

# Disabled Yet Disqualified: Is It “Unreasonable” to Demand Accommodations for Employees with Depression Under the Americans with Disabilities Act?

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What rights does an employee with depression have against discrimination in the workplace? Imagine, for example, Claudia Peterson, a hypothetical employee diagnosed with depression<sup>1</sup> working in a typical nine-to-five office setting. Despite her depression, Claudia has consistently performed well; however, in order for her to seek treatment for her disorder she needs to take an extended lunch break once a week to meet with her therapist. Her employers do not want to grant the extended lunch break because they think Claudia merely wants a more favorable schedule than her co-workers. In response to her request, Claudia’s employers reduce her hours from full-time to part-time employment. Does Claudia have any recourse against her employers? Is she entitled to such an accommodation?

In 1990, Congress passed the Americans with Disabilities Act (ADA or the Act), which made it unlawful to discriminate against an employee in the workplace on the basis of physical or mental disability.<sup>2</sup> In order to recover under the ADA, the employee bears the initial burden of showing that he or she has a disability,<sup>3</sup> that he or she is qualified for the employment

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<sup>1</sup> Depression is a mood disorder most commonly associated with feelings of sadness, loss, anger, or frustration, which lasts for at least two weeks and often longer. *Major Depression*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001941/> (last reviewed Mar. 8, 2013); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 349 (4th ed. 2000) (“The essential feature of a Major Depressive Episode is a period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities.”).

<sup>2</sup> 42 U.S.C. § 12101(b)(1) (2012).

<sup>3</sup> 42 U.S.C. § 12102(3) (2012).

position,<sup>4</sup> and that there is a nexus between the discrimination and the disability.<sup>5</sup> Historically, employees with depression were denied coverage under the ADA because they could not prove the presence of a disability,<sup>6</sup> and they could not show that they were qualified for the job under the statute.<sup>7</sup> In 2008, Congress passed the ADA Amendments Act (ADAAA) to strengthen the ADA by making significant changes to the standards for establishing when an individual is disabled.<sup>8</sup> The ADAAA made it easier for an employee with depression to prove he or she has a disability; however, it did not alter the standards governing when an employee meets the ADA's "qualified" standard.<sup>9</sup>

For an employee to be "qualified" under the ADA, he or she must be able to perform the essential duties of the job with or without a reasonable accommodation.<sup>10</sup> Furthermore, an employer is not obligated to provide an accommodation if it would result in undue hardship to the business.<sup>11</sup> This Note argues that employees with depression seeking relief under the current version of the ADA will continue to have their cases dismissed or end in unfavorable summary judgment as the courts will find, in the majority of cases, an employee with depression is not "qualified" for the position in question. This argument is based on the negative impact of depression on what courts consider essential functions of the job, and the difficulty of finding an accommodation that will give the employee adequate support without unduly burdening the employer. On the other hand, excluding employees with depression from the ADA's coverage is troublesome because of the prevalence of depression and the underutilized potential of employees with depression.

"Depression is one of the most common psychiatric disorders, and from a societal perspective, is perhaps the most costly."<sup>12</sup> It is estimated that depression costs \$43.7 billion annually in business losses due to absenteeism—missed days from work, presenteeism—coming to work with a physical or mental health

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4 42 U.S.C. § 12112(a) (2012). The statute states discrimination will not be allowed against a "qualified individual." *Id.*

5 *Id.* Discrimination is not allowed "on the basis of disability." *Id.*

6 *See infra* note 25.

7 *See infra* notes 45–57, 66–82, and accompanying text.

8 ADA Amendments Act of 2008, Pub. L. No. 110-325.

9 James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 LAW & PSYCHOL. REV. 89, 112 (2012).

10 42 U.S.C. § 12112(b)(5)(A).

11 *Id.*

12 HANDBOOK OF DEPRESSION 21 (Ian H. Gotlib & Constance L. Hammen eds., 2nd ed. 2002).

condition, and treatment costs in the United States.<sup>13</sup> Thus, depression not only affects the individual living with the disorder, it affects employers as well. Employers may perceive employees with depression as weak or responsible for their condition.<sup>14</sup> However, discriminating employers fail to recognize the underused potential of employees with depression. If caught early enough, depression is more responsive to treatment, thereby restoring the employee's productivity.<sup>15</sup> Individuals with depression may experience increased levels of creativity, concentration, and perfectionism.<sup>16</sup> Society should strive to enable employees with depression to achieve their full potential in the workplace. Thus, this Note proposes changes to the workplace approach to interacting with employees with depression through stronger communication requirements and management education in order to promote a healthier workplace environment and enable employees with depression to reach their full levels of productivity. One way to achieve more effective communication between employers and employees is to modify the U.S. Equal Employment Opportunity Commission (EEOC) regulations<sup>17</sup> to require employers to consistently engage in a brainstorming process to best assist employees who have disabilities where the best accommodation is not readily apparent, such as employees with depression.<sup>18</sup>

Part I will provide a brief update on the ADA following the enactment of the ADAAA. Part II will define what it means to be "qualified" under the ADA. Part III will explore why employees with depression will fail to meet the "qualified" requirement under the amended ADA. Part IV will propose a possible solution, followed by a brief conclusion.

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<sup>13</sup> Michael Klachefsky, *Hidden Costs, Losses of Mental Health Diagnosis*, BENEFITS MAGAZINE, Feb. 2013, at 36–37; Kathryn Hawkins, *Depression's Growing Toll On the Workplace*, OFFICEPRO, March 2011, at 14.

<sup>14</sup> SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 9 (2001).

<sup>15</sup> Sean Sullivan, *Promoting Health and Productivity for Depressed Patients in the Workplace*, J. OF MANAGED CARE PHARMACY S12, S14 (2004).

<sup>16</sup> Jonah Lehrer, *Depression's Upside*, N.Y. TIMES MAGAZINE, Feb. 28, 2010, available at <http://www.nytimes.com/2010/02/28/magazine/28depression-t.html?pagewanted=all&r=1&>.

<sup>17</sup> 29 C.F.R. § 1630 (2013). The EEOC is the agency that interprets the ADA. *Id.* § 1630.1.

<sup>18</sup> Currently, the EEOC regulations state: "to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process." 29 C.F.R. § 1630.2(o)(3).

## I. THE ADA: RECENT ADA REFORM

Employees with disabilities became a protected class under civil rights law in July of 1990 with the enactment of the ADA.<sup>19</sup> It was modeled after Section 504 of the Rehabilitation Act of 1973,<sup>20</sup> which disallowed workplace discrimination for government-funded entities.<sup>21</sup> The ADA expanded this protection to the private sector, stating that: “[n]o covered entity shall discriminate against a qualified individual on the basis of disability 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.”<sup>22</sup> The Act was received amongst high expectations for discrimination reform in the workplace.<sup>23</sup> The Equal Employment Opportunity Commission (EEOC) was the agency granted interpretive and enforcement powers.<sup>24</sup>

Despite the initial enthusiasm, a series of Supreme Court cases reduced the impact of the statute by setting a hard-to-meet standard for when a person has a disability.<sup>25</sup> In 2008, Congress breathed new life into the ADA by passing the ADA.<sup>26</sup> The

<sup>19</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336.

<sup>20</sup> Pub. L. No. 93-112 (1973).

<sup>21</sup> “Much of the substance of the ADA was drawn directly from Section 504 of the Rehabilitation Act of 1973—a provision prohibiting discrimination on the basis of disability by entities that receive federal funds—and the regulations implementing that section.” E. Pierce Blue, *Arguing Disability Under the ADA Amendments Act: Where Do We Stand?*, FED. LAW, Dec. 2012, at 38. The ADA further clarifies the relationship between the ADA and the Rehabilitation Act: “[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.” ADA Amendments Act, Pub. L. 110-325 (2008).

<sup>22</sup> 42 U.S.C. § 12112(a) (2012).

<sup>23</sup> Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 271 (2000) (“When the Americans with Disabilities Act was passed in 1990, one of its principal goals was to enhance employment opportunities for people with disabilities who wanted to and could work but were being kept out of the job market because of discrimination on the basis of disability.”).

<sup>24</sup> 42 U.S.C. § 12116 (2012); 29 C.F.R. app. § 1630 (2013).

<sup>25</sup> For a comprehensive discussion of the Supreme Court cases (the “Sutton cases”) that narrowed the definition of disability under the ADA and their implication on employees with mental illnesses, see Michelle Parikh, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 735–42 (2004). See also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>26</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325. The ADA went into effect on January 1, 2009. *Id.* The ADA was not Congress’s first attempt at reform. In 2006 and 2007, Congress attempted to pass the ADA Restoration Act (ADARA), which proposed to remove the word “substantially” from the ADA’s “substantially limits.” The “substantially limits” refers to the ADA’s requirement that an employee be substantially

ADAAA “emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.”<sup>27</sup>

The ADAAA was both reactionary and restorative.<sup>28</sup> Not only did it overturn the Supreme Court cases that had narrowly interpreted the meaning of disabled, it brought the ADA closer to its original purpose—protecting employees from discrimination in the workplace.<sup>29</sup> The ADAAA lowered the bar for establishing the existence of a disability by urging the courts not to take such a narrow interpretation of when a disability “substantially limits” an employee in a major life activity, a pre-requisite to establishing a disability;<sup>30</sup> prohibiting the courts from considering mitigating measures, such as medication, when determining when an employee is disabled;<sup>31</sup> and expressly allowing an episodic impairment or an impairment that is in remission to be classified as a disability if it would substantially limit a major life activity when active.<sup>32</sup> Because the ADAAA is not applied retroactively,<sup>33</sup> there are a limited number of decisions that have applied the ADAAA, and even fewer that have applied the ADAAA in the case of depression. Still, the available case law and the new definition of disabled under the

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limited in a major life activity to qualify as disabled. 42 U.S.C. § 12102 (2012). The bill was met with resistance for what was feared to be overly broad coverage, and Congress closed before its passing. Frederick J. Melkey, *Creating New Law or Restoring the Old? - Retroactivity and the Americans with Disabilities Amendments Act of 2008: A Comment on EEOC v. Autozone*, 34 N.C. CENT. L. REV. 1, 28–29 (2011).

<sup>27</sup> *Notice Concerning The Americans with Disabilities Act (ADA) Amendments Act of 2008*, EEOC, [http://www.eeoc.gov/laws/statutes/adaaa\\_info.cfm](http://www.eeoc.gov/laws/statutes/adaaa_info.cfm) (last visited May 9, 2013).

<sup>28</sup> Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 667 (2010) (quoting the ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 18 (2007)). House Majority Leader Steny H. Hoyer stated:

[W]e could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because with medication they would be considered too functional to meet the definition of disabled. Nor could we have fathomed a situation where the individual may be considered too disabled by an employer to get a job, but not disabled enough by the courts to be protected by the ADA from discrimination. What a contradictory position that would have been for the Congress to take.

*Id.*

<sup>29</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325.

<sup>30</sup> 42 U.S.C. § 12102(2)(A).

<sup>31</sup> 42 U.S.C. § 12102(4)(E)(i)(1).

<sup>32</sup> 42 U.S.C. § 12102(4)(D).

<sup>33</sup> See *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) (stating that the ADAAA was not meant to be applied retroactively, hence cases concerning discrimination that occurred before the ADAAA’s effective date are still scrutinized under the pre-amended version of the ADA).

ADAAA indicate that an employee with depression will most likely meet the requirements of having a disability because people with major depression are likely to be substantially limited in one or more major life activities, such as sleeping, interacting with others, and concentrating.<sup>34</sup> However, although employees with depression will likely now overcome the first hurdle of establishing a disability under the ADAAA, in addition to being disabled, they must still show they are qualified for the position.<sup>35</sup> The ADAAA did not change the standards set forth by the ADA and EEOC to determine whether an employee is qualified for the position;<sup>36</sup> therefore, employees with depression will likely struggle to establish they are qualified under the ADA, even as amended by the ADAAA.

## II. HOW THE ADA DEFINES “QUALIFIED”: THE ELEMENTS AND DEFENSES

Whether an employee is qualified is a two-part inquiry. First, the employee must have the “requisite skill, experience, education and other job-related requirements.”<sup>37</sup> The second requirement, and the focus of this Note, is that an employee must also be able to perform the essential duties of the job with or without a reasonable accommodation.<sup>38</sup> Finally, even if the employee can meet this initial burden, the employer can claim that the requested accommodation amounts to an undue hardship.<sup>39</sup> The subsections below will elaborate on the meanings of “essential functions” of the job, “reasonable accommodation,” and “undue hardship” as defined by the ADA and interpreted by the EEOC.

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<sup>34</sup> See *Palacios v. Cont'l Airlines, Inc.*, No. CIV. A. H-11-3085, 2013 WL 499866, at \*4 (S.D. Tex. 2013) (finding plaintiff's depression was covered under the ADAAA); *Naber v. Dover Healthcare Assocs., Inc.*, 765 F. Supp. 2d 622, 643–47 (D. Del. 2011) (same); *Estate of Murray v. UHS of Fairmount, Inc.*, No. Civ. A. No. 10-2561, 2011 WL 5449364, at \*6–8 (E.D. Pa. 2011) (same); see also *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, EEOC, <http://www.eeoc.gov/policy/docs/psych.html> (last visited May 12, 2013) (providing an example that shows how an employee with depression will be substantially limited in several major life activities of sleeping, concentrating, and interacting with others).

<sup>35</sup> 42 U.S.C. § 12112(a) (2012).

<sup>36</sup> *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited May 9, 2013) (stating that the ADAAA does not change the definitions of “qualified,” “direct threat,” “reasonable accommodation,” and “undue hardship,” nor does it change who has the burden of proof in demonstrating any of these requirements).

<sup>37</sup> 42 U.S.C. § 12111(8) (2012); 29 C.F.R. § 1630.2(m) (2013).

<sup>38</sup> 42 U.S.C. § 12111(8); see also 29 C.F.R. app. § 1630.

<sup>39</sup> 42 U.S.C. § 12111(10).

A. The employee must meet the “essential functions of the employment position”

Essential functions means “the fundamental job duties of the employment position the individual with a disability holds or desires,” and “does not include the marginal functions of the position.”<sup>40</sup> The employer’s judgment as to what functions are considered essential are taken into account, as well as job descriptions prepared before advertising the position or interviewing potential applicants.<sup>41</sup> Courts will also consider the following factors when determining whether a job function is essential: (i) whether the position was created for the fulfillment of that function; (ii) whether there are a limited number of employees who are capable of completing the job function and could have the function redistributed to them; and/or (iii) whether the employee was hired for his or her expertise or ability in a highly specialized job function.<sup>42</sup> For example:

If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement.<sup>43</sup>

While essential functions vary based on the job, courts have found regular attendance and interacting positively with others to be essential functions of jobs.<sup>44</sup> As the following cases illustrate, employees with depression and related mental health disorders often have a hard time meeting such qualifying factors. In *Johnson v. Loram Maintenance of Way, Inc.*, Jerry Johnson, a manufacturer assembler with depression and anxiety, was terminated after being unable to work for six months following a severe panic attack,<sup>45</sup> and his doctor expressed a belief that “Johnson was only ‘marginally able to return to work full-time.’”<sup>46</sup> Johnson brought suit under the ADA.<sup>47</sup> The court had to determine whether Johnson was qualified to perform the essential functions of his occupation.<sup>48</sup> His employer argued that Johnson was not qualified because he had “poor attendance and

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40 29 C.F.R. § 1630.2(n)(1).

41 42 U.S.C. § 12111(8).

42 29 C.F.R. § 1630.2(n)(2).

43 29 C.F.R. app. § 1630.

44 See cases cited *infra* notes 45–57 and accompanying text.

45 *Johnson v. Loram Maint. of Way, Inc.*, 83 F. Supp. 2d 1007, 1010 (D. Minn. 2000).

46 *Id.* at 1015.

47 *Id.* at 1010.

48 *Id.* at 1014.

lack[ed] . . . dependability.”<sup>49</sup> The court found that attendance was an essential function of an assembler, and therefore Johnson could not perform an essential function of his job.<sup>50</sup>

In *Pesterfield v. Tennessee Valley Authority*, Troy Pesterfield, a tool room attendant for the Tennessee Valley Authority (TVA), had successfully completed his job for a year when he began to struggle with timeliness and being courteous to his co-workers.<sup>51</sup> Around this time, Pesterfield began to complain of “nervousness and anxiety” and was hospitalized for both “mental and physical reasons.”<sup>52</sup> Following hospitalization, TVA’s Rehabilitation Department sought a letter from Pesterfield’s psychiatrist with a recommendation regarding Pesterfield’s return to work.<sup>53</sup> The letter stated:

[W]hat we have is a very depressed man whose self esteem is very fragile. His physical well being is essentially what he had to offer on the job and now this is damaged resulting in little or no remaining confidence in himself. I suspect he needs considerable support from a supervisory authority in order to function. If there is the slightest hint of rejection or criticism, he becomes extremely anxious and depressed.<sup>54</sup>

TVA fired Pesterfield for medical reasons.<sup>55</sup> Pesterfield sued under the Rehabilitation Act.<sup>56</sup> The court found that Pesterfield could not perform the essential functions of his position because it required him to “get along with supervisors and co-workers” and, given his fragile emotional state, “it would be impossible for him to perform the essential functions of his work.”<sup>57</sup>

While employees with depression may struggle to perform the essential functions of their employment positions without an accommodation, they may still be able to establish they are

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<sup>49</sup> *Id.* at 1014.

<sup>50</sup> *Id.* at 1016; *see also* *Vera v. Williams Hospitality Grp.*, 73 F. Supp. 2d 161, 166 (D.P.R. 1999) (citations omitted) (“Unlike jobs that can be performed off-site, attendance is generally an essential function of any job. Rather than setting a threshold number of absences before considering an employee not to be complying with attendance, courts state that meeting the attendance requirement means that an employee must come to work on a regular and reliable basis. The requisite level of attendance and regularity depends on the particular position or job.”).

<sup>51</sup> *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 438 (6th Cir. 1991).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 439.

<sup>55</sup> *Id.*

<sup>56</sup> Although the *Pesterfield* case was brought under the Rehabilitation Act, the language of the Rehabilitation Act and the ADA are sufficiently similar that the case is relevant. *See* Carrie Griffin Basas, *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 61 (2008) (stating that the ADA borrowed language regarding the “qualified” elements directly from the Rehabilitation Act of 1973).

<sup>57</sup> *Pesterfield*, 941 F.2d at 441–42.

qualified if they make a *prima facie* showing that they can perform the essential functions of the task with a reasonable accommodation.<sup>58</sup> However, when proposing an accommodation, what the employer and the courts consider reasonable has been a challenge for employees with depression.

B. There is a struggle to find a “reasonable accommodation”

Unless it poses an undue hardship on the business, an employer informed of an employee’s mental disability must make a reasonable accommodation.<sup>59</sup> “[A]n accommodation is 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.”<sup>60</sup> The EEOC Guidelines define reasonable accommodations as:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.<sup>61</sup>

The ADA proposes the following as possible accommodations: “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, and the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”<sup>62</sup>

However, there are limitations as to what will be considered a “reasonable accommodation.” First, while the employer may be expected to reassign nonessential functions of the job, there is no requirement to reassign tasks that are considered essential to the job.<sup>63</sup> Next, there is no duty to provide the best accommodation or even the accommodation that the employee

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<sup>58</sup> 42 U.S.C. § 12112(b)(5) (2012).

<sup>59</sup> *Id.*

<sup>60</sup> 29 C.F.R. app. § 1630 (2013).

<sup>61</sup> 29 C.F.R. § 1630.2(o).

<sup>62</sup> 42 U.S.C. § 12111(9) (2012).

<sup>63</sup> 29 C.F.R. app. § 1630.

requested.<sup>64</sup> Furthermore, the suggested accommodations found in the statute are not guaranteed to the employee. For example, the following cases illustrate that courts have found that job restructuring, such as transferring the employee to a new supervisor, modifying the work schedule to allow the employee to switch to a part-time schedule, and allowing the employee to alter his or her shift were unreasonable accommodations in those employment situations.<sup>65</sup> In *Kennedy v. Dresser Rand Co.*, Carolyn Kennedy, a nurse, brought suit under the ADA claiming that she was denied her accommodation request relating to her depression, which was triggered by her supervisor who oversaw all of the company's health care personnel.<sup>66</sup> Kennedy requested that "she no longer work for, report to, associate with, or be influenced by her assigned supervisor" and that her employer "eliminate any personal contact" between Kennedy and her supervisor.<sup>67</sup> The court stated that, although all accommodation requests are analyzed on a case-by-case basis, there is a presumption against a request to change supervisors.<sup>68</sup> Here, the court found that shielding Kennedy from her supervisor would lead to "excessive organizational costs" and would make it "virtually impossible for Kennedy to perform her job," and thus a change in supervision was an unreasonable accommodation.<sup>69</sup>

In *Simmerman v. Hardee's Food Systems, Inc.*, Frederick Simmerman, a restaurant manager for the Hardee's chain of restaurants with clinical depression, sought to return to work after a leave of absence and requested that he work forty hours per week maximum, only during the day shift, and in a restaurant outside of Philadelphia.<sup>70</sup> A copy of the Hardee's General Manager Classification Worksheet stated that working fifty hours a week and a flexible schedule were requirements of the position.<sup>71</sup> Hardee's reassigned Simmerman to a crew supervisor in Delaware, a position below general manager.<sup>72</sup> Simmerman sued under the ADA claiming that Hardee's had failed to accommodate his disability in his role as a general

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<sup>64</sup> *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996) ("An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.").

<sup>65</sup> See cases cited *infra* notes 66–82 and accompanying text.

<sup>66</sup> *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 121 (2d Cir. 1999).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 122–23.

<sup>69</sup> *Id.* at 123.

<sup>70</sup> *Simmerman v. Hardee's Food Sys., Inc.*, No. CIV. A. 94-6906, 1996 WL 131948, at \*1 (E.D. Pa. 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997).

<sup>71</sup> *Id.* at \*4.

<sup>72</sup> *Id.* at \*1.

manager.<sup>73</sup> The court found that the requested accommodations were not reasonable because “[t]his [was] not a situation in which, with some adjustment or assistance from the employer—such as special equipment—the employee could in fact perform the essential functions.”<sup>74</sup> The court reasoned that Simmerman’s request attempted to erase essential functions of being in a supervisory role, which went beyond a reasonable accommodation.<sup>75</sup>

In *Guice-Mills v. Derwinski*, Constance Guice-Mills was a head nurse of the Veterans Administration Hospital.<sup>76</sup> Guice-Mills was diagnosed with depression, anxiety, and insomnia.<sup>77</sup> She began taking a sedative antidepressant upon her psychiatrist’s recommendation, which led to Guice-Mills having difficulty meeting the 8:00 a.m. shift start time.<sup>78</sup> She requested that she be allowed to start her shift two hours later.<sup>79</sup> Her employer offered to give her a staff-nurse position, but would not grant the later start time for Guice-Mills in the head nurse role because that would leave the patient units unsupervised by an individual in a management position from 8:00 a.m. to 10:00 a.m.<sup>80</sup> Guice-Mills sued under the Rehabilitation Act because she considered the staff-nurse position a demotion.<sup>81</sup> The court found that Guice-Mill’s request was unreasonable and stated that “[w]hen an employer offers an employee an alternative position that does not require a significant reduction in pay and benefits, that offer is a ‘reasonable accommodation’ virtually as a matter of law.”<sup>82</sup> Thus, in this case, a schedule adjustment was found to be an unreasonable accommodation.

C. If an employee is otherwise “qualified,” the employer still has an “undue hardship” defense available

Finally, even if an employee can make the initial showing that there is some accommodation that would allow him or her to perform the essential functions of the job, the employer is not forced to provide such accommodation if it would cause an undue

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*8.

<sup>75</sup> *Simmerman*, 1996 WL 131948, at \*8. The court continues to explain that these requested accommodations would place an additional burden on the other restaurant managers and Hardee’s was “not required to shoulder this burden.” *Id.*

<sup>76</sup> *Guice-Mills v. Derwinski*, 967 F.2d 794, 795 (2d Cir. 1992).

<sup>77</sup> *Id.* at 796.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 797.

<sup>81</sup> *Guice-Mills*, 967 F.2d at 797.

<sup>82</sup> *Id.* at 798.

hardship to the operation of the business.<sup>83</sup> An undue hardship is “an action requiring significant difficulty or expense.”<sup>84</sup> The ADA includes such factors as “the nature and cost of the accommodation needed” and “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.”<sup>85</sup> The EEOC Guidelines also include the “impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business” as a factor.<sup>86</sup>

The following case shows that requiring a small employer to hire two people for a one-person job is undue hardship. In *EEOC v. Amego, Inc.*, Ann Marie Guglielmi was a team leader for Amego, Inc., a small nonprofit organization devoted to the care of severely disabled individuals.<sup>87</sup> One of her duties was to administer medication to the patients.<sup>88</sup> A year after starting her job with Amego, Guglielmi was diagnosed with depression and attempted suicide twice by taking an overdose of medications.<sup>89</sup> Guglielmi told her employers she had been diagnosed with depression, but did not tell her employer about either suicide attempt.<sup>90</sup> When her supervisors at Amego learned of the suicide attempts, they terminated Guglielmi, stating that she “could not meet the essential job function of handling prescription medication.”<sup>91</sup> The EEOC argued on behalf of Guglielmi that Amego should have accommodated Guglielmi by reassigning her from team leader to behavior therapist, a position that did not explicitly list administering medication as a job responsibility, although all behavior therapists were trained in this duty and were expected to be able to perform this function.<sup>92</sup>

The court found that the suggested accommodation of transferring Guglielmi to a different position was not per se unreasonable, but in this case it would cause Amego undue hardship and therefore would not be granted.<sup>93</sup> The court reasoned that while transfers can be a reasonable accommodation, transferring Guglielmi to a behavior therapist

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<sup>83</sup> 42 U.S.C. § 12112(b)(5)(A) (2012).

<sup>84</sup> 42 U.S.C. § 12111(10)(A) (2012).

<sup>85</sup> 42 U.S.C. § 12111 (10)(B).

<sup>86</sup> 29 C.F.R. § 1630.2(p) (2013).

<sup>87</sup> *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 137 (1st Cir. 1997).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 138.

<sup>90</sup> *Id.* at 139.

<sup>91</sup> *Id.* at 141.

<sup>92</sup> *Id.* at 147–48.

<sup>93</sup> *Id.* at 148.

position would not eliminate her responsibility to administer drugs to patients. It would require hiring another behavioral therapist to work alongside Guglielmi at all times in order to ensure that Guglielmi's patients received their proper medication and Guglielmi was not left alone with the medication.<sup>94</sup> The court stated, "[t]he expense of hiring these additional staff would be too great for a small nonprofit like Amego to be reasonably expected to bear."<sup>95</sup>

Thus, these pre-ADAAA cases show it has been challenging for employees with depression to meet their initial burden of establishing they are qualified individuals, and why people with depression will continue to hit these obstacles.

### III. WHY THE ADAAA DOES NOT ADDRESS THE CONCERNS OF PEOPLE WITH DEPRESSION

The ADA, as amended by the ADAAA, has made it possible for many employees who may not have otherwise been covered by the ADA due to the judiciary's narrow interpretation of who is disabled to fall under the protection of the ADA.<sup>96</sup> However, the ADA still does not adequately protect employees with depression because even if the employee can easily plead he or she has a disability, the nature of the disorder makes it difficult for the employee to properly plead he or she is qualified under the ADA's definition of the term.

First, this section will illustrate how the ADAAA has not altered the standards for showing when an employee is qualified. Next, this section will define depression and its impact on the workplace. Finally, this section will show why the nature of depression and the current state of the law makes it difficult for an employee with the disorder to establish he or she is qualified for the employment position.

A. *Hill v. Walker*: The ADAAA has not altered the "qualified" standards, thus the outcome remains the same

In one of the first opinions to address a mental health disability under the ADAAA, *Hill v. Walker* illustrates the tough road that employees with depression will still likely face. In *Hill v. Walker*, Yulanda Hill, an employee with stress and anxiety,<sup>97</sup> brought suit under the post-ADAAA version of the ADA following

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *supra* note 34 and accompanying text.

<sup>97</sup> Although Hill was not an employee with depression, she was an employee with a mental health disorder; the case is being used for the limited purpose of showing that the ADAAA did not affect any of the requirements of a qualified employee.

her termination as a family service worker from the Arkansas Department of Human Services (DHS).<sup>98</sup> Hill had requested reassignment from a particularly stressful case involving an abusive client.<sup>99</sup> After Hill informed her supervisors “she was on medication for stress and that she had been experiencing [job-related] anxiety attacks,”<sup>100</sup> she was initially granted a month-long leave of absence, then the decision was reversed and she was told to return to work after only two weeks of leave.<sup>101</sup> Hill wrote to her employers asking them to allow her the additional two weeks for a full recovery and warned DHS that sending her certified letters demanding she return to work “while [she was] on medical leave and against [her] doctor’s orders” was “unprofessional.”<sup>102</sup> Hill then proceeded to take almost a month-long leave of absence.<sup>103</sup> She was terminated for violating company policy regarding following reasonable orders as well as for medical reasons.<sup>104</sup> During discovery, Hill indicated that at the end of the month-long leave she was ready to return to work, but that she would request an accommodation of not being assigned the case that led to her taking leave.<sup>105</sup>

When presented with the issue of whether Hill could perform the essential functions of her job, the court found that “handling of abusive clients and stressful cases” was an essential function of being a family service worker and Hill’s resistance to work with a hostile client showed she was unable to perform the functions required of a family worker.<sup>106</sup> The court also considered whether Hill’s initial request for a month-long leave of absence was reasonable and whether DHS should have accommodated her.<sup>107</sup> The court stated that once an employee makes a prima facie showing that a reasonable accommodation is possible, the burden shifts to the employer to show why the accommodation cannot be granted.<sup>108</sup> One way an employer can accomplish this is to show that even if the accommodation is granted, the employee cannot perform the essential functions of the job.<sup>109</sup> While the court found that an additional two-week

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<sup>98</sup> Hill v. Walker, 918 F. Supp. 2d 819, 823 (E.D. Ark. 2013).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 825.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 826.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 830.

<sup>106</sup> *Id.* at 828–29.

<sup>107</sup> *Id.* at 829–30.

<sup>108</sup> *Id.* at 830 (citing *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 712 (8th Cir. 2003), a pre-ADAAA case, for the rules regarding when an employee is qualified).

<sup>109</sup> *Id.*

leave of absence would have been a reasonable accommodation because it was not an open-ended request for leave, DHS effectively demonstrated that it could not accommodate Hill because her reluctance to return to work on a hostile case showed that even with a reasonable accommodation she could not perform the essential function of working with a hostile client.<sup>110</sup>

Thus, even after the ADAAA's implementation, the results for an employee with a mental health disorder, such as stress, anxiety, or depression, are similar to pre-ADAAA case results regarding whether an employee is qualified and whether an employer has a duty to accommodate. But is this the correct result? Shouldn't employees still be able to show they are "qualified" for a job? Should people with depression be given special accommodations that might appear to be favoritism to the outside world? The answer: it depends.

## B. Depression: What it is, the stigma surrounding it, and how it affects the workplace

In order to understand the unique challenges faced by employees with depression seeking to show they are qualified, one must first understand the nature of depression. This subsection will first define depression and identify its symptoms. Next, it will explore the misconceptions of people with depression. Finally, this subsection will discuss the effects of depression in the workplace.

### 1. Defining Depression: Symptoms and Treatment

"Depression is a disorder of mood, so mysteriously painful and elusive in the way it becomes known to the self—to the mediating intellect—as to verge close to being beyond description."<sup>111</sup> Depression manifests itself differently in each person or even in the same person at different times.<sup>112</sup> It is also a disorder with a high rate of recurrence, and the age of the initial episode is increasingly lower.<sup>113</sup> For many individuals with depression, the symptoms do not fully subside but merely vary in intensity over time.<sup>114</sup> The most common treatments for depression are medication, psychotherapy, or a combination of

<sup>110</sup> *Id.*

<sup>111</sup> WILLIAM STYRON, *DARKNESS VISIBLE: A MEMOIR OF MADNESS* 7 (1990).

<sup>112</sup> PETER D. KRAMER, *AGAINST DEPRESSION* 69 (2005).

<sup>113</sup> *HANDBOOK OF DEPRESSION*, *supra* note 12, at 21.

<sup>114</sup> RAYMOND W. LAM & HIRAM MOK, *DEPRESSION* 5 (2008) ("About two-thirds of patients with a major depressive episode will fully recover, while one-third of depressed patients will either only partially recover or remain chronically ill."); *see also* *HANDBOOK OF DEPRESSION*, *supra* note 12, at 26 ("Lifetime prevalence estimates of MD in U.S. surveys have ranged widely, from as low as 6% . . . to as high as 25% . . .").

the two.<sup>115</sup> The earlier treatment is commenced, the more effective it will be.<sup>116</sup> The medications used to treat depression, anti-depressants, can have strong side effects such as: drowsiness, change in appetite, and an increased tendency towards suicide.<sup>117</sup>

## 2. The Myth of the “Madman”: The Stereotypes and Stigmas Surrounding Depression

In October 2012, NBC’s *The Office*, a “mockumentary”<sup>118</sup> set in the office of a paper company, featured an episode where one of the main characters finds a little yellow pill that he discovers is used to treat anxiety.<sup>119</sup> The character commences a witch-hunt for the “madman in [their] midst.”<sup>120</sup> While the episode simultaneously made light of the stigmas that persist for employees with mental health disorders and educated the viewers on how common and nonthreatening such disorders may be, in many offices the stigmas are no laughing matter.

Employees with mental health disorders, such as depression, have received a disproportionate amount of animus compared to their physically impaired counterparts.<sup>121</sup> Dangerousness, unpredictability, incompetence, defective character, and malingerers are traits often associated in the minds of others with the mentally ill.<sup>122</sup> One poll showed that 47% of Americans blame depression on “the weak character of the sufferer.”<sup>123</sup> The belief that depression is within the patient’s control may explain some of the stigma surrounding the people with the disorder:

[C]haracteristics perceived to be within the individual’s control are equivalent to character flaws that intensify stigma and the desire for social distance. Because the characteristic is controlled by the individual, society views the failure to conform to its standards as the product of unwillingness, rather than inability. If the individual would

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115 NATIONAL INSTITUTE OF MENTAL HEALTH, DEPRESSION 10 (2011), available at <http://www.nimh.nih.gov/health/publications/depression/depression-booklet.pdf>.

116 *Id.*

117 *Id.* at 11–14; see also STYRON, *supra* note 111, at 54 (“The pill made me edgy, disagreeably hyperactive, and when the dosage was increased after ten days, it blocked my bladder for hours one night.”).

118 A mockumentary is “a facetious or satirical work (as a film) presented in the style of a documentary.” *Mockumentary*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/mockumentary> (last visited May 9, 2013).

119 *The Office: Here Comes Treble* (NBC television broadcast Oct. 25, 2012).

120 *Id.*

121 Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 51 (2005) (“Although individuals with physical impairments have also been the subject of disparaging public opinion, the animus directed at psychiatric impairments is proportionately greater and more pervasive.”).

122 *Id.* at 52–56.

123 STEFAN, *supra* note 14, at 9.

only choose to try harder, all problems would disappear. Rather than viewing group members with pity, an emotion often associated with physical disabilities, society instead views them with anger and irritation. The desire to offer assistance in any respect is seriously diminished because the need only arises as a result of the individual's failure to help himself.<sup>124</sup>

Employers are particularly susceptible to such beliefs, as studies have found that employers "are less likely to hire depressed individuals based on expectation of substandard work performance."<sup>125</sup> The following subsection tests the accuracy of those beliefs.

### 3. Depression Goes to Work: Costs and Contributions of Depression

Depression is the leading cause of disability in the United States for people between the ages of fifteen and forty-four.<sup>126</sup> This mental health disorder costs employers approximately 200 million lost workdays each year, which translates to billions of dollars.<sup>127</sup> "In terms of work productivity, those suffering with depression are three to four times more likely to take sick days off work than non-depressed individuals."<sup>128</sup> Employees with depression account for the most mental health-related charges filed with the EEOC between 1997 and 2012.<sup>129</sup>

However, the effects of depression in the workplace are not all negative as employees with depression both benefit from being part of the workforce and provide valuable contributions to the workplace. Employees with depression "have a perceived increase in self-rated productivity when they experience fewer and less severe depressive symptoms, suggesting that early treatment of depression would economically benefit

<sup>124</sup> Hensel & Jones, *supra* note 121, at 55.

<sup>125</sup> See LAM & MOK, *supra* note 114, at 7.

<sup>126</sup> *Entering the World of Work: What Youth with Mental Health Needs Should Know About Accommodations*, UNITED STATES DEPARTMENT OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, <http://www.dol.gov/odep/pubs/fact/transitioning.htm> (last visited Nov. 13, 2013) ("According to the National Institute of Mental Health, the leading cause of disability in the U.S. for ages 15–44 is major depressive disorder . . .").

<sup>127</sup> See *Depression*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/workplacehealthpromotion/implementation/topics/depression.html> (last visited May 9, 2013). This number may be on the rise thanks to the economic recession, which has led to an increase in layoffs, mortgage foreclosures, and expenses. Hawkins, *supra* note 13, at 12.

<sup>128</sup> LAM & MOK, *supra* note 114, at 7.

<sup>129</sup> *ADA Charge Data by Impairment/Bases*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm> (last visited May 9, 2013). In 2012, depression accounted for 6.8% of all EEOC claims. *Id.* Aside from the "other disability" category, depression was one of the most prevalent disabilities, following discrimination based on orthopedic impairments and discrimination based on record of disability or being regarded as disabled. *Id.*

employers.”<sup>130</sup> Furthermore, while many studies focus on the negative effects of depression in the workplace, scientists Andrews and Thomson have suggested a controversial theory about the benefits an employee with depression may bring to the office, such as better problem solving skills.<sup>131</sup> They suggest that the lack of interest in sex and food common during depressive episodes is a by-product allowing for better focus and “an extremely analytical style of thinking.”<sup>132</sup> For example, Charles Darwin, famous for his contributions to biology, had depression.<sup>133</sup> While Darwin’s depression prevented him from objectively perceiving his accomplishments,<sup>134</sup> “the pain may actually have accelerated the pace of his research, allowing him to withdraw from the world and concentrate entirely on his work.”<sup>135</sup> Additionally, the negative effects of depression in the workplace may be mitigated. Although the side effects of anti-depressants may be unpleasant, “medications can have a very favorable—and measurable—effect on worker productivity.”<sup>136</sup> Thus, with treatment, employees with depression can make great contributions in the workplace if given an opportunity. However, the challenges of establishing that an employee with depression merits protection under the amended ADA may prevent employers and employees from realizing these benefits. The following section explores why employees with depression struggle to meet the initial burden of showing they are qualified for their employment positions in a post-ADAAA setting.

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<sup>130</sup> LAM & MOK, *supra* note 114, at 7.

<sup>131</sup> Lehrer, *supra* note 16. For more information on Andrews and Thomson’s studies, see generally Paul W. Andrews & J. Anderson Thomson Jr., *The Bright Side of Being Blue: Depression as an Adaptation for Analyzing Complex Problems*, 116 PSYCHOL. REV. 620, 620–54 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2734449/>.

<sup>132</sup> Lehrer, *supra* note 16.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (“The ‘race is for the strong,’” Darwin wrote. “I shall probably do little more but be content to admire the strides others made in Science.”).

<sup>135</sup> *Id.* (“His letters are filled with references to the salvation of study, which allowed him to temporarily escape his gloomy moods. ‘Work is the only thing which makes life endurable to me,’ Darwin wrote and later remarked that it was his ‘sole enjoyment in life.’”).

<sup>136</sup> Sullivan et al., *supra* note 15, at S14 (“Improvements seen with antidepressants actually appear to be much greater than with medical treatments used to manage anxiety, migraine headaches, and hypertension.”). However, for a critical discussion of psychiatric drugs, see generally ROBERT WHITAKER, ANATOMY OF AN EPIDEMIC (2010).

C. The ADAAA does not help employees with depression due to the difficulty of meeting the essential functions of the job, with or without a reasonable accommodation

As the ADAAA did not change the qualified requirements, employees with depression will continue to struggle to show they satisfy the essential functions of the employment obligations. Furthermore, establishing the existence of a reasonable accommodation is a hard task as there are communication complications as well as precedent for excluding accommodations that may assist employees with depression.

1. “Essential Functions”: Inseparably Entwined with Symptoms of Depression

Without reaching the issue of whether there is a potential accommodation, it must first be acknowledged that depression and the side effects of the medications used to treat depression can directly affect an employee’s ability to satisfy the essential functions of many jobs.<sup>137</sup> “Rarely is anyone—writer, scientist, manager, line worker—set an assignment for which he lacks the skill. The issue is the ailment. Apathy, despair, confusion, perfectionism, anomaly of will—the symptoms are as paralyzing as those of almost any illness we might name.”<sup>138</sup> Courts have held such skills as timeliness and the ability to get along with others to be essential functions of various jobs.<sup>139</sup> However, depending on the severity of the disorder, the symptoms or treatments of depression may prevent an employee from performing such tasks.<sup>140</sup> For example, low self-esteem may rob an employee of the confidence necessary to execute a presentation or sales pitch. However, the employee may seek to overcome these limitations on his or her ability to perform essential functions through a reasonable accommodation.

2. Balancing Employee Needs with Business Needs: The Difficult Hunt for a Reasonable Accommodation

There are many factors that contribute to the difficulty of finding a reasonable accommodation for an employee with

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<sup>137</sup> Douglas A. Blair, *Employees Suffering from Bipolar Disorder or Clinical Depression: Fighting an Uphill Battle for Protection Under Title I of the Americans with Disabilities Act*, 29 SETON HALL L. REV. 1347, 1396–97 (1999) (“In other words, the manifestations of these disorders might be so pervasive that no reasonable accommodation would enable the individuals to perform their jobs’ essential functions. Also, the side effects of medication used to treat these diseases could likewise impede the ability to carry out job-related functions.”).

<sup>138</sup> See KRAMER, *supra* note 112, at 74.

<sup>139</sup> See *supra* notes 45–57 and accompanying text.

<sup>140</sup> Blair, *supra* note 137, at 1397.

depression that does not cause an undue burden on the employer. First, in order to find a reasonable accommodation, the employee must disclose that he or she has depression in order to start the conversation with his or her employer about seeking an accommodation, which can be intimidating in light of employer animus towards employees with mental health disorders. Furthermore, the circuit courts have set inconsistent standards regarding the employer's duty to engage in such conversations.<sup>141</sup> Finally, the most common accommodations requested by employees with depression have been found to be unreasonably burdensome or difficult to administer by the courts.<sup>142</sup>

a. Bias from employers and uncertain communication requirements decrease the probability of establishing a reasonable accommodation

Unlike a physical disability, where the reasonable accommodation may be more evident, the employee with depression is limited to his or her words to convey the severity of the disorder and the accommodation that will allow for completion of the job's essential tasks. First, an employee must disclose that he or she has a disability—a difficult task when he or she knows that means opening oneself to bias or potentially greater supervisor scrutiny.<sup>143</sup> In fact, to disclose the presence of depression and request an accommodation requires the employee to be assertive and proactive, characteristics that can be dulled by the disorder.<sup>144</sup> From the employer's perspective, it is difficult to justify the requested accommodation:

Accommodations that are not of a physical nature may also be perceived less as a necessary tool to allow the individual to work than as special or easier treatment of the individual with a psychiatric disability. Non-physical accommodations such as flexible scheduling, time off for therapy, or increased supervision and positive feedback are more likely than physical accommodations to be seen as favorable treatment or as something everyone will want if they can get it.<sup>145</sup>

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<sup>141</sup> See *infra* notes 148–56 and accompanying text.

<sup>142</sup> See *infra* notes 157–65 and accompanying text.

<sup>143</sup> See *Wirey v. Richland Cmty. Coll.*, 913 F. Supp. 2d 633, 643 (C.D. Ill. 2012) (quoting *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir. 1995)) (“We think that an employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability.”); Matthew I. Kozinets, *The Americans with Disabilities Act: Does the ADA Protect A Person with the Chronic Fatigue Syndrome from Employment Discrimination?*, 13 HOFSTRA LAB. L.J. 139, 167 n.246 (1995) (citations omitted) (“[A] disabled person may be reluctant to disclose such information in fear of discrimination.”).

<sup>144</sup> See KRAMER, *supra* note 112, at 69 (describing a case study about a patient with depression and her difficulty asserting herself and putting her needs first).

<sup>145</sup> Stephanie Proctor Miller, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 736 (1997).

The employer, unable to discern if an employee is genuinely disabled due to the non-physical and cyclical nature of depression, feels compelled to defend the business from undeserving employees looking for a way around the rules. Furthermore, the discrimination may not be blatant.<sup>146</sup> It may manifest itself in an inability to comprehend the need to modify the nature of the employment, particularly in stressful work environments where the change is most needed, but where there is a work culture of accepting stress as part of the job.<sup>147</sup>

Another factor that contributes to the difficulty of obtaining a reasonable accommodation is the uncertainty that surrounds the employer's obligation to engage in an interactive process to assist the employee in finding such an accommodation.<sup>148</sup> The amended ADA defines discrimination, in part, as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual."<sup>149</sup> Whether an employee is qualified is a case-by-case, fact-specific inquiry.<sup>150</sup> In order to provide guidance for both parties as to what such an inquiry would entail, the EEOC regulations state:

To determine the appropriate reasonable accommodation it *may* be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.<sup>151</sup>

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Furthermore, an employment decision based on an employer's bias may be difficult to question in court, as courts are reluctant to question business judgment decisions; *see also* Blair, *supra* note 137, at 1396 (footnote omitted) ("[C]ourts are often all too eager to accept an employer's statutorily sanctioned defenses that a mentally disabled employee either posed a direct threat to the safety of others in the workplace or that accommodating the employee would create an undue hardship.").

<sup>146</sup> Susan Stefan, "You'd Have to Be Crazy to Work Here": *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 800 (1998).

<sup>147</sup> *Id.*

<sup>148</sup> Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More Than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 282 (1998) ("Further, the more perplexing question for parties addressing any accommodation issue may be what the employer and employee's duties are with regard to how each must work with the other in an effort to determine whether a reasonable accommodation can be provided.").

<sup>149</sup> 42 U.S.C. § 12112(b)(5)(A) (2012).

<sup>150</sup> *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999) (citations omitted) ("On the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits. This burden is not a heavy one. Moreover, the question of whether a proposed accommodation is reasonable is 'fact-specific' and must be evaluated on 'a case-by-case basis.' Nevertheless, district courts may properly grant summary judgment when a plaintiff fails to meet even this light burden.").

<sup>151</sup> 29 C.F.R. § 1630.2(o)(3) (2013) (emphasis added).

The permissive wording of the statute, using “may” as opposed to a “must,” has led to much debate regarding whether the employer has a duty to engage in the interactive process.<sup>152</sup> As the Supreme Court has not issued a decision on whether failure to engage in the interactive process is a per se violation of the ADA, there is a circuit split on the issue.<sup>153</sup> For example, some courts have found:

“[T]he ‘interactive process’ envisioned by Congress in enacting the ADA is one ‘by which employers and employees work together to assess whether an employee’s disability can be reasonably accommodated.’ As such, an employer’s failure to engage in the interactive process is insufficient by itself to support employer liability; the employee must also show that the breakdown of the interactive process led to the employer’s failure to provide a reasonable accommodation.”<sup>154</sup>

Other courts have attempted to fashion incentives for employers to engage in the interactive process, such as courts in the Eighth Circuit where summary judgment will not be granted to an employer who fails to engage in the interactive process.<sup>155</sup> However, even courts that take an employee-favorable approach to the interactive process treat cases where there was no possible accommodation differently, and are less likely to find there was a duty to engage in the interactive process.<sup>156</sup> Regardless of the

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<sup>152</sup> See John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say “Yes” but the Law Says “No,”* 79 CHI-KENT L. REV. 665, 667–68 (2004) (“[T]he EEOC statements utilize language that, contrary to the suggestion of some judges and commentators, can hardly be considered unequivocal: the regulations state that it ‘may be necessary’ for employers to interact, while the Interpretative Guidance suggests that reasonable accommodations are ‘best determined’ through the interactive process. It is, therefore, unclear whether even the agency itself views the interactive process as mandatory.”).

<sup>153</sup> PollyBeth Proctor, *Determining ‘Reasonable Accommodation’ Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 SW. U. L. REV. 51, 59 (2003); see also 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, 940–41 (2003). The Third, Eighth, and Ninth Circuits have imposed “an affirmative obligation to engage in an interactive process once it has been put on notice that an accommodation may be necessary.” *Id.* at 940–41 n.57. However, the Tenth and Eleventh Circuits have pointed out that “the statute only mandates the provision of a reasonable accommodation if such exists, but not participation in a procedural step that may or may not bear fruit.” *Id.* at 941 n.58.

<sup>154</sup> *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F. Supp. 2d 236, 244 (W.D.N.Y. 2003) (citations omitted).

<sup>155</sup> *Hill v. Walker*, 918 F. Supp. 2d 819, 831 (E.D. Ark. 2013) (While it appears there is no per se right to engage in the interactive process apart from the duty to accommodate a qualified employee, in the Eighth Circuit, “an employer’s failure to engage in an interactive process does not equal per se ADA liability . . . [however] such a failure does preclude the granting of summary judgment.”).

<sup>156</sup> See Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who Is Disabled to Who Can Work*, 34 HAMLIN L. REV. 469, 484 (2011) (claiming that circuits have found there is no separate

standard applied, even if the employer engages in the interactive process, there is no guarantee that the employee will be granted an accommodation, particularly as the typical accommodations for employees with depression are not considered reasonable in many business settings.

b. There is a struggle to find a “reasonable accommodation” compatible with business needs

The typical accommodations requested by an employee with depression are a transfer, a reduction in hours, or a leave of absence.<sup>157</sup> While these accommodations are compatible with the accommodations suggested in the ADA, such as “job restructuring, part-time or modified work schedules, [and/or] reassignment to a vacant position,”<sup>158</sup> the reality is that in the vast majority of employment discrimination cases brought by a plaintiff with depression, the court finds even the “suggested” accommodations too unreasonable or too burdensome on the employer to grant.<sup>159</sup>

Because courts have found, with limited exceptions, attendance is an essential function of the job, accommodation requests such as flexible schedules,<sup>160</sup> late-start shifts,<sup>161</sup> and indefinite leaves of absence<sup>162</sup> have been found to be unreasonable accommodations. Focusing on the business perspective, it would be cost-inefficient to keep an employee on

right to the interactive process if the plaintiff fails to show a reasonable accommodation was even possible); Autry, *supra* note 148, at 687 (arguing that “because the ADA protects only those disabled persons who are statutorily qualified, and because ADA liability attaches for a failure to accommodate an employee’s disability, not a failure to interact with the employee regarding the accommodation, there are *no* circuits that currently require employers to interact, nor is any court *permitted* to impose such a requirement unless the ADA is amended”) (emphasis in original).

<sup>157</sup> Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 295 (2000).

<sup>158</sup> 42 U.S.C. § 12111(9)(B) (2012).

<sup>159</sup> See *supra* cases in notes 66–82 and accompanying text; Stefan, *supra* note 146, at 798–99 (“Employees whose disabilities were related to increasing stress, increased hours on the job, or the demands of new positions or new responsibilities. These people often requested, and were denied, accommodations considered reasonable by the Equal Employment Opportunity Commission (EEOC), including modified work schedules involving limited overtime, no night shifts, transfers, or leaves of absence.”).

<sup>160</sup> Kennedy v. Applause, Inc., No. 94-CV-5344-SVW, 1994 WL 740765, at \*7 (C.D. Cal. 1994), *aff’d*, 90 F.3d 1477 (9th Cir. 1996) (“Thus, numerous courts have held that open-ended ‘work when able’ schedules are not reasonable accommodations that employers must adopt.”) (collecting cases).

<sup>161</sup> Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir. 1992).

<sup>162</sup> Barfield v. Bell S. Telecomm., Inc., 886 F. Supp. 1321, 1326 (S.D. Miss. 1995) (“Many courts have held, both under the Rehabilitation Act and the ADA, that employees who are disabled cannot prove that they can adequately perform the essential functions of a job without showing they can maintain a regular and dependable level of attendance at that job.”) (collecting cases).

payroll when the employer does not know when the employee will come back to work or when the business must hire a second worker in the interim. Transfers or modifying the schedule to avoid co-workers that exacerbate the employee's condition have been found to be unreasonable accommodations due to the difficulty of administering such a remedy.<sup>163</sup> Furthermore, allowing an employee to modify who he or she works with or under, calls into question the employer's business judgment and ability to structure the business as he or she sees fit.<sup>164</sup> As depression is a recurring condition and an employee who has experienced depression a few times in the past has an increasingly higher probability of relapsing,<sup>165</sup> it is challenging to develop a contingency plan for a disruptive event that is almost certain to reoccur. Due to variability in severity and symptoms of the disorder coupled with different business needs per employer, it would be difficult to declare a bright-line rule to ensure the protection of employees with depression. While broad amendments to the revised ADA may be impracticable, this Note proposes that a small but significant change to the EEOC regulations as well as employer education may be a suitable beginning.

#### IV. PROPOSING A REQUIRED DUTY TO ENGAGE IN THE INTERACTIVE PROCESS FOR EMPLOYEES WITH DEPRESSION COUPLED WITH BETTER MENTAL HEALTH EDUCATION FOR EMPLOYERS

The first step to finding a solution for employees with depression would be to consistently interpret the EEOC

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<sup>163</sup> See, e.g., *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 577, 581 (3d Cir. 1998) (finding an employee with depression and anxiety's requested accommodation of "transfer to a position where he would not be subjected to prolonged and inordinate stress by coworkers" was too burdensome for the following reasons: (1) it would "impose a wholly impractical obligation on . . . any employer" as the employer "could never achieve more than temporary compliance because compliance would depend entirely on [the employee's] stress level at any given moment"; (2) employee's "proposed accommodation would also impose extraordinary administrative burdens on [the employer]" as "[i]n order to reduce [employee's] exposure to coworkers who cause him prolonged and inordinate stress, [employer's] supervisors would have to consider, among other things, [employee's] stress level whenever assigning projects to workers or teams, changing work locations, or planning social events" and "[s]uch considerations would require far too much oversight and are simply not required under law"; and (3) the accommodation requested "essentially ask[ed] this court to establish the conditions of his employment, most notably, with whom he will work").

<sup>164</sup> *Wernick v. Fed. Reserve Bank of New York*, 91 F.3d 379, 384 (2d Cir. 1996) ("[N]othing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.").

<sup>165</sup> HANDBOOK OF DEPRESSION, *supra* note 12, at 343.

regulations, that state an employer *may* be required to engage in the interactive process<sup>166</sup> as *must* be required to engage in the interactive process of finding a reasonable accommodation for employees where the disability and the solution are not readily apparent, particularly employees with depression. By requiring the employer to engage in the process at the first sign of trouble, this minor change ensures that the reasonable accommodation takes into account both the employee's and the employer's needs. As the employee is in the best position to know his or her limits and the employer is most aware of how an employment position can be restructured,<sup>167</sup> the sooner the conversation is earnestly commenced, the greater likelihood of finding an accommodation. The EEOC instruction could state that the interactive process is *required* only when the nature of the employee's disability makes a reasonable accommodation difficult to ascertain, such as with mental health disorders. This proposal may raise issues of fairness and unequal treatment among ADA claimants; however, the nature of depression makes early disclosure and employer involvement with finding a solution critical to establishing a reasonable accommodation. Limiting the expansion of the EEOC requirements also compromises with potential employer counterarguments about limited company resources and excessive litigation. This change in the regulations will have a greater impact if coupled with a few in-house best practices, such as fostering an environment of open communication with supervisors and human resource departments well versed in accommodating employees with depression.

Engaging in the interactive process to find a reasonable accommodation will be less effective if the employers are engaging in the conversation strictly for the sake of compliance, and not from a genuine desire to find the best resolution for both parties. Having managers trained in recognizing symptoms of depression and human resource departments equipped with information on how to best accommodate employees with depression may save costs by promoting more productive work hours in a better environment and avoiding litigation due to early resolution.<sup>168</sup>

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<sup>166</sup> 29 C.F.R. § 1630.2(o)(3) (2013). For a discussion of the confusion and unequal application of the EEOC regulations, see *supra* notes 148–56 and accompanying text.

<sup>167</sup> Hillary K. Valderrama, Comment, *Is the ADAAA a "Quick Fix" or Are We Out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 204 (2010). The Valderrama Comment goes beyond the scope of mental health disorders and proposes requiring the interactive process in every disability discrimination case.

<sup>168</sup> While depression can vary in severity and recurrence, one supported generalization is that the sooner it is addressed, the greater likelihood that treatment will

For example, reimagine Claudia Peterson, the hypothetical employee diagnosed with depression who continues to produce high-quality work but is seeking an extended lunch hour once a week to meet with her therapist. One of the hurdles she is facing is her supervisor's misconception that Claudia is merely seeking preferential treatment. However, if Claudia's company had invested in training its supervisors to confront their stigma toward employees with mental health disorders and replace internal bias with empathy while engaging in the interactive process, Claudia's supervisor may have been more amenable to Claudia seeking treatment. In an alternative scenario, what if Claudia feels uncomfortable requesting an accommodation and decides to forgo treatment? She can continue to physically attend work, but in time the untreated disorder may cause her work product to suffer, which in turn will not benefit her employer. If the disorder persists, by the time Claudia seeks treatment, therapy may not be enough and her employer may be even more reluctant to grant more burdensome accommodations, such as an extended time-off request. Thus, an open-communication, flexible approach at the early onset of depression with active employer engagement in the interactive process will allow Claudia to seek the treatment she needs while continuing to contribute valuable work to her employer.

One drawback to this proposal is that it may not go far enough to address the needs of employees with more severe depression in need of more serious accommodations. Another potential wrinkle is time and cost—determining whether required engagement in the interactive process is a misuse of company time if employers will only do the bare minimum to comply and finding who will pay for training managers and hiring departments. Could an employer claim that being forced to engage in the interactive process at the first sign of a potential disability creates an undue hardship and a litigious workforce? An additional potential negative repercussion would be overzealous policing of employees and an increased risk of bias and discrimination based on perceived disability. However, given the millions of dollars wasted on an underutilized workforce, it would appear that employers would benefit from starting the movement toward a more mental health friendly workplace. The ideal solution may be elusive as of yet, but starting with enforcing the EEOC regulations for employees with depression would be a step in the right direction towards protecting them from employment discrimination.

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be effective. See Kathryn M. Rost, *Improving Depression Treatment by Integrated Care*, J. OF MANAGED CARE PHARMACY S5, S6 (2004).

## CONCLUSION

As the spike in the national average of adults who reported an episode of clinical depression corresponded with the rise in unemployment demonstrates,<sup>169</sup> to many Americans, employment signifies more than a means with which to pay bills. The ability to go to work may equate with feelings of self-worth and a sense of belonging in society.

Yet, the ADA, as amended by the ADAAA, does not address the hurdles faced by employees with depression or the cost faced by employers. Although the ADAAA made it easier to categorize depression as a disability, it did not alter the requirements for establishing when an employee with depression is qualified for a position. It is this qualification requirement that presents a barrier to employment for employees with depression.

One possible solution would be to require employers to engage in the interactive process of finding a reasonable accommodation that would allow employees with depression to perform the essential functions of their jobs for employees with mental health disorders or other “invisible” disabilities. This minor alteration to the EEOC regulations would be most effective if the employers also invested in educating supervisors on confronting mental health stigmas and how to interact with employees that face mental health disorders. This modification should enable employers who have been subsidizing the financial effects of depression in the workplace<sup>170</sup> to receive the benefits of a healthy workforce, and employees with depression to receive the protection intended when the ADA was passed.

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<sup>169</sup> Hawkins, *supra* note 13, at 12.

<sup>170</sup> See Paul Hemp, *Presenteeism: At Work—But Out of It*, HARV. BUS. REV., Oct. 2004, available at <http://hbr.org/2004/10/presenteeism-at-work-but-out-of-it/ar/1> (defining presenteeism as the term that refers to times when the employee is physically present at work but not fully engaged).



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