part of the employer's relationship with its employees to tell them when and where to report to work. On the other hand, it *would* fundamentally alter the employer–employee relationship to require an employer to provide transportation services to its employees.

Another transportation case involved the issue whether an employee's request for help with commuting to work was reasonable.[227] The employee had been transferred to a location

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[222] *See, e.g.*, Mobley v. Allstate Ins. Co., 531 F.3d 539, 546 (7th Cir. 2008) (stating that "[a]n employer is not obligated to provide an employee the accommodation [s]he requests or prefers" (alterations in original) (internal quotation mark omitted)); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996) ("It is by now well established that the ADA does not require an employer to provide the best accommodation possible to a disabled employee.").

[223] *See supra* Part II.D.*2.b*.

[224] Wade v. Gen. Motors Corp., No. 97-3378, 1998 WL 639162, at *2 (6th Cir. 1998). Interestingly, it is unclear from where this rule is derived because the personal-benefit rule does not apply here. If the employee is only seeking transportation to and from work, this is not something that benefits the employee in his personal life, unless, of course, the employer provided a car.

[225] Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (3d Cir. 2010).

[226] If it was possible to change shifts, either the case was poorly litigated or the court decided it incorrectly.

[227] Nixon–Tinkelman v. N.Y.C. Dep't of Health & Mental Hygiene, 434 F. App'x 17, 19 (2d

much farther from home, creating difficulties with the employee's ability to commute to work because of her disability.[228] The court suggested several possible accommodations, including transferring the employee back to the closer location, finding another closer location, allowing the employee to work from home, or providing a car or parking permit, all of which would allow the employee to keep working.[229]

In the other transportation case discussed earlier,[230] the employee with a mobility disability asked the employer to pay for a parking space near the workplace and near the courts, which the employee had to visit on a daily basis.[231] Public transportation was not an option because the employee could not stand or climb stairs. Without the accommodation, paying for parking consumed 15%–26% of the employee's net salary.[232] The court held that, although it was a question of fact, "there is nothing inherently unreasonable, given the stated views of Congress and the agencies responsible for overseeing the federal disability statutes, in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work."[233] The *Martin* standard can explain this result. Employer-provided parking does not fundamentally alter the nature of the employer–employee relationship.

This case exemplifies why the personal/job-related distinction does not work well. Helping an employee get to work is job-related, yet one can also argue that transportation problems are personal. The fundamental alteration rule in *Martin* is much more coherent than the arbitrary personal/job-related distinction. Although the employer did not normally provide parking spaces,[234] it is difficult to say that providing parking spaces would fundamentally alter the nature of the employer–employee

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Cir. Aug. 10, 2011).

[228] Nixon–Tinkelman, v. N.Y.C. Dep't of Health & Mental Hygiene, No. 08 Cv. 4509(BSJ), 2012 WL 2512017, at *2 (S.D.N.Y. June 28, 2012).

[229] *Nixon–Tinkelman*, 434 F. App'x at 20.

[230] *See supra* Part II.D.*2.b*.

[231] Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1513 (2d Cir. 1995).

[232] *Id.* at 1514.

[233] *Id.* at 1517.

[234] *Id.*

relationship. The employer still has the opportunity to argue that the cost of providing the parking spaces causes an undue hardship, but the accommodation should not be deemed unreasonable simply because it involves the employee's ability to get to work rather than some other aspect of the job. After all, employees with disabilities cannot work if they cannot get to work. On the other hand, in the *Nixon–Tinkelman* case, whether the employer would be obligated to provide the accommodation under a *Martin* standard would depend specifically on the accommodation considered. The court left that an open question.[235] Reassignment to a closer location would be reasonable in most cases, working from home may or may not be reasonable under the fundamental alteration standard, and providing a parking space would not fundamentally alter the nature of the employer–employee relationship. Yet providing transportation likely would fundamentally alter the nature of the employer's relationship with its employees. If the employer does not normally provide transportation for its employees, it should not have to alter its business to provide that service to the employee with the disability.

Another contentious accommodation is working from home.[236] As stated above, these cases often turn on whether it is possible for the employee to perform the job's essential functions at home. In some industries, working from home would fundamentally alter the nature of the relationship between the employer and its employees. For almost all service and retail jobs, it is easy to understand why individuals cannot work from home.[237] For instance, consider a very simple example of a waitress in a restaurant. If the waitress had a disability that required her to work from home, clearly the essence of the relationship between the employee and her employer—to wait on customers and serve the employer's food to the customers—would be fundamentally altered.

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[235] *Nixon–Tinkelman*, 434 F. App'x at 20.

[236] *See supra* notes 129–41 and accompanying text.

[237] This, of course, assumes working in brick-and-mortar stores rather than online retail stores.

In other industries, even if the job involves mostly sitting at a desk and working on a computer, which presumably could be accomplished at home, the business might be so strongly team-oriented or supervisor-driven such that allowing an employee to regularly work from home as a reasonable accommodation would fundamentally alter the employer–employee relationship. But in some industries, an employee working from home with some way of monitoring the employee's work quantity and quality would not fundamentally alter the nature of the employer–employee relationship and therefore should not be deemed unreasonable. Using the fundamental alteration standard in *Martin* does not provide an automatic answer in every work-at-home case, but it gives us a clearer standard than the one courts currently use.

Going forward, courts could use this framework for determining whether a requested accommodation is reasonable. If a court prefers a more specific test than asking whether the accommodation fundamentally alters the nature of the employer–employee relationship,[238] courts could ask the inverse question of whether the accommodation requested is the type of accommodation that falls within the scope of the employer–employee relationship. As stated above, I have identified four types of accommodations that fall within the boundaries of the employer–employee relationship.[239] They are: (1) accommodations to make the physical structure of the workplace accessible; (2) accommodations to make the work environment accessible, including tools and equipment; (3) modifications to shifts and schedules; and (4) accommodations to remedy the subtle barriers in the workplace—the rules and structures built around the assumption of able-bodied employees. A court seeking a positive test that asks whether the accommodation is reasonable rather than whether the accommodation is unreasonable will determine if the requested accommodation falls within one of the four

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[238] I am not necessarily convinced that a more specific test is needed. Courts use the fundamental alteration standard in Title II and Title III cases without having a more specific test. There is, however, at least an argument to be made that a more specific test will lead to more consistent results. *See generally* Waterstone, *supra* note 27 (arguing for a more specific test when determining if a modification sought by a professional athlete would fundamentally alter the professional sport).

[239] *See supra* Part III.B.*1.a.*

categories above. In sum, as long as the accommodation would remove a barrier, whether physical or structural, that the employer was responsible for creating or perpetuating, the accommodation should be given. And, of course, courts should get to the same result by asking the *Martin* question: does the accommodation fundamentally alter the nature of the employer–employee relationship? If the answer to that question is "yes," the accommodation does not have to be provided.

2. Accommodations Are Unreasonable If They Give the Employee with the Disability an Unfair Competitive Advantage. Many accommodations have a relatively minor effect—or no effect—on the employer, but rather only affect co-employees. As the Supreme Court has said, if the accommodation only affects other employees, the employer cannot ordinarily claim an undue hardship defense.[240] Instead, the Court said we look to the "reasonable" standard to decide when an employer is obligated to give an accommodation that affects other employees.[241] Outside of the seniority context in *Barnett*, however, courts inconsistently decide reasonable accommodation issues when the accommodations affect other employees.[242] Relying on *Martin* can help decide these difficult issues.

In *Martin*, in addition to considering whether giving Martin a golf cart would fundamentally alter an essential aspect of the game of golf, the Court also said that allowing the golf cart would not fundamentally alter the golf tournament because it did not give Martin an unfair competitive advantage.[243] Obviously, the competitive aspect of a professional golf tournament is much more important than competition in the workplace, but an analogy can

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[240] *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002) (stating that the reasonable accommodation provision is not a "mirror image" of the undue hardship defense because "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent").

[241] *Id*. at 401.

[242] *See* Porter, *supra* note 7, at 798–99 (offering examples of inconsistent decisions); Porter, *supra* note 20, at 325 n.79 (noting an example of applying the *Barnett* rule in other contexts).

[243] PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001).

nevertheless be made.[244] This desire to avoid giving the employee with a disability an unfair competitive advantage is seen in several rules that are very well settled in disability law. First, the ADA is not an affirmative action statute.[245] Many scholars and courts have called it one because of the obligation to give reasonable accommodations that seem like preferential treatment.[246] But as other scholars have made clear, the obligation to provide a reasonable accommodation is not the same thing as affirmative action.[247] The ADA does not require an employer to prefer a disabled applicant over a more qualified nondisabled applicant when hiring individuals or when making a promotion decision.[248] Placing this rule into the parlance of *Martin*, giving employees with disabilities a preference over nondisabled employees in hiring or promotions would give the employee with a disability an unfair competitive advantage over nondisabled employees and is therefore not required. Similarly, the law is well settled that when considering the accommodation of reassignment to a *vacant* position, the employer is not required to bump an incumbent employee, hence the word "vacant" in the statute.[249] Again, it would give employees with disabilities an unfair competitive advantage if they were allowed to bump incumbent employees out of their jobs.

Those issues are well settled. But what about other accommodations that affect co-employees? How do we decide when an accommodation would give an unfair competitive advantage to the disabled employee? In answering this, it is important to distinguish between two different scenarios. Sometimes, an accommodation proposed or considered is one of several that could

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[244] *See* Waterstone, *supra* note 27, at 1490 ("Many businesses and industries involve intense competition, and professional sports should not be separated from these areas in any blanket fashion."); *id.* at 1547 ("To say that the element of competition in professional sports mandates a special exemption both puts professional sports on too high of a pedestal and denigrates the importance of competition in other workplace[s] . . . .").

[245] Malabarba v. Chi. Tribune Co., 149 F.3d 690, 700 (7th Cir. 1998); Weber, *supra* note 10, at 1138.

[246] Porter, *supra* note 20, at 346–50.

[247] *Id.*

[248] *See* 42 U.S.C. §§ 12112(a), 12113(a) (2006) (defining "discrimination" and noting that a disabled applicant's lack of qualifications for the position is a defense).

[249] *Id.* § 12111(9)(B).

possibly allow an employee to remain employed. In these scenarios, the employer can choose how much of a burden it will allow an accommodation to place on other employees and pick a different accommodation with a lesser burden if it so chooses.[250] But other times the accommodation is one of last resort,[251] meaning that without the accommodation the employee will be fired.[252] This latter scenario is similar to the situation in *Martin*. Without the modification to the no-golf-cart rule, Martin would have been unable to participate in the golf tournament.[253] Similarly, without an accommodation of last resort, an employee with a disability would be out of a job.

The reason the Court in *Martin* held that giving a golf cart to Martin would not give him an unfair advantage is because he was already suffering from a disadvantage—his significant disability—and the golf cart only put him on an even playing field with the other competitors.[254] Although the competitive environments of the workplace and a professional golf tournament are not the same, employees with disabilities also suffer from a disadvantage; thus, the purpose of a reasonable accommodation is to level the playing field between employees with disabilities and their nondisabled coworkers. Instead of the equal playing field being the ability to compete in the golf tournament, the equal playing field here is the ability to remain employed.[255]

An example will help illuminate this point. Suppose an employee has a disability affecting the ability to lift or push very heavy objects. This employee works on an assembly line, packing glass. The employee can lift the glass to pack it, in large part because any larger pieces are, for obvious reasons, lifted as a team.

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[250] This is because, as stated above, an employer does not have an obligation to provide the employee's preferred accommodation, only an effective accommodation. Mobley v. Allstate Ins. Co., 531 F.3d 539, 546–47 (7th Cir. 2008).

[251] *See, e.g.*, Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996) (implying that reassignment is an accommodation of last resort).

[252] *See* Porter, *supra* note 20, at 345 (discussing an employers' difficulty in deciding whether to transfer a disabled employee so he can remain employed or to give the position to another employee with more seniority).

[253] PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

[254] *Id.* at 690.

[255] For an argument that professional sports are really not that different than other industries, see Waterstone, *supra* note 27, at 1523–24.

Even though the majority of the job's task is packing glass, the palette on which the glass has been stacked gets full about once an hour. Someone must then push the palette across the plant floor to another location and bring back an empty palette. Under normal circumstances, the employees would simply take turns doing this task. But because of the employee's disability, the employer asks the other employees on the same shift to take the disabled employee's turn exchanging the full palette for an empty one. This accommodation burdens other employees, who have to rotate through the more arduous task more often; as a result, some courts have said that any accommodation that requires co-employees to work longer or harder is unreasonable.[256] But if we apply the *Martin* test, giving the employee the accommodation that causes other employees to have to push the palette more frequently does not give the disabled employee an unfair advantage. It simply allows the disabled employee to remain employed. It does not provide the employee with the disability any advantage over the nondisabled coworkers.[257]

Another example of this principle is a recent case from the Seventh Circuit, where the court reversed the lower court's grant of summary judgment, holding that there was enough evidence to allow a jury to find that the plaintiff could perform the essential functions of his job with a reasonable accommodation.[258] The employee, who worked on a bridge crew, had a disabling fear of heights.[259] Yet, despite his disability, he could perform all of the tasks required except "walking a bridge beam."[260] He estimated that he would only have difficulty with less than 3% of his job description, and he was able to perform all of the assigned tasks except on one occasion when he had a panic attack.[261] Despite the

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[256] *E.g.*, Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007); Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); *see also* Porter, *supra* note 7, at 799–800 (citing cases).

[257] I suppose this analysis would need to be altered in the case of an employer who utilizes a pay system where employees are paid per piece of glass packed or widget manufactured. In my example, this is not an issue because no one can pack glass when the palette is being exchanged.

[258] Miller v. Ill. Dep't of Transp., 643 F.3d 190, 192 (7th Cir 2011).

[259] *Id.*

[260] *Id.*

[261] *Id.* at 192–93.

employer's assertion that the plaintiff could not perform all of the essential functions of his job because of his disability, the court found that the members on plaintiff's bridge crew "accommodated the various skills, abilities, and limitations of the individual team members by organizing itself according to those skills, abilities, and limitations."[262] Accordingly, the court found that "a reasonable jury could find that working at heights in an exposed or extreme position was not an essential function"; therefore, the plaintiff's request that other members of the team substitute for him when a task required working at heights in an extreme position was reasonable.[263] This result fits within the *Martin* framework: this accommodation was reasonable, even though it burdens other employees, because having his coworkers perform some of the tasks that he could not did not give him an unfair advantage over them.

The most difficult issues regarding accommodations that affect other employees involve the reassignment accommodation. I have spent considerable time discussing this issue;[264] here is simply a summary. I have argued that an employer should reassign an employee with a disability if reassignment is necessary for the employee to avoid termination, unless doing so would bump another employee out of a job or lead to the termination of another employee.[265] Despite the fact that the Supreme Court decided this issue to the contrary regarding seniority systems in *Barnett* and would likely have decided it against the disabled employee in *Huber* if that case had not been dismissed, I believe that the disabled employee's need for an accommodation should trump the desires of the nondisabled co-employees. Until now, my reliance on *Martin* has been mostly descriptive, using it to explain the results of many accommodation cases. Here, my argument is normative—courts *should* rely on *Martin*, and cases decided to the contrary were incorrect. Because the reassignment obligation never requires a promotion, allowing the disabled employee's interests to trump in these cases will not give the employee an

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[262] *Id.* at 198.
[263] *Id.*
[264] Porter, *supra* note 20, at 316–18; Porter, *supra* note 7, at 795–806.
[265] Porter, *supra* note 20, at 335–36; Porter, *supra* note 7, at 800–01.

unfair competitive advantage. While it will allow the disabled employee to transfer into a position other employees apparently covet, the co-employees will still be employed and will have other opportunities to transfer into lateral positions in the future. Without the accommodation, the employee with the disability will be out of a job. Accordingly, allowing the reassignment simply puts the employee with a disability on an even playing field with nondisabled employees when that playing field is remaining employed.

For those who would argue that my proposal places too many burdens on other employees, there are a few principles of ADA law that ameliorate what some might see as harsh consequences to those nondisabled co-employees. First, the employee with the disability must be qualified for the position: that is, able to perform the essential functions of the position with or without reasonable accommodation.[266] If an employee cannot perform the main functions of the job, it is not a reasonable accommodation to ask someone else to do those tasks.[267] As stated by one court, "An accommodation that eliminates an essential function of the job is not reasonable."[268] Using the glass-packing example above, while it would be a reasonable accommodation to require the other employees to move the full palette more frequently, it would not be a reasonable accommodation to require the other employees to actually pack the glass for the disabled employee.

Another principle that ameliorates the perceived harshness of my rule is that an employer only has to provide an accommodation that affects other employees if there is no other way to accommodate the employee—in other words, if it is an accommodation of last resort.[269] For instance, if a vacant position was available for which the disabled employee was qualified, the employer could choose to transfer the disabled employee rather than place burdens on co-employees. It is my sense that employers

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[266] 42 U.S.C. § 12111(8) (2006); Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 724 (6th Cir. 2000); McDonald v. Kansas, 880 F. Supp. 1416, 1422 (D. Kan. 1995).

[267] 42 U.S.C. § 12111(9).

[268] *McDonald*, 880 F. Supp. at 1423; *see also Hoskins*, 227 F.3d at 729 ("[T]he ADA does not require employers to accommodate individuals by shifting an essential job function onto others.").

[269] Porter, *supra* note 20, at 335.

have a tendency to avoid placing burdens on other employees,[270] and employers are not obligated to provide the disabled employee's preferred accommodation.[271] Finally, it is important to remember that some of the harshest consequences would fall on the co-employees of small employers, and the ADA does not apply to employers with fewer than fifteen employees.[272]

3. Accommodations That Affect Both Employers and Employees. Two related accommodations can be said to affect both employers and employees. One is a request to create a new position. This might arise if an employee can no longer perform the essential functions of a position even with a reasonable accommodation, and there are no other "vacant" positions for which the employee is qualified. In these cases, a disabled employee might ask an employer to create a new position in order to continue to work for the employer. The other accommodation—related to and perhaps more common than the first—is a request to turn a temporary or part-time position into a full-time position. This often arises when an employer has reserved a temporary light-duty position for employees who injure themselves on the job and temporarily cannot perform their current job. Employers have an interest in having a light-duty position available for those injured on the job because, under workers' compensation laws, employers generally are responsible for paying the employee's wages whether the employee is working or not, and most employers would prefer to pay an employee to do some kind of work than to do no work at all.[273]

Courts have consistently held that employers are not required to create a position as a reasonable accommodation.[274] Courts do

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[270] *See id.* at 345 (stating that some employers may prefer a bright-line rule giving them a justifiable excuse for accommodating a disabled employee).

[271] *Requesting Reasonable Accommodation*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17.

[272] 42 U.S.C. § 12111(5)(A).

[273] MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW CASES AND MATERIALS 759–60 (7th ed. 2011).

[274] *E.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 614 (3d Cir. 2006); Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000); Fedro v. Reno, 21 F.3d 1391, 1396 (7th Cir. 1994); Moore v. Hexacomb Corp., 670 F. Supp. 2d 621, 628 (W.D. Mich. 2009); Smith v. United Parcel Serv., 50 F. Supp. 2d 649, 653 (S.D. Tex. 1999); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 887 (S.D. Ind. 1996); McDonald v. Kansas, 880 F.

not explain the reason for the rule, except to cite the EEOC's rule in the Enforcement Guidance.[275] Similarly, courts have uniformly held that employers are not required to transform temporary light-duty positions into full-time positions.[276]

These accommodations affect both employers and employees. This is because there are financial costs and operational consequences to creating and funding a new position. But once a position is created, giving it automatically to the disabled employee rather than any other employee, or allowing a disabled employee to move into a temporary light-duty position full time, would obviously affect other employees as well. The fundamental alteration standard in *Martin* informs both parts of this analysis.

We first ask whether creating a new position would fundamentally alter the nature of the employer–employee relationship. Candidly, an argument can be made on both sides of this question. One might argue that it is the employer's responsibility to decide on and create positions for its employees. One could also argue, perhaps more persuasively, that it is not part of the employer–employee relationship for an employer to create a new position for one particular employee when the employer does not need or want the position.[277]

Even if one were to find more persuasive the argument that creating a new position would not fundamentally alter the nature of the relationship between the employer and employee, we next need to look at whether hiring the disabled employee for the created position over all other employees gives the disabled employee an unfair competitive advantage. This also can be argued both ways. On one hand, if hiring for this created position

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Supp. 1416, 1423 (D. Kan. 1995).

[275] *See Types of Reasonable Accommodations Related to Job Performance*, *supra* note 17 (emphasizing that the statutory word "vacant" in "reassignment to a vacant position" means that "[t]he employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position").

[276] *Turner*, 440 F.3d at 614; *Hoskins*, 227 F.3d at 730; *Types of Reasonable Accommodations Related to Job Performance*, *supra* note 17.

[277] It is also worth noting that having to create a new position would, in many cases, cause an undue hardship on the employer. This is certainly true for smaller employers or high-paying positions. However, if we imagine a large manufacturing employer who has hundreds of relatively low-paying, interchangeable jobs, one more position would likely not create an undue hardship.

is more akin to an applicant applying for a job, the employer is under no obligation to prefer the applicant with the disability over other, more qualified employees.[278] On the other hand, if this created position is more akin to a vacant position, and the accommodation is framed as one of reassigning the disabled employee to a vacant position, the earlier analysis would compel giving the created position to the disabled employee because the employee will be out of a job otherwise (assuming this is an accommodation of last resort). As stated earlier, allowing the employee with a disability to be on an even playing field with other employees, when that playing field is defined as remaining employed, requires reassignment of the disabled employee even if there are more senior or more qualified employees.[279] However, this analysis applies only to the "reassignment to a vacant position" accommodation.[280] We do not get to the point of considering reassignment to a vacant position if there is no vacant position to which the employer can transfer the disabled employee. Accordingly, when analyzing the possibility of creating a new position as one accommodation, rather than as two separate steps, the better argument is that, under the *Martin* standard, an employer is not obligated to create a new position for an employee with a disability.

IV. ADDRESSING THE CRITICISM

This part will discuss two primary criticisms that are likely to be lobbied at my proposal. The first is that my proposal might place unreasonable burdens on employers or co-employees. The second criticism is that my proposed test is already part of the undue hardship defense.

A. UNREASONABLE BURDENS ON EMPLOYERS OR OTHER EMPLOYEES?

The most vocal critics of my proposals are likely those who want to preserve as much employer autonomy as possible. *Martin*izing

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[278] As stated earlier, the ADA is not an affirmative action statute. Weber, *supra* note 10, at 1177–78.

[279] *See supra* notes 264–65 and accompanying text.

[280] 42 U.S.C. § 12111(9) (2006).

Title I of the ADA, however, does not require employers to provide any additional accommodations that affect those employers. Rather, it simply explains the current state of the law, giving context and a framework to reasonable accommodation cases. For accommodations that are not consistently held to be reasonable or unreasonable, using the fundamental alteration standard in *Martin* provides a framework for deciding these cases in the future, but it should not cause significantly more cases to be decided in favor of providing an accommodation to a disabled employee.

On the other hand, using *Martin* as I have interpreted it *does* require the provision of some accommodations that place burdens on co-employees. Specifically, I am referring to cases where the required accommodation might force co-employees to rotate through a shift or a particular job function more often if the employee with a disability cannot work the particular shift or perform the particular job function. I am also referring to the reassignment cases, where, contrary to some precedent, I argue that employers should reassign a disabled employee even if another employee is more senior or more qualified.

How do I justify this departure from precedent? More generally, in light of lower-court inconsistency when accommodations place burdens on co-employees, how do I justify placing some burdens on co-employees? As I have argued elsewhere, we can justify placing some of the burden of accommodating disabled employees on their nondisabled coworkers by relying on disability advocates' goal of independence, infused with a communitarian perspective.[281] As disability scholars have noted, one goal of the disability rights movement is to increase the independence of individuals with disabilities.[282] In fact, one way in which disability-rights activists achieved the passage of the ADA was to focus on its politically palatable independence goal. As stated by Professor Bagenstos,

> the value of the independence frame to disability rights advocates should be obvious. To achieve their

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[281] Porter, *supra* note 7, at 801.

[282] BAGENSTOS, *supra* note 7, at 13–16, 22–28.

> goals, disability rights leaders could almost endorse the wave of fiscal conservatism and opposition to welfare programs. They could say that people with disabilities do not want to be dependent on disability benefits; they "simply want to work."[283]

If the goal is to increase the independence of individuals with disabilities, that goal must logically include the goal of increasing the employability of individuals with disabilities.[284]

Accordingly, if an employee with a disability needs an accommodation and would be fired without the accommodation, then in order to further the independence goal of the ADA, the accommodation should be provided even if it causes some burdens on other employees.[285] If the disabled employee loses this job, getting another will likely be very difficult, which could force the employee to rely on public benefits.[286] Because the goal of the ADA is to decrease reliance on public support, allowing accommodations even when they affect other employees should be a priority.[287] It defies logic to refuse to accommodate a qualified, disabled employee, leading to termination and likely reliance on government support rather than placing relatively minor burdens on other employees.[288]

Of course, some might quarrel with the goal of independence if realizing such a goal places even minor burdens on disabled employees' coworkers. Communitarian theory provides further support for my approach to the reasonable accommodation provision of the ADA. Communitarians emphasize the value of community over individual rights.[289] The community as a whole—both a particular workplace and society in general—is clearly better off when individuals with disabilities remain employed rather than having to rely on government-funded support.[290]

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[283] *Id.* at 29.
[284] Porter, *supra* note 7, at 802.
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.* at 802–03.
[289] *Id.* at 803.
[290] *Id.*

Employers benefit by not losing a valuable employee, and society benefits by not having to pay for the support of an individual with a disability. Yet some of the cases discussed above allow the rights of nondisabled employees to trump the need of the individual with a disability to remain employed.[291] Two primary arguments reveal the error of that approach.

The first argument is one of efficiency. Simply stated, it is inefficient to allow the interests of nondisabled coworkers to trump the disabled employee's need for an accommodation. Accommodations that place burdens—often minor burdens—on other employees are much more efficient than not accommodating the disabled employee or accommodating in such a way as to avoid placing burdens on other employees.[292] For example, consider the issue of rotating shifts. Many individuals with disabilities cannot work rotating shifts.[293] If the employer does not provide an accommodation allowing the disabled individual to work a straight shift and making other employees rotate through the other shifts more frequently, the employer has two inefficient choices. It can (and often does) fire the disabled employee and pay the price of having to hire and train a new employee, in addition to the cost of defending a lawsuit, or it can allow itself to be short-staffed on some shifts and over-staffed on others. Either alterative is inefficient to the workplace.[294]

Instead of either inefficient result, communitarian theory emphasizes working together to reach a common goal. Here, the goal is to keep the disabled employee employed not at all costs, but at a reasonable cost to other employees. Because the communitarian theory places an emphasis on working together to reach a common goal, it supports the objective here—to keep individuals with disabilities employed even when needed accommodations cause relatively minor burdens on other employees.[295]

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[291] *See supra* Part II.D.*2.b*.

[292] Porter, *supra* note 7, at 803.

[293] *Id.* at 803–04. Such individuals include those whose disabilities make it impossible to work at night and those whose medical care requires regular hours. *Id.* at 804.

[294] *Id.*

[295] *Id.*

More importantly, however, the communitarian emphasis on working together to reach a common goal allows us to view a reasonable accommodation not just as something that benefits one particular employee, but as something that has the potential to benefit all employees. We all exist along a spectrum of abilities,[296] and the entire population is at risk of chronic illness and disability.[297] Because all employees are at risk of moving along the spectrum from able-bodied to disabled, all employees should support a broad accommodation mandate that might eventually help them remain employed if they someday need accommodations. As the number of individuals with disabilities increases because of the broadened statutory coverage,[298] an employee could be both a nondisabled coworker who must take on some of the burden for a disabled worker's accommodation and, simultaneously, a disabled employee who needs an accommodation to remain employed, thus placing some burdens on other employees.[299] Considering the issue in this way, it becomes clear that the burdens placed on nondisabled coworkers are really no different than the community support coworkers always provide for each other.[300]

A recent example of this phenomenon is the *Miller* case mentioned above.[301] Miller, the plaintiff with a disabling fear of heights, could not perform tasks on his bridge crew that involved

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[296] *Id.* at 805.

[297] BAGENSTOS, *supra* note 7, at 144.

[298] *See supra* Part II.C (discussing how the ADAAA has made it much easier to fall within the ADA's protected class).

[299] Porter, *supra* note 7, at 805. Consider this example: John has a night-vision disability that precludes him from working the night shift. Because the employer follows my proposal and accommodates his disability, other employees, including coworker Jim, have to rotate through the night shift more often. One day Jim is in a car accident, which causes a serious back disability, making him no longer able to perform the physically demanding packing position on the plant floor. Accordingly, he requests reassignment to a less demanding vacant position doing light maintenance work. John also applies for this vacant job, and even though he has been there longer and is arguably more qualified than Jim, the employer gives the job to Jim to allow Jim to remain employed. In this example, John and Jim have both been the beneficiaries of my community-based rule and have both had to bear some of the burdens. In the tried and true cliché, "what goes around comes around." *Id.*

[300] *Id.* at 805–06.

[301] Miller v. Ill. Dep't of Transp., 643 F.3d 190 (7th Cir. 2011).

working at extreme heights in exposed conditions.[302] But another employee on the crew could not weld, a second employee could not ride in the snooper bucket, and a third employee could not perform some tasks because of allergies.[303] The individual members of the team took on tasks according to their capacities and abilities and accommodated each other's limitations.[304] This case is a great example of a workplace environment infused with a communitarian culture. We help others in our communities because we care about them, but we also know that the members of our communities will be there to help us if and when we find ourselves in need.[305]

B. "THERE IS NO SUCH THING AS AN UNREASONABLE ACCOMMODATION" OR "ISN'T THIS ALREADY PART OF THE UNDUE HARDSHIP DEFENSE?"

This sub-part responds most directly to Professor Weber's article *Unreasonable Accommodation and Due Hardship*, in which he argues that there is no such thing as an "unreasonable" accommodation.[306] There are really two sub-parts to Weber's argument, although they are related. One is that all accommodations that do not create an undue hardship are reasonable; in other words, that reasonable accommodation and undue hardship are two sides of the same coin.[307] The other is that the undue hardship defense encompasses other burdens besides financial ones.[308] I read Weber's argument to allege that the "reasonable" inquiry adds nothing because he interprets the undue hardship defense as encompassing more than financial burdens.

Weber uses a detailed review of the legislative history, current regulations, and case law under the ADA to justify his position. As discussed above, Weber argues that the only limitation on the reasonable accommodation provision is the undue hardship

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[302] *Id.* at 192.
[303] *Id.* at 198.
[304] *Id.*
[305] Porter, *supra* note 7, at 806.
[306] Weber, *supra* note 10.
[307] *Id.* at 1124.
[308] *Id.* at 1131.

defense and that there should not be a separate inquiry into whether an accommodation is reasonable.[309] Although Weber does a good job justifying his position through the legislative history, he does not sufficiently explain the cases where the courts have held some accommodations to be unreasonable. He mentions many of the accommodations, discussed above,[310] which courts have held are always or sometimes unreasonable (such as creating a position, allowing the disabled employee to work permanently in a light-duty job, or providing transportation to the disabled employee),[311] but he never explains why he thinks the courts in those cases were incorrect in finding the accommodations unreasonable. Does he think those accommodations should be required if they did not result in an undue hardship for the employer, if we define undue hardship in its traditional sense as encompassing purely financial burdens? Or does he think that the accommodations should not be required because they place other kinds of burdens on employers and should therefore be found to constitute an undue hardship? The answer is not clear.

Weber also discusses *U.S. Airways, Inc. v. Barnett*, where the Court stated that the reasonable accommodation provision is not a "mirror image" of the undue hardship defense because

> a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.[312]

Weber acknowledges that the Court in *Barnett* stated that an "accommodation could be unreasonable on grounds other than effects on the operation of the business, for example, because of its

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[309] Weber, *supra* note 10, at 1124; *see supra* Part II.D.*2.b*.
[310] *See supra* Part II.D.*2.a*.
[311] *Id.* at 1157–58.
[312] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002).

effect on co-workers."[313] Yet Weber argues that because the Court in *Barnett* held that the ordinary burden of demonstrating that an accommodation is "reasonable" is a fairly light burden—the plaintiff must only show that the accommodation is reasonable in the ordinary run of cases—the Court was not "too far off the mark" from Weber's framework of "reasonable accommodation" and "undue hardship" as two sides of the same coin.[314] Weber alleges that, even though the Court's opinion in *Barnett* is not perfectly in tandem with his interpretation that courts should not inquire into "reasonable" separately from "undue hardship," the Court's interpretation in *Barnett* was "bounded by the unique—perhaps peculiar—desire to insulate seniority systems from attack and is widely known only with regard to its holdings about reassignment under seniority systems."[315] But as others and I have argued, it is not clear that the Court's result in *Barnett* is limited only to seniority systems.[316] In fact, there are cases applying an expansive reading of *Barnett*, holding that an accommodation is not required because of the burdens it places on other employees, even if those burdens do not involve violating another employee's seniority rights.[317] These arguments make it more difficult to assert that *Barnett* is an anomaly because of its focus on seniority systems.

Having said that, I do not think Weber needs to fit *Barnett* into his theory that the reasonable accommodation inquiry and the undue hardship inquiry are two sides of the same coin. He could simply assert that *Barnett* was wrongly decided—he would not be alone in doing so. But I read Weber's argument as both normative and descriptive. He is arguing not just that courts should treat reasonable accommodation and undue hardship as two sides of the

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[313] Weber, *supra* note 10, at 1161.

[314] *Id.* at 1162–63.

[315] *Id.* at 1164.

[316] *E.g.*, Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 35–36 (2002); Porter, *supra* note 20, at 324–28.

[317] *See, e.g.*, Rehrs v. Iams Co., 486 F.3d 353, 357, 359 (8th Cir. 2007) (holding that allowing the plaintiff to work a straight day-shift schedule rather than a rotating-shift schedule was unreasonable because it would place a heavier or unfavorable burden on other employees, requiring them to work the undesirable night shift more frequently).

same inquiry, but that they already do. It is possible I might be overstating his position—he does conclude his discussion of *Barnett* stating, "Even if Barnett is unlikely to be overruled or disapproved in the near future, it should be read extremely narrowly as to the burden placed on claimants to show reasonableness of an accommodation: simply that there is no obvious undue hardship caused by the accommodation."[318] In fact, "[c]ourts should be encouraged to think of the reasonableness step as unnecessary altogether."[319]

The reason Weber can and does allege that the reasonableness issue is not a separate inquiry from the undue hardship defense is because he interprets the undue hardship defense much more broadly than courts do. In fact, he alleges that the undue hardship defense under Title I and the "fundamental alteration" defense under Titles II and III are the same defense.[320] For instance, when describing an education case under Section 504 of the Rehabilitation Act, Weber states that the Court "meant to exclude from mandatory accommodations only those that make fundamental alterations in programs, which is essentially the undue hardship standard embodied in the ADA."[321] Comparing Title III cases to Title I cases, Weber states, "Title III requires providers of public accommodations to make reasonable modifications in their policies (the analogue of reasonable accommodation) unless the provider can show the modifications would fundamentally alter the nature of the public accommodation (the analogue of undue hardship)."[322] Furthermore, in describing the Court's holding in *Martin*, Weber concludes that the "Court thus treated reasonable modification and fundamental alteration as one term, two sides of the same coin."[323] Weber also points to a Title II case regarding governmental benefits, where the Court

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[318] Weber, *supra* note 10, at 1164.

[319] *Id.*

[320] *Id.* at 1166–67.

[321] *Id.* at 1138.

[322] *Id.* at 1166.

[323] *Id.* at 1167; *see also id.* at 1168 ("The Court in *Martin* not only treated the reasonable modification duty (comparable to reasonable accommodation) and the fundamental alteration limit (comparable to undue hardship) as a single term, it also displayed a high level of skepticism about the value of standard operating procedure and uniform treatment of all persons subject to a set of rules.").

interpreted " 'reasonable modifications' and 'fundamental alteration' as the same term."[324] As Weber argues, in most Title II cases, "courts typically omit or give only the slightest attention to any reasonable modification determination and instead leap to considering fundamental alteration, thus taking the reasonable modification–fundamental alteration question as the same inquiry."[325] Weber argues that because courts interpret reasonable modification and fundamental alteration as two sides of the same coin under Titles II and III, they should consider reasonable accommodation and undue hardship as two sides of the same coin under Title I.[326]

Weber bolsters his argument by pointing to the EEOC's position that burdens placed on coworkers by accommodations are not what makes an accommodation unreasonable but are instead part of what may cause an undue hardship for the employer.[327] The EEOC Enforcement Guidance states that employers "may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other [employees'] ability to work."[328] Interestingly, the EEOC adds a factor to the statutory definition of undue hardship. The statutory definition includes four factors,[329] but the EEOC's regulations include a fifth factor: "The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees

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[324] *Id.* at 1168–69 (citing Olmstead v. L.C., 527 U.S. 581, 604 (1999) (plurality opinion)).

[325] *Id.* at 1170.

[326] *Id.*

[327] *Id.* at 1140.

[328] *Undue Hardship Issues*, *in* EEOC ENFORCEMENT GUIDANCE, *supra* note 17. To illustrate its point, the EEOC uses the following examples. In the first example, an employee with cancer is fatigued as a result of chemotherapy treatment. The employer assigns "three of her marginal functions to another employee for the duration of the chemotherapy treatments." *Id.* The employee is unhappy with the extra assignments, but because the employer determines that the employee can perform the new assignments without too much difficulty, the employer cannot show undue hardship. *Id.* As a contrary example, the EEOC uses a convenience store clerk with multiple sclerosis who requests a part-time work schedule. *Id.* Because the store assigns two clerks per shift, the second clerk's workload would be increased "significantly beyond his ability to handle" it. *Id.* Such an arrangement would make it difficult to "serve customers in a timely manner, keep the shelves stocked, and maintain store security." *Id.* Thus, the EEOC states that "the employer can show . . . significant disruption to its operations" and would therefore be able to prove undue hardship. *Id.*

[329] *See supra* note 51 and accompanying text.

to perform their duties and the impact on the facility's ability to conduct business."[330] Despite the EEOC's position in this regard, courts have not consistently held that the undue hardship defense encompasses burdens other than financial burdens.[331]

If I were arguing that the "fundamental alteration" defense in *Martin* should be statutorily added to the undue hardship defense in Title I, my position and Weber's position would be very similar. Where we differ is that I do not believe that the undue hardship defense, as currently written, already encompasses a fundamental alteration defense. Certainly, a statutory amendment is one possible way of achieving my result—*Martin*izing Title I of the ADA—and I would not object to such an amendment. But I believe it is more logical to use the fundamental alteration inquiry to explain which accommodations are not reasonable. I take this position because I believe "reasonable" means something. When an employer is asked to monitor an employee's medications, the response is not, "It is much too burdensome for me to do that." Rather, the response is, "I should not have to do such an outrageous thing," which is the same as saying it is unreasonable.[332] Using *Martin*'s fundamental alteration standard simply helps to explain *why* it is unreasonable. Accordingly, while I think Weber and I would agree on the end result in many (if not most) cases, we differ on how we get there. I believe *Martin*izing Title I is best accomplished by using the fundamental alteration standard to define the scope of reasonableness.

V. CONCLUSION

In light of the anticipated increased focus on reasonable accommodation issues caused by the ADAAA, it is important to have a coherent, unified framework for answering the many difficult issues that will likely arise. Until this point, when deciding which accommodations are always unreasonable and which are sometimes unreasonable, the lower courts have

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[330] 29 C.F.R. § 1630.2(p)(2)(v) (2012).

[331] *Barnett* is one example. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002).

[332] *See* Waterstone, *supra* note 27, at 1533 (stating that "reasonable" is an initial screen that can curb "outlandish" accommodations).

produced a body of case law that is nothing short of chaotic. This Article proposes borrowing the well-known Title III standard from *PGA Tour, Inc. v. Martin* in order to develop a unified framework. I propose that when deciding reasonable accommodation cases under Title I, courts should use the "fundamental alteration" standard used in *Martin* by asking two questions: (1) whether the accommodation would fundamentally alter the nature of the relationship between the employer and employee, and (2) whether the accommodation would give the employee with a disability an unfair advantage. By *Martin*izing Title I of the ADA, courts will be able to decide reasonable accommodation cases in a much more coherent and predictable manner.