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The Americans with Disabilities Act of 1990: Burden on Business or Dignity for the Disabled?

It has been described as the most significant civil rights legislation in the last quarter century,¹ an emancipation proclamation for people with disabilities² and a bill of rights for the disabled.³ The Americans With Disabilities Act (hereinafter "the ADA" or "the Act") goes into effect on July 26, 1992 for employers with twenty-five or more employees and on July 26, 1994 for employers with fifteen or more employees, and is a comprehensive bill outlawing discrimination against the disabled. For over fifteen years, only government contractors and recipients of government assistance were required to adhere to anti-discrimination regulations regarding the disabled, enforced through the Rehabilitation Act of 1973. However, the ADA will affect virtually all businesses throughout the country. The ADA is also unique in its approach. While existing anti-discrimination legislation, namely the Civil Rights Act of 1964, prohibits consideration of personal characteristics such as race or national origin, the ADA requires an employer to consider personal characteristics and to determine whether some type of reasonable accommodation could remove the barrier created by these personal characteristics.⁴

The ADA was drafted to meet the growing need to protect those disabled members of society that are discriminated against in the areas of employment, public service, public transportation and public accommodation.⁵ In initial findings, Congress noted that approximately forty-three million Americans have one or more physical or mental disabilities, and this number is constantly increasing as the general population ages.⁶ Congress further found that the

1. Peter A. Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16(2) *Employee Relations L J* 157 (Autumn 1990).

2. Tom Harkin, "Our Newest Civil Rights Law: The A.D.A.," *Trial Magazine* 56 (Dec 1990).

3. R. Lee Creasman, Jr. and Patricia Greene Butler, *Will the Americans with Disabilities Act of 1990 Disable Employers?*, *Employment Law Counselor*, 1, 2 (Oct 15, 1990).

4. Appendix to the Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 CFR § 1630.

5. ADA of 1990, 42 USC § 12101(a)(3) (1990).

6. ADA of 1990, 42 USC § 12101(a)(1) (1990).

disabled are routinely discriminated against and disadvantaged solely because of their disabilities.⁷ While other distinct groups, such as blacks and women, are protected by the Civil Rights Act, the disabled had no recourse against discrimination.⁸ It was out of this growing desire to eliminate discrimination against individuals with disabilities that the ADA developed.⁹

The goal of the ADA, to erase all discrimination against disabled individuals,¹⁰ is indeed a noble one. However, such a virtuous and admirable goal is not without its controversy. The controversy arises because of the unique compliance provisions of the ADA. While most legislation to deter discrimination seeks to govern conduct, the ADA not only regulates conduct but also imposes the cost of conforming conduct upon business.¹¹ For example, provisions of the ADA require that public transportation and accommodations offered by private businesses must be made accessible to the disabled, and business owners must bear this cost.¹² The cost to businesses for these accommodations will be substantial, but because accessibility for the disabled is condoned and expected by the general public, access provisions of the ADA may not be the most controversial provisions of the legislation. The sections of the ADA that will cause the greatest concern for employers are the provisions on non-discriminatory employment practices for qualified individuals with disabilities, those provisions requiring reasonable accommodations for the disabled, and determining when reasonable accommodations create an undue hardship on the employer. These provisions will affect the everyday operations and practices of virtually all businesses, and are likely to arouse the most concern and confusion for employers. The primary impact for all employers will be to implement practical business procedures that will not violate the Act.¹³

Supporters of the ADA minimize the burdens the ADA will place on employers, claiming the cost of compliance will be "no big deal" and that most disabled employees require only low-cost accommo-

7. ADA of 1990, 42 USC § 12101(a)(1-7) (1990).

8. ADA of 1990, 42 USC § 12101(a)(4) (1990).

9. ADA of 1990, 42 USC § 12101(b)(1) (1990).

10. *Id.*

11. See ADA of 1990, 42 USC §§ 12101, 12112, 12147, 12181-89 (1990) and Appendix 29 CFR § 1630, Background Comments.

12. ADA of 1990, 42 USC §§ 12181-89 (1990).

13. Susser, 16(2) *Employee Relations L J* at 175, (cited in note 1), which discusses the ADA's significant impact on employers and the need to carefully analyze current practices in order to comply with the ADA. *Id.*

dation.¹⁴ Meanwhile, opponents of the ADA warn that compliance with the law will result in "exorbitant" costs and send small businesses "down the chute."¹⁵ The actual impact of the ADA probably lies somewhere in between these two extreme positions.¹⁶ In order to better understand the ADA and the balance that it must achieve between these two positions, this article will focus on defining and interpreting who is a "qualified individual with a disability" and what is "reasonable accommodation without undue hardship" upon an employer.

I. DEFINING DISABILITY UNDER THE ADA

The ADA provides that entities shall not

discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.¹⁷

This prohibition implies that an employer has the underlying responsibility of first determining whether an individual is disabled and qualified before the protection of the ADA arises.

The ADA definition of an individual with a disability encompasses three groups of individuals, and is taken almost verbatim from the Rehabilitation Act's description of a disability.¹⁸ The first group includes individuals with physical or mental impairments that substantially limit one or more major life activities.¹⁹ The second group encompasses individuals with a record of an impairment,²⁰ and the third group is comprised of individuals regarded as having an impairment.²¹ Employers may believe that all disabilities are easily detectable, but in fact the definition is somewhat

14. Remarks of Senator Harkin (D-Iowa), 135 Cong Rec 4986 (May 9, 1989).

15. Remarks of Senator Helms (R-NC), 135 Cong Rec 10773 (Sept 7, 1989).

16. Ronald A. Lindsay, *Discrimination against the Disabled: The Impact of the New Federal Legislation*, 15(3) Employee Relations L J 333 (Winter 1989-90). Mr. Lindsay notes that while the ADA will probably only destroy a few businesses, the impact of compliance will be substantial because it imposes the cost of accommodation upon the employer. Lindsay, 15 Employee Relations L J at 333 (cited within this note).

17. ADA of 1990, 42 USC § 12112(a) (1990).

18. See the Rehabilitation Act of 1973, 29 USC § 706(8)(B) (1973). The only difference between the Rehabilitation Act and the ADA definitions is that the Rehabilitation Act used the phrase individuals with "handicaps" while the ADA uses the more modern terminology of individuals with "disabilities," but the terms are interchangeable. See Appendix, 29 CFR 1630.1(a).

19. ADA of 1990, 42 USC § 12102(2)(A) (1990).

20. ADA of 1990, 42 USC § 12102(2)(B) (1990).

21. ADA of 1990, 42 USC § 12102(2)(C) (1990).

complex and protects a broad range of individuals.²²

The Equal Employment Opportunity Commission (hereinafter "EEOC"), at the direction of Congress, has compiled new federal regulations which assist in the interpretation of many of the definitions of the ADA. The revised EEOC regulations will be incorporated into the Code of Federal Regulations in Title 29, section 1630.²³ These new regulations help define a disability to a great extent.

The first prong of the disability definition broadly protects anyone with an impairment.²⁴ Under the new regulations, any physiological, mental or psychological disorder that substantially limits one or more major life activities is considered an impairment.²⁵ Life activities are those basic functions of living, such as caring for one's self, walking, seeing, hearing, speaking, breathing, learning, performing manual tasks, working,²⁶ sitting, standing, lifting and reaching.²⁷ An individual is substantially limited if he is unable to perform or is significantly restricted in the performance of the major life activities which the average person can perform.²⁸ An individual is impaired even if his condition is controlled or corrected by medication or a prosthetic device because impairment is measured in comparison with an average person,²⁹ and its existence is to be determined without regard to mitigating measures.³⁰

Because the concept of being substantially limited in life activities is open to confusion if too broadly or loosely interpreted, the new regulations state that the nature and severity of the impairment, the expected duration of the impairment and the long-term permanent impact of the impairment are all factors to consider.³¹ These considerations rule out temporary impairments, such as broken bones or temporary illnesses. Also, to be substantially limited in the activity of working, the individual must be significantly restricted from a class of jobs or a broad classification of jobs,³² thereby preventing a finding of impairment merely because an in-

22. See ADA of 1990, 42 USC § 12102(2)(A-C) (1990).

23. These regulations are also located at 56 Fed Reg § 35726-01 (1991).

24. ADA of 1990, 42 USC § 12102(2)(A) (1990).

25. 29 CFR § 1630.2(g)(1). Note: also located at 56 Fed Reg 35739 (July 26, 1991).

26. 29 CFR § 1630.2(i).

27. Appendix, 29 CFR § 1630.2(h).

28. 29 CFR § 1630.2(j)(i).

29. Henry H. Perritt, *ADA Handbook*, § 3.2 at 23, 26 (1991).

30. Appendix, 29 CFR § 1630.2(h).

31. 29 CFR § 1630.2(j)(ii)(2)(i-iii).

32. 29 CFR § 1630.2(j)(3)(i).

dividual is substantially limited in performing one particular job.³³

The statute and regulations that interpret the Act attempt to clearly define its terms, and the majority of disabled individuals will easily fit into the first group in the disability definition. For example, a paraplegic is substantially limited in the activity of walking and is therefore disabled. A person with a lung disease is substantially limited in the activity of breathing and is therefore disabled. Likewise, an individual with a hearing loss is substantially limited in hearing, even if corrected by a hearing aid, and is therefore disabled.

The above examples are easily understood as disabilities. However, a successful interpretation of the ADA must look beyond the clear-cut situations. For example, an individual with AIDS is substantially limited in the activity of procreation and is therefore disabled.³⁴ Also, obesity may not appear to be an impairment, but if it substantially limits an individual's ability to walk or breathe, it may be classified as an impairment.³⁵ Age alone is not an impairment, but if it is associated with other disabling conditions, such as crippling arthritis or hearing loss, an individual of advanced age should be considered disabled.³⁶

Although the definition of a basic disability appears to be quite broad, the ADA has specifically excluded several conditions from the category of disability, including transvestitism,³⁷ homosexuality and bisexuality,³⁸ transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders and other sexual behavior disorders,³⁹ compulsive gambling, kleptomania or pyromania,⁴⁰ and disorders resulting from the use of illegal drugs.⁴¹ It appears that Congress intended to keep certain anti-social behavior outside the definition of a disability. However, if any of these conditions were somehow the result of an actual physical impairment, it is conceivable that the ADA would offer protection for these individuals

33. Appendix, 29 CFR § 1630.2(j).

34. Peritt, *ADA Handbook*, at 26 (cited in note 29).

35. See Appendix, 29 CFR § 1630.2(h), which states that physical characteristics, such as weight when within normal range, are not considered an impairment. This should be read in conjunction with Appendix, 29 CFR § 1630.2(j), which states that an impairment rises to the level of a disability when it substantially limits a major life activity, such as walking or breathing.

36. Appendix, 29 CFR § 1630.2(h).

37. ADA of 1990, 42 USC § 12208 (1990).

38. ADA of 1990, 42 USC § 12211(a) (1990).

39. ADA of 1990, 42 USC § 12211(b)(1) (1990).

40. ADA of 1990, 42 USC § 12211(b)(2) (1990).

41. ADA of 1990, 42 USC § 12211(b)(3) (1990).

from discrimination.

It is also important to distinguish between an actual impairment, and characteristics that are not impairments. For example, an impairment does not include purely physical characteristics such as eye color, hair color, or normal height and weight.⁴² Other conditions that are not the result of some physiological disorder are also not impairments, such as pregnancy.⁴³ An impairment also does not include common personality traits, such as poor judgment or a quick temper.⁴⁴ However, it is possible that if such traits are the result of a legitimate physiological or mental disorder, they would constitute an impairment.⁴⁵ Environmental, cultural or economic disadvantages are also not impairments.⁴⁶ For example, being unable to read because of a lack of an education is not an impairment.⁴⁷ Again, it should be noted that if a condition such as the inability to read is due to a learning disability and not just an environmental disadvantage, it would be considered an impairment.⁴⁸

The rationale behind protecting this first group in the disability definition is found in the legislative purpose of the ADA, which is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴⁹ The best way to achieve this goal is to draft a very broad definition of a disability, and therefore the first group protected under the disability definition are all those persons who actually have a substantially limiting physical or mental impairment.⁵⁰ The determination of whether an individual's condition constitutes a disability should be made on a case-by-case basis because there is no exact formula or chart listing all disabling conditions.⁵¹ Case law in this area is helpful only to the extent that it can reveal what conditions have been held to be disabilities under the Rehabilitation Act since the ADA does not go in effect until 1992 and 1994. For example, multiple sclerosis⁵² and hearing loss⁵³ have been held

42. Appendix, 29 CFR § 1630.2(h).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Appendix, 29 CFR § 1630.2(j).

49. ADA of 1990, 42 USC § 12101(b)(1) (1990).

50. ADA of 1990, 42 USC § 12102(2)(A) (1990).

51. Appendix, 29 CFR § 1630, Introductory Comments.

52. *Carter v Casa Central*, 849 F2d 1048 (7th Cir 1988). In this case, a nurse was

to be physical disabilities, and manic depression⁵⁴ and severe anxiety, insomnia and depression resulting in repeated suicidal episodes, and drug abuse⁵⁵ have been held to be mental disabilities under the Rehabilitation Act.⁵⁶ Case law also discloses the types of conditions that are not disabilities, such as exceeding an airline's weight guidelines⁵⁷ or having a fear of heights.⁵⁸

The second group encompassed by the definition of disability are those persons who have a record of an impairment.⁵⁹ The intent behind this provision is to ensure that individuals are not discriminated against merely because they have a history of disability.⁶⁰ The classic examples in this situation are individuals that have recovered from serious conditions, such as cancer, heart disease or mental illness.⁶¹ This provision also protects individuals who have been misclassified as disabled.⁶² For example, if an individual has been misclassified as mentally retarded, an employer cannot discriminate against that person because of the misclassifi-

diagnosed with multiple sclerosis and there was no dispute between the parties that her condition was a handicap under the Rehabilitation Act. *Carter*, 849 F2d at 1051.

53. *Southeastern Community College v Davis*, 442 US 397 (1979), in which a plaintiff with a serious hearing impairment was considered to be disabled. While the plaintiff was found to be disabled in this case, she did not meet the otherwise qualified requirements because she could not safely participate in a clinical training program. *Id.*

54. *Gardner v Morris*, 752 F2d 1271 (8th Cir 1985). In this case, the plaintiff was denied a transfer position because of his diagnosed condition of manic depression which was controlled by medication. The court and the parties agreed that manic depression was a psychological disability, but disagreed over whether this condition could be reasonably accommodated because plaintiff required regular medical monitoring which was unavailable at the Saudi Arabia site at that time. *Id.*

55. *Doe v Region 13 Mental Health-Mental Retardation Comm.*, 704 F2d 1402, 1404-05 (5th Cir 1983). The plaintiff was a mental health caseworker whose job performance had consistently been rated as outstanding. However, during this same time, the plaintiff suffered from severe depression, insomnia, severe anxiety and suicidal inclinations, resulting in several short term hospitalizations. Upon learning of the severity of the plaintiff's condition, her supervisor eventually terminated her employment. The court held that the plaintiff's mental condition qualified as a handicap and was protected under the Rehabilitation Act. *Doe*, 704 F2d at 1404-05.

56. See Perritt, *ADA Handbook* at 28-32 (cited in note 29).

57. *Tudyman v United Airlines*, 608 F Supp 739 (CD Ca 1984). In *Tudyman*, it was held that the applicant's weight was not an impairment because it did not substantially limit a major life activity and the applicant was only prevented from obtaining this particular job and was not barred from an entire classification of jobs. *Tudyman*, 608 F Supp at 745-46.

58. *Forrisi v Bowen*, 794 F2d 931 (4th Cir 1986).

59. ADA of 1990, 42 USC § 12102(2)(B) (1990).

60. Appendix, 29 CFR § 1630.2(k).

61. *Id.*

62. *Id.*

cation.⁶³ The second portion of the disability definition is designed to protect individuals who have overcome some disability from prejudice and misconceptions regarding their recovery.⁶⁴

The group protected under the third provision of the disability definition are those persons who are regarded as being impaired.⁶⁵ In this category, an individual who has an impairment which is not substantially limiting but is perceived by the employer to be limiting, or who has no impairment but is regarded by the employer as having a substantially limiting impairment, is covered.⁶⁶ For example, controlled high blood pressure or a condition causing an occasional head jerk are not substantially limiting.⁶⁷ However, if the employer treats these individuals differently, such as by assigning less strenuous work, then the employer is regarding that individual as disabled.⁶⁸ Likewise, if someone is rumored to have a disabling condition such as AIDS, and is discriminated against because of this rumor, even if totally unfounded, the employer has perceived and treated the individual as disabled and therefore that individual is covered under the ADA.⁶⁹

The rationale for the second and third provisions to the disability definition is found in the case of *School Bd. of Nassau County v Arline*,⁷⁰ which involved a teacher that had recovered from tuberculosis and then suffered a relapse twenty years later. She was discharged because of her supposed susceptibility to the disease and fear of current contagiousness. The Court in *Arline* held that the teacher must be classified as disabled and offered protection under the Rehabilitation Act of 1973 because "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."⁷¹

The question of who is disabled is the initial starting point for an employer. The employer must consider the unique characteristics of each individual and determine each matter on a case-by-case basis. The employer must also go one step further in evaluating a disability situation. The ADA prohibits discrimination on the

63. *Id.*

64. *Id.*

65. ADA of 1990, 42 USC § 12102(2)(C) (1990).

66. 29 CFR § 1630.2(l)(1)-(3).

67. Appendix, 29 CFR § 1630.2(l).

68. *Id.*

69. *Id.*

70. 480 US 273 (1987).

71. *Arline*, 480 US at 284.

basis of a disability against "qualified" individuals with disabilities.⁷² This definition leads an employer to ask: when is an individual with a disability "qualified?"

As with the definition of a disability, the definition of "qualified" is a multi-part test.⁷³ First, an employer should look strictly at the individual's background to determine whether he meets the prerequisites of a position.⁷⁴ An employer must determine what qualifications he wants his employees to have, such as educational background, experience, skills, licenses, etc., and then decide whether the individual has those qualifications.⁷⁵ The disability does not come into play at this point. The first step is merely to look at an individual's qualifications and determine whether that person meets the prerequisites for that position.⁷⁶ The second part of the "qualified" test takes into consideration the individual's disability. An employer must determine whether or not the individual can perform the essential functions of a position, with or without reasonable accommodation.⁷⁷ Essential functions are only those functions which the individual must be able to perform unaided or with the assistance of reasonable accommodation.⁷⁸ In order to be essential, the functions must truly be necessary to the job and must be applied equally to all applicants for that position.⁷⁹ The second part of this test ensures that qualified applicants are not turned down merely because they cannot perform some auxiliary task.⁸⁰

As an example of the "qualified" test, suppose a paraplegic applies for an engineering/surveying position. Before even considering the disability, an employer must determine whether the applicant has the threshold qualifications for the position, such as an engineering degree, experience in the area and the necessary licenses. If the applicant is otherwise qualified, the employer must then determine whether the applicant can perform the essential functions of the job. If the essential functions of the job are to draft engineering designs at the home office and the individual can

72. ADA of 1990, 42 USC § 12112(a) (1990).

73. ADA of 1990, 42 USC § 12111(8) (1990).

74. Appendix, 29 CFR § 1630.2(m).

75. *Id.*

76. *Id.* Also referred to in Rehabilitation Act case law as being "otherwise qualified."

Id.

77. *Id.*

78. Appendix, 29 CFR § 1630.2(n).

79. *Id.*

80. *Id.*

perform these functions, then the applicant is qualified and may not be discriminated against on the basis of his disability. However, if the employer does a lot of underground mining and requires all of its engineers to crawl and climb underground to do surveying work, perhaps the applicant could not be safely or reasonably accommodated to perform these essential functions and would therefore not be qualified for the position.

A final consideration for qualification determinations is that an employer must make a decision based on the capabilities of the individual at the time of the decision.⁸¹ An employer may not base a decision upon speculation or belief that in the future the employee may become unable to perform the job.⁸² Also, an employer may not base a decision upon the belief that employing the disabled individual will result in increased insurance premiums or increased worker's compensation claims.⁸³

In coming to terms with who is disabled, the ADA employs a unique balance. An individual must show that he has some impairment that substantially limits a major life activity.⁸⁴ But at the same time, the individual cannot be so disabled as to be unable to perform the essential functions of the position or he will not be qualified.⁸⁵ In this respect, the balance is to assist disabled individuals by removing the barriers created or imposed because of their disability, yet at the same time ensure that employers only have to consider qualified individuals.

This balance appears again when an employer must determine whether a disabled, qualified individual can be reasonably accommodated, while at the same time ensuring that the accommodation may not cause undue hardship.

II. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA

Mention has been made in several definitions thus far that an employer must make reasonable accommodation for a qualified individual with a disability. The general rule is that an employer is "obligated to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with

81. Appendix, 29 CFR § 1630.2(m).

82. *Id.*

83. *Id.*

84. ADA of 1990, 42 USC § 12102(2)(A) (1990).

85. Perritt, *ADA Handbook* at 35 (cited in note 29).

a disability unless to do so would impose an undue hardship on the operation" of the employer's business.⁸⁶ In general, an accommodation is any change in the work environment or work procedures that removes the barrier created by an impairment and enables an individual with a disability to enjoy equal employment.⁸⁷ How far an employer has to go to reasonably accommodate an individual is a concern for the business community. The ADA gives several examples of what can be reasonable accommodation, such as making facilities readily accessible and usable by the disabled, job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment, training materials or policies, and providing qualified readers or interpreters.⁸⁸ Reasonable accommodation can be any measure which enables a disabled individual to perform his job.⁸⁹ The list of examples given within the ADA is not exclusive, and any reasonable measure can be an appropriate accommodation.⁹⁰

The key is to determine what assistance the disabled individual requires and then to decide what type of accommodation would provide that assistance. For example, if an employee requires dialysis treatment every morning and is unable to get to work until noon, perhaps the employer could restructure that employee's working day or allow for part-time employment to accommodate this individual. Accommodation can also involve the assistance of other employees.⁹¹ For example, if a disabled employee is unable to perform the marginal functions (not essential functions) of a position, an employer could give the disabled individual more essential functions and assign the marginal functions to another employee. If a blind employee is required to make occasional business trips, a reasonable accommodation would be to provide a travel attendant for the trips.⁹² Changing equipment to meet the special needs of a disabled employee, such as obtaining computerized verbal equipment instead of requiring manual entry of information, is also an accommodation.⁹³ An employer does not have to accommodate an employee to the point where he has in effect hired two persons to

86. See 29 CFR § 1630.2(o) for an overview of the regulations' definitions of "reasonable accommodation."

87. Appendix, 29 CFR § 1630.2(o).

88. ADA of 1990, 42 USC § 12111(9)(A, B) (1990).

89. Appendix, 29 CFR § 1630.2(o).

90. *Id.*; 29 CFR § 1630.2(o)(2).

91. Appendix, 29 CFR § 1630.2(o).

92. *Id.*

93. *Id.*

do the work of one.⁹⁴ An individual must be able to perform the essential functions of a job and it is not a reasonable accommodation to have an assistant perform these functions.⁹⁵ For example, if a security guard is required to visually check identification cards, it would not be reasonable to hire an assistant to check the cards for a blind security guard.⁹⁶ In this case, the accommodation would go to the performance of essential functions of the job and is therefore not reasonable.

In most instances, the accommodation required should be fairly easy to identify, particularly if the employer and the employee work together to overcome any barriers in the work environment. However, employers must be certain that they explore all avenues of accommodation before terminating an employee. The Rehabilitation Act case of *Arneson v Heckler*⁹⁷ illustrates the court's insistence that all reasonable steps be taken to accommodate an employee.⁹⁸ In *Arneson*, the plaintiff had a neurological disorder which affected his comprehension and organizational skills.⁹⁹ The plaintiff was originally accommodated by being given a private office and special headset, to remove distractions and enhance concentration, as well as some assistance with his work.¹⁰⁰ However, the plaintiff then voluntarily took a new position where he could not be provided with a private office.¹⁰¹ The plaintiff received seventy-five separate unsatisfactory job performance evaluations and was fired.¹⁰² The court in *Arneson* held that the employer had violated the Rehabilitation Act because it failed to adequately explore accommodating the plaintiff with the use of clerical assistants in his new position.¹⁰³ On the surface, *Arneson* seems to indicate that an employer must take extreme measures to accommodate an employee. However, *Arneson* in actuality only reiterates the position that all avenues of accommodation should be explored and that assistants for non-essential job functions can be a reasonable accommodation.¹⁰⁴

94. *Id.*

95. *Id.*

96. *Id.*

97. 879 F2d 393 (8th Cir 1989).

98. *Arneson*, 879 F2d at 398.

99. *Id.* at 395.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 397-98.

104. *Id.*

Determining what accommodation is necessary is the first and most basic step.¹⁰⁵ If the accommodation is unreasonable, the employer has a defense by asserting that the accommodation imposes an undue hardship upon his business.¹⁰⁶ As with most definitions under the ADA, the crux of a claim or defense will turn on the definition applied to the crucial term: when is an accommodation an "undue hardship?"¹⁰⁷

Under the regulations, an accommodation creates an undue hardship if it results in "significant difficulty or expense."¹⁰⁸ The regulations state several factors that should be considered when determining whether an accommodation creates an undue hardship.¹⁰⁹ These factors include consideration of the nature and cost of the accommodation, the financial resources of the facility and employer, and the impact the accommodation will have on operations.¹¹⁰ An employer must consider all of the factors, particularly the impact of the accommodation, and cannot be solely concerned with the cost of the accommodation.¹¹¹

The introductory comments to the changes made in the regulations indicate that several employers and employer groups requested that the EEOC set specific guidelines as to when an accommodation's cost exceeds its value.¹¹² The EEOC responded that the House Judiciary Committee specifically rejected such a guideline (by refusing to define an undue financial hardship as any accommodation that costs more than ten percent of an employee's salary) and likewise did not include such a standard or factor in

105. Appendix, 29 CFR § 1630.2(o). This section states that "the determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations."

106. Appendix, 29 CFR § 1630.2.

107. ADA of 1990, 42 USC § 12111(10); 29 CFR § 1630.2; Appendix, 29 CFR § 1630.2. All these sources use vague terms, e.g., "significant difficulty," to describe an undue hardship and then list factors to consider in determining whether an accommodation creates an undue hardship. However, there is no exact definition or formula which leads to a precise finding of an undue hardship. As emphasized in the regulatory comments, a "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities For this reason, neither the ADA nor this part [regulatory appendix] can supply the 'correct' answer in advance for each employment decision concerning an individual with a disability." Appendix, 29 CFR § 1630, Background Comments.

108. 29 CFR § 1630.2(1).

109. 29 CFR § 1630.2(i-v).

110. *Id.*

111. Appendix, 29 CFR § 1630.2.

112. 29 CFR § 1630.2, Introductory Comments.

the definition of an undue hardship.¹¹³ The implication is that monetary concerns are not to be the sole factor in an undue hardship determination.

The explanatory appendix to the regulations reiterates that financial realities of an employer are not the only factor in an undue hardship determination.¹¹⁴ Again, this shows the balance between accommodating both employers and employees. Disabled individuals are somewhat protected from bare assertions that accommodations are too expensive and employers can consider the total impact accommodations will have upon their operations.¹¹⁵ There are numerous examples of undue financial hardship, such as a small employer that cannot afford to purchase state-of-the-art electronic equipment for a disabled employee, or cannot afford to hire interpreters to assist an employee in his job duties. However, what may be an undue financial burden for a small employer may be a reasonable accommodation for a larger employer. Employers must take care to determine that an accommodation is truly a financial hardship before making this claim. It should also be noted that the finances of an individual employer are not always the sole measure of the impact of an accommodation. For example, an accommodation that may be unreasonable for a small, family-owned business may not be unreasonable if the business is merely a subsidiary of a large, publicly-owned corporation. An employer should also explore federal, state or local methods of assistance in obtaining these accommodations. If tax credits or public agency funding is available, the employer cannot claim that the accommodation creates a financial hardship.¹¹⁶ Also, if an accommodation appears to create an undue hardship, the disabled individual should be given the option of personally paying that portion of the accommodation that is unreasonable.¹¹⁷ The key to the determination of whether the cost of an accommodation presents an undue hardship is to honestly and fully examine the resources of the employer and the true impact the accommodation will have on the operations of the business. However, exactly how the EEOC will interpret financial hardship is unknown, and it is likely employers will claim a much lower threshold of financial hardship than an agency protecting the

113. *Id.*

114. Appendix, 29 CFR § 1630.2.

115. See ADA of 1990, 42 USC § 12111(10), read in conjunction with 29 CFR § 1630.2 and Appendix, 29 CFR § 1630.2.

116. Appendix, 29 CFR § 1630.2.

117. *Id.*

rights of disabled individuals.

There are several other types of accommodations that may produce an undue hardship which are not of a financial nature, but rather impact negatively upon the business. For example, an individual with poor vision who has difficulty seeing in dimly lit settings, could easily, inexpensively and reasonably be accommodated by increasing the lighting in a facility.¹¹⁸ However, if that facility is a nightclub, and increasing the lighting would ruin the atmosphere of the club or interfere with a stage show, this accommodation would create an undue hardship because of its negative impact on the business operations.¹¹⁹ The overall consequences of an accommodation must be evaluated in order to determine whether an undue hardship is created for the employer.

III. CONCLUSION

According to a primary promoter of the ADA, the Act

. . . sends a clear message that people with disabilities are now legally entitled to be treated with dignity. They are to be judged on the basis of their abilities and not with fear, ignorance, prejudice, or patronization. Segregation and exclusion are now illegal.¹²⁰

Individuals with disabilities are now ensured the right to be integrated into society's economic, social and cultural mainstream.¹²¹ However, the burden of actually implementing and abiding by the directives of the ADA will fall upon employers. The ADA is forcing business and society to have a conscience but is insisting that business pay for this advancement. While the goals of the ADA are worthy and admirable, employers argue that the cost will be too high. However, according to a 1982 survey of federal contractors regarding compliance with the Rehabilitation Act, half of all accommodations cost nothing, thirty percent cost less than five hundred dollars and only eight percent cost more than two thousand dollars.¹²² The cost of compliance with the Rehabilitation Act has been reasonable and it remains to be seen whether any employer's cries of financial ruin will be justified.

Admittedly, the ADA is in its initial stages and its interpretation

118. *Id.*

119. *Id.*

120. Harkin, *Trial Magazine* at 61 (cited in note 2).

121. *Id.*

122. Creasman and Butler, *Employment Law Counselor* at 6 (cited in note 3), citing June 11, 1990 *Business Week* at 92 (editorial).

at this point may be somewhat vague. At least the ADA is making society aware of the growing percentage of disabled individuals and is attempting to accommodate the disabled rather than ignore them or delegate them to an inferior position in society because of prejudice or ignorance. The ADA will allow disabled individuals, by right, to participate and contribute to society rather than be dependent upon the unenforceable good intentions, ignorance, prejudice or fear of the business community. The regulations governing the ADA may require some fine-tuning over the next few years, but the Act is a solid and positive step toward making this country a better nation, and business and society can only profit from recognizing the contributions offered by disabled individuals.

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