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Challenges in Meeting the Disability Qualification under the ADA: The Tenth Circuit's Analysis in Mason v. Avaya Communications, Inc.

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CHALLENGES IN MEETING THE DISABILITY QUALIFICATION UNDER THE ADA: THE TENTH CIRCUIT'S ANALYSIS IN *MASON V. AVAYA COMMUNICATIONS, INC.*

I. INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA")[1] was enacted in part because of pervasive discrimination against persons with disabilities in this country,[2] resulting in segregation,[3] inferior status,[4] and a denied opportunity to "compete on an equal basis" with those not disabled.[5] A report conducted by the Task Force on the Rights and Empowerment of Americans with Disabilities concluded that this discrimination costs governments and businesses billions of dollars in "unnecessary expenditures resulting from the dependency and non-productivity of persons with disabilities."[6] Since the ADA was enacted, there has been significant litigation over what constitutes a disability and what accommodations must be made for those with disabilities.[7] In January 2004, the Tenth Circuit added to this debate when it held for the first time in *Mason v. Avaya Communications, Inc.*[8] that working from home is not a reasonable accommodation.[9] This ruling is not notable in itself, as a majority of circuits have reached the same conclusion. What makes this case unique is the manner in which the Tenth Circuit applied the law to the peculiar facts and circumstances of Mason's disability. *Avaya* demonstrates that the ADA provides employers great deference in determining what constitutes an "essential function" of a job. This deference allows employers to make sweeping assertions to support their view of what constitutes an essential function of the job without the court applying much scrutiny. As time progresses beyond the enactment of the

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1. 42 U.S.C. §§ 12101–12213 (1990).

2. ADA: PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES § 1.03 (2004) [hereinafter ADA PUBLIC ACCOMMODATIONS] (citing NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE—AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES WITH LEGISLATIVE RECOMMENDATIONS 2 (1986) [hereinafter NAT'L COUNCIL ON THE HANDICAPPED], *available at* http://www.ncd.gov/newsroom/publications/1986/toward.htm (last visited Mar. 30, 2005)).

3. ADA PUBLIC ACCOMMODATIONS, *supra* note 2, at 2.

4. *Id.* Inferior status includes "social interactions, economic well-being, vocational pursuits, and educational attainment." *Id.*

5. *Id.*

6. *Id.* Unnecessary expenditures result in part from "provisions of existing Social Security laws . . . [that] serve to discourage and penalize people with disabilities if they seek to become employed and selfsupporting." NAT'L COUNCIL ON THE HANDICAPPED, *supra* note 2, at viii-ix. At the time of the report, annual federal disability programs and benefits cost $60 billion dollars. *Id.* at viii.

7. *See* Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997 (2004) (citations omitted).

8. 357 F.3d 1114 (2004).

9. *Avaya*, 357 F.3d at 1123.

ADA, are the disabled more able to compete on an equal basis in the workplace or has litigation only added more roadblocks on the path to equality?

The purpose of this article is to explore the ADA and advocate that decisions like *Avaya* are not positive steps in the direction of realizing the policy that drove the enactment of the ADA. Section II is the backdrop to the discussion. Subsection A discusses the ADA and what Congress hoped to achieve when it enacted the Act. Subsection B discusses the confusion about the ADA and how it differs from more traditional civil rights legislation such as affirmative action. Section III discusses the *Avaya* case in detail. Section IV is an analysis of the *Avaya* decision. Specifically, subsection A discusses the court's ruling that physical attendance in the workplace is an essential job function. Subsection B discusses inconsistent scrutiny applied to Avaya's and Mason's arguments, and the court's zealous affirmation of Avaya's factual allegations while derisively crushing Mason's attempts to advocate her position. Subsection C discusses future directions and advocates that the Tenth Circuit, and other circuits, should consider taking a more permissive approach to the merits of valid ADA claims. Section V concludes the discussion with the argument that the *Avaya* holding is consistent with the majority of circuits, but it is not positive step in realizing the legislative intent behind the ADA.

II. BACKGROUND

The ADA is an anti-discrimination statute like Title VII, but it does not offer a class-based remedy like its antecedents. Instead, it relies on a case-specific analysis to determine whether an employer can make a reasonable accommodation for a disabled employee that will not create an undue burden on the employer.

A. Americans with Disabilities Act

The ADA is a "comprehensive federal antidiscrimination statute"[10] enacted in 1990 to combat widespread discrimination against the disabled[11] in this country.[12] The ADA, like its federal antidiscrimination

10. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2 (1996).

11. Under ADA regulations, "disability" as applied to an individual is defined as: "(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630(2)(g) (2004). Exceptions to this definition are found in 29 C.F.R. § 1630.3 (2004), which includes those engaged in the illegal use of drugs, transvestites, kleptomania, compulsive gambling, psychoactive substance use disorders, and others. Under 29 C.F.R. § 1630.2(m) (2004), a "[q]ualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." This definition is also subject to the exceptions listed in § 1630.3 (2004).

antecedents, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, requires employers to ignore disabilities in the same way that they must ignore sex, race, religion, or age.[13] This requirement, referred to as the "sameness model of equality," means that it is based on a traditional model of equality where the protected class (the disabled) must be treated exactly the same as other employees.[14] Under the sameness model, intentional discrimination and the "application of neutral rules that adversely affect the protected class"[15] are prohibited. Unlike its antecedents, however, the ADA also requires employers to provide "reasonable accommodations to disabled employees who request them."[16] Commentators call this the "difference model of equality" and it stems from the realization that the sameness model of equality "is not enough to guarantee equality to all individuals with disabilities because sometimes those disabilities . . . can negatively affect job performance unless they are accommodated."[17] Upon request, an employer must consider a disability when accommodating the employee and treat the disabled employee differently.[18] The sameness and difference models can be distinguished in that blacks, women, and older workers can complain about discrimination under the sameness model, but only the disabled can "insist upon discrimination in their favor" under the difference model.[19]

The distinction between the two models can be best explained through a hypothetical.[20] Suppose that a blind employee with a guide dog works for Company A. Under the *sameness* model, Company A cannot discriminate against the employee for raises or promotions on the grounds that the employee is blind. Likewise, under the sameness model, Company A cannot require the blind employee to adhere to a neutral policy, such as "no dogs allowed at the workplace," when that policy would discriminate against the blind employee. Under the *difference* model, if the blind employee requests that Company A reasonably accommodate for her need to care for her dog during working hours, assuming she is qualified under the ADA, the company must allow her to do this if it would not create an undue hardship on them.

As this example shows, what constitutes a reasonable accommodation depends on the specific circumstances of the employee, the em-

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12. NAT'L COUNCIL ON THE HANDICAPPED, *supra* note 2, at 20.
13. *Id.* at 27.
14. *See, e.g.*, Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 952, 954 (2004); Karlan & Rutherglen, *supra* note 10, at 10.
15. Ball, *supra* note 14, at 957.
16. Karlan & Rutherglen, *supra* note 10, at 3.
17. Ball, *supra* note 14, at 955.
18. *Id.*
19. Karlan & Rutherglen, *supra* note 10, at 3.
20. This is an expansion of a similar analogy by Karlan & Rutherglen. *See id.* at 10.

ployer, and the working environment. While a blind employee with guide dog might need an accommodation so that she could care for her dog during the day, an employee in a wheelchair might need a ramp to enter the work building. Unlike traditional antidiscrimination statutes, such as Title VII, that apply to classes of individuals,[21] under the ADA, each employee with a unique disability requires a unique reasonable accommodation from the employer.[22] What constitutes a reasonable accommodation under the ADA is unique to the circumstances because "to get beyond [an individual's disability], we must first take account of [that disability]."[23] Thus, ADA cases are analyzed on a case-by-case basis.[24]

Similarly, the facts of each case determine which accommodations constitute an undue hardship, creating burdens for both the disabled employee and the employer.[25] The disabled employee bears the burden to show that reasonable accommodation is possible because the employee would have a better understanding than the employer of what would be needed.[26] When this accommodation is identified, the burden shifts to the employer who must show that the accommodation would result in an undue hardship because the employer has a better understanding of what meeting this accommodation would cost.[27]

When analyzing the facts in an ADA dispute, there are four material factors that must be considered: (1) the specific disability; (2) the essential job functions for the disabled employee; (3) the possible accommodations the employer could make; and, (4) the burden of those accommodations on the employer.[28] Essential job functions and burden of accommodations are the commonly contested issues because the other two options are effectively static.[29] Essential job functions can be restructured to account for the disability, and thus the critical issue is whether "job restructuring causes undue hardship to the employer."[30]

B. *Affirmative Action and Reasonable Accommodation*

Reasonable accommodation under the ADA is often confused with its Title VII brethren such as affirmative action.[31] While the two share

21. *See* Karlan & Rutherglen, *supra* note 10, at 2; Ball, *supra* note 14, at 974.

22. *See* Ball, *supra* note 14, at 974.

23. Karlan & Rutherglen, *supra* note 10, at 10 (quoting Justice Blackmun in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dictum)).

24. *See, e.g.*, *Avaya*, 357 F.3d at 1124 ("The Supreme Court has generally eschewed per se rules under the ADA . . . [and this case] must likewise be made on a case-by-case basis.") (citing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999)).

25. Karlan & Rutherglen, *supra* note 10, at 12.

26. *Id.* at 12–13.

27. *Id.*

28. *Id.* at 13.

29. *See id.* For example, if an employee were blind, this would not generally be a fact in dispute. Likewise, the job responsibilities, work space, and other relevant factors would determine the accommodations an employer could make to enable the employee to function effectively.

30. *Id.* at 14.

31. *See, e.g.*, Ball, *supra* note 14, at 960.

similarities, they are also vastly different.[32] Indeed, affirmative action and reasonable accommodation are terms that have been used interchangeably by the judiciary, prompting some commentators to distinguish between the two.[33] While they are similar in that both provide special treatment to classes of individuals,[34] there are several key distinctions. While affirmative action is a form of remedy for *past* wrongs, reasonable accommodation applies to *current or future* discrimination as a form of compensation for a handicap[35] that enables the disabled to compete and perform equally with their nondisabled colleagues and it ensures that they will remain on equal footing in the future.[36] Affirmative action applies to a class of individuals, regardless of their circumstances, while reasonable accommodation is a "highly individualized form of analysis that looks to the particular interaction . . . between an employee's disability and the essential functions of a job."[37] Affirmative action only requires a person to be a member of a protected class for eligibility, while reasonable accommodation requires the employee to show membership in a class (disabled) and that "the employer's policies constitute particular barriers . . . that interfere with the ability of that particular employee to perform the essential functions of the job."[38] In other words, class membership is necessary, but not sufficient, to meet the eligibility requirement under reasonable accommodation; thus, membership in the disabled class does not, by itself, constitute grounds for preferential treatment under ADA.[39]

III. *MASON V. AVAYA COMMUNICATIONS, INC.*[40]

A. *Facts*

Diane Mason worked for the United States Post Office in Edmund, Oklahoma.[41] After witnessing the murder of several of her co-employees at the post office in 1986,[42] she sought counseling and was diagnosed with post traumatic stress disorder ("PTSD").[43] She changed jobs in

32. *Id.*
33. *See id.* at 973; Karlan & Rutherglen, *supra* note 10, at 14.
34. *See* Karlan & Rutherglen, *supra* note 10, at 14.
35. Professor Ball uses the term "substantive liability" to characterize an employer's forward-looking obligation to compensate for a handicap. *See* Ball, *supra* note 14, at 953, 969, 973, 977.
36. *Id.* at 960, 973. *See also* Hubbard, *supra* note 7, at 1039 ("the ADA was the promise of 'the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.'") (quoting 42 U.S.C. § 12101)).
37. Ball, *supra* note 14, at 974.
38. *Id.* at 975.
39. *Id.*
40. Mason v. Avaya Communications, Inc., 357 F.3d 1114 (2004).
41. *Avaya*, 357 F.3d at 1116.
42. *Id.* at 1116–17. The incident on August 20, 1986 was coined the "Edmund Post Office massacre." *Id. See, e.g.*, Leonard Saffir, *'Terrified For My Life' Says Post Office Massacre Survivor*, LAKE WORTH HERALD, Mar. 28, 2002 (eyewitness account of the massacre and her subsequent challenges with PTSD), *available at* http://www.postalwatch.org/2002_01_17_lake_worth_postal_police.htm#Terrified (last visited Apr. 14, 2005).
43. *Avaya*, 357 F.3d at 1117.

1998 because working for the post office aggravated her disorder.[44] Avaya hired her as a service coordinator, a position where she scheduled service appointments for field technicians, monitored the service ticket queue, and communicated with technicians by "computer, telephone, and fax."[45] From January 1998 to March 2000, her work performance was satisfactory and without incident.[46] On March 21, 2000, her co-employee, Kevin Lunsford, pulled a knife on another employee during a verbal confrontation and was given a one-week suspension.[47] Mason did not witness the altercation, but she heard about it from other employees.[48] She was also told "that Lunsford had previously threatened to 'go postal,' retained a cache of weapons, and compiled a 'hit list.'"[49] Avaya informed employees that it had conducted a "fitness-for-duty examination on Lunsford and concluded that he could safely return to the workforce."[50] When Lunsford returned to work on March 28, 2000, "Mason called in sick because she was physically and emotionally unable to work with Lunsford . . . ."[51] Doctors confirmed that she suffered a relapse of PTSD.[52] Mason told Avaya that she could come back to work, but not in the same building as Lunsford while he was working.[53] Avaya placed her on short-term disability,[54] which lasted a year.[55]

In June 2000, "Mason requested Avaya accommodate her disorder by (1) relocating Lunsford, (2) allowing Mason to work at another Avaya facility in Oklahoma City, or (3) allowing her to work out of her home."[56] After review, Avaya concluded that it could not relocate Lunsford, it could not allow Mason to work out of her home because "physical attendance at the administration center was a function of a service coordinator's job," and it recommended that Mason inquire about other service coordinator positions through its transfer program.[57] Mason looked into the transfer program; the only available service coordinator positions in Oklahoma City were in the facility where she worked, and she did not want to move from Oklahoma.[58] After a year on short-term disability, Avaya denied Mason's request for long-term disability benefits and fired her in April 2001 because she did not return to work.[59]

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 1118.
56. *Id.* at 1117.
57. *Id.* at 1117–18.
58. *Id.* at 1118.
59. *Id.*

B. Background

The ADA prohibits discrimination against a qualified individual on the basis of a disability.[60] Discrimination is defined as "'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee[.]'"[61] To be a qualified individual, the employee must make a prima facie case for discrimination by showing: (1) the employee was "disabled within the meaning of the ADA"; (2) the employee is "qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired"; and, (3) the employee was discriminated against because of the disability.[62] A disability means that an individual has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, . . . a record of such an impairment, . . . or being regarded as having such an impairment."[63]

The employee "bears the burden of showing she is able to perform the essential functions of her job."[64] Evidence of whether a job function is essential includes, but is not limited to:[65]

> (i) the employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; and . . . (vi) the work experience of past incumbents in the job . . . .[66]

Consideration is given to the employer's judgment regarding which job functions are essential[67] and the court will not second guess this judgment when its description is "job-related, uniformly enforced, and consistent with business necessity"[68] or requires "the employer to lower company standards."[69]

Mason filed a discrimination claim against Avaya with the Equal Employment Opportunity Commission ("EEOC"), which determined that there was "reasonable cause to believe Avaya violated the ADA."[70] Mason brought an action under the ADA, 42 U.S.C. §§ 12101-12213, in

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60. *Id.* at 1118 (quoting Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2004)).
61. *Avaya*, 357 F.3d at 1118 (quoting 42 U.S.C. § 12112(b)(5)(A)).
62. *Id.* (citing 42 U.S.C. § 12111(8), which defines a "qualified individual with a disability").
63. 42 U.S.C. § 12102(2) (2004).
64. *Avaya*, 357 F.3d at 1119.
65. 29 C.F.R. § 1630.2(n)(3) (2004).
66. *Id.* The *Avaya* court considered several of these factors in its analysis. *Avaya*, 357 F.3d at 1120.
67. *Id.* at 1119 (quoting 42 U.S.C. § 12111(8)).
68. *Id.* (citing Davidson v. Am. Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2003)).
69. *Id.* (citing Tate v. Farmland Indus., Inc., 268 F.3d 989, 993 (10th Cir. 2001)).
70. *Id.* at 1118.

the District Court for the Western District of Oklahoma against Avaya, alleging that Avaya violated the ADA by failing to "accommodate her post traumatic stress disorder by . . . refusing to allow her to work from home" and terminating her.[71] The District Court granted Avaya's motion for summary judgment because Mason failed to prove she was a qualified individual with a disability under the ADA.[72] Mason followed with a direct appeal to the Tenth Circuit.[73]

C. The Tenth Circuit's Analysis

Since Avaya conceded that Mason was disabled, Mason met the first element of an ADA prima facie case.[74] The dispute focused on the second element, whether Mason was "qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired."[75] To show qualification, Mason must meet at least one prong of a two-prong analysis: (1) whether a disabled person "can perform the essential functions of the job," and if not, (2) whether the employer can make any reasonable accommodations to enable the employee to perform the essential functions of the job.[76] Mason could only pursue the second prong of this test because she could not perform the essential functions of her job while working with Lunsford; his presence was the trigger of her disability. Accordingly, Mason argued she could perform the essential functions of the coordinator position, but she required a reasonable accommodation because her disability prevented her from working with Lunsford.[77]

Due to her unique disability, how it is triggered, and the circumstances of her work situation, Mason had only one viable legal argument to meet her burden: she had to convince the court that working from home was a reasonable accommodation. First, Avaya would not fire Lunsford[78] and they were not legally required to transfer him under the ADA.[79] Second, she did not want to move from Oklahoma City,[80] Avaya did not have any open coordinator positions in other service centers in the city, and they were not legally required to open a new position for her

71. *Id.* at 1116.
72. *Id.*
73. *Id.*
74. *Id.* at 1118.
75. *Id.*
76. *Id.* (citing *Davidson*, 337 F.3d at 1190; 42 U.S.C. § 12111(8)).
77. *Id.* at 1119.
78. *Id.* at 1117.
79. *Id.* at 1119 (citing Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995), which stated that an accommodation that adversely affects other employees is not required under the ADA).
80. *Id.* The district court held this to be "unreasonable," yet the Supreme rule statement does not address this issue.

under the ADA.[81] It is implied that there was no flexibility in shifting her work times such that she could work in the same facility, but not at the same time, as Lunsford.[82] Thus, Mason only had one other option available to her: convince the court that working from home was a reasonable accommodation that would enable her to perform the essential functions of the service coordinator position.[83]

The Tenth Circuit rejected Mason's argument that physical attendance at the Avaya service center was not an "essential function of the service coordinator position because she can perform all of the essential functions of the job at home using a computer, telephone, and fax machine."[84] Instead, the Tenth Circuit determined for the first time that physical attendance is an essential function of a job when it ruled that Mason's presence at Avaya's work center is an essential function of the service coordinator position because the position requires supervision and teamwork.[85]

In making this determination, the court first relied on the ADA's requirement that the court consider Avaya's judgment of what the essential functions of the coordinator position entailed.[86] Avaya asserted that Mason's physical presence at the service center was an essential function of her job because the "low-level hourly position is administrative in nature and requires supervision."[87] If Mason worked from home, Avaya alleged that it would know that she was logged into her computer, but it could not ascertain her computer activities.[88] Likewise, the court ruled that Avaya supplied "significant evidence demonstrating that teamwork was an essential function of the service coordinator position" when it noted that coordinators "typically assist and cover for one another in a job."[89] To support their arguments, Avaya presented evidence to the district

81. *Id.* (citing Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174-75 (10th Cir. 1995), which held that a reassignment to a vacant position is a possible acceptable accommodation, but it is not reasonable to require the company to create a new position).

82. *Id.* This is implied by the lack of discussion on the topic of flex time or changing shifts (e.g., move from day shift to night shift) as a means for Mason to avoid working with Lunsford.

83. *Id.* While the court stated that it had to conduct the two-prong qualification analysis, it was really only determining whether Mason's request to work from home was a reasonable accommodation because she could not work at the service center and her other options had already been whittled away through interim analysis. Further, as both prongs require "essential function" of a position as a necessary condition, their analysis hung on what they determined was an essential function. Under the Americans with Disabilities Act, "consideration shall be given to the employer's judgment." 42 U.S.C. § 12111(8) (2004). Since the court conceded this issue with high deference to Avaya through a minimal showing, the court effectively rubber-stamped Avaya's determination. *See id.* at 1119 ("We will not second guess the employer's judgment . . . [or] require the employer to lower company standards." (citations omitted)).

84. *Avaya*, 357 F.3d at 1120.

85. *See id.* at 1119, 1122.

86. *Id.* at 1119.

87. *Id.* at 1120.

88. *Id.* at 1120–21.

89. *Id.* at 1121.

court of four of the seven evidentiary factors identified by the EEOC in its regulations.[90] Specifically:

> (1) . . . attendance at the administration center, supervision, and teamwork as essential functions of the service coordinator position, (2) all of its service coordinators work their entire shift at the administration centers, (3) it has never permitted a service coordinator to work anywhere other than an administration center, and (4) service coordinators cannot be adequately trained or supervised if they are not at the administration center.[91]

The Tenth Circuit held that the district court properly held that "Mason's physical attendance at the administrative center was an essential function of the service coordinator position because [it] required supervision and teamwork."[92]

Mason did not persuade the court that the essential functions of the coordinator position do not include supervision and teamwork.[93] Mason relied on firsthand experience and she noted that the job description does not mention supervision or teamwork as a duty or position responsibility.[94] The court dismissed her firsthand experience as "self-serving testimony"[95] and rejected her allegations that any of the fourteen coordinators can cover for one another, or that she could cover for any of them as long as she had a telephone, computer, and fax machine at home.[96]

The court pointed to a Seventh Circuit holding that "[t]he mere fact that others could do [Mason's] work does not show that the work is non-essential"[97] and it placed little credence to Mason's "bald assertion" that technology would enable her to cover her employees[98] because it was "in no position to second guess Avaya's desire to directly supervise its lower level employees."[99]

The court determined that an at-home accommodation, under the facts in this case, was facially unreasonable because it would "eliminate

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90. *Id.* at 1120 (referring to 29 C.F.R. § 1630.2(n)(3) (2004)). Under section 1630.2(n)(3) (2004) code section, the seven evidentiary factors used to determine whether a job function is essential include, but are not limited to:
(i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

91. *Avaya*, 357 F.3d at 1120.

92. *Id.* at 1122.

93. *Id.* at 1121–22.

94. *Id.* at 1120.

95. *Id.* at 1121–22.

96. *Id.* at 1121.

97. *Id.* (citing Basith v. Cook County, 241 F.3d 919, 929 (7th Cir. 2001)).

98. *Id.* at 1121 n.2.

99. *Id.* at 1121.

or change the essential functions of the service coordinator position."[100] In reaching this conclusion, the court cited cases in other circuits that held that an "employee's request for an at-home accommodation is unreasonable under the ADA."[101] Here, as noted, the court held that because the coordinator position required supervision and teamwork, working in the Avaya service center was an essential function of the job, and thus an employee cannot "*effectively perform all work-related duties at home*."[102] As a result, "Mason's request for an at-home accommodation is, as a matter of law, unreasonable."[103] The court concluded that Mason was not a "qualified individual with a disability under the ADA because she could not perform the essential function of the service coordinator position with or without a reasonable accommodation . . . [and thus she] failed to establish a prima facie case of disability discrimination under the ADA."[104]

In reaching this conclusion, the court noted, and dismissed, a conflicting opinion in the Ninth Circuit[105] in *Humphrey v. Memorial Hospitals. Association*,[106] which held that "[w]orking at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."[107] The court distinguished *Humphrey* as a case involving "unusual" or "extraordinary" facts because the plaintiff, Humphrey, was a medical transcriptionist whose employer permitted some of its other transcriptionists to work from home.[108] The Fourth Circuit asserted a similar point in *Tyndall v. National Education Centers*[109] that it is an unusual case "where an employee can *effectively perform all work-related duties at-home*."[110] The permissive attitude on the part of Humphrey's employer differed vastly from that of Avaya in this case.

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100. *Id.* at 1124.

101. *Id.* at 1123 (citing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995); Kvorjak v. Maine, 259 F.3d 48, 51, 57–58 (1st Cir. 2001); Hypes v. First Commerce Corp., 134 F.3d 721, 726–27 (5th Cir. 1998); Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) (quoting *Vande Zande*, 44 F.3d at 544)).

102. *Avaya*, 357 F.3d at 1124 (citing Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 214 (4th Cir. 1994) (this is a synopsis of the *Avaya* court's reasoning) (italics in original)).

103. *Id.* at 1124.

104. *Id.* at 1125.

105. *Id.* at 1123–24.

106. Humphrey v. Mem'l Hosps. Assoc., 239 F.3d 1128 (9th Cir. 2001).

107. *Humphrey*, 239 F.3d at 1136. The Ninth Circuit compared *Vande Zande*'s restrictive rule (an employer is not required to allow disabled workers to work at home except in extraordinary circumstances) with the very permissive rule in Langon v. Dep't of Health and Human Servs., 959 F.2d 1053, 1060–61 (D.C. Cir. 1992) ("an employer must consider requested accommodation of working at home"), and chose instead to "follow the approach taken by the EEOC in its Enforcement Guidance." *Humphrey*, 239 F.3d at 1137 n.15.

108. *Avaya*, 357 F.3d at 1123-24.

109. 31 F.3d 209 (4th Cir. 1994).

110. *Avaya*, 357 F.3d at 1124 (quoting *Tyndall*, 31 F.3d at 214) (italics in original).

IV. ANALYSIS

The Tenth Circuit did not conduct a fact-specific analysis to determine that physical attendance is an essential job function. Instead, it adopted this ruling from cases in other circuits whose facts materially differed from the facts in this case.[111] Ironically, it dismissed a ruling from the Ninth Circuit that would have supported a fact-based analysis on grounds that the facts in that case were distinguishable. To add insult, the court applied inconsistent scrutiny to evidence supplied by the litigants in Avaya's favor and summarily dismissed Mason's only opportunity for legal redress.

A. Physical Attendance in the Workplace as an Essential Job Function

The Tenth Circuit held that physical attendance in the workplace is an essential function of most jobs.[112] To support this holding, the court cites cases in several circuits that came to the same conclusion,[113] and placed particular emphasis on *Tyndall*,[114] *Gantt*,[115] and *Hypes*.[116] The court's reliance on these prominently cited cases is misplaced, however, because ADA cases require a fact-specific analysis and the facts in *Avaya* can be distinguished from these cases.

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111. *See infra* notes 113–15.

112. Mason v. Avaya Communications, Inc., 357 F.3d 1114 (2004).

113. *See Avaya*, 357 F.3d at 1124. This is the rule in most circuits. *See* Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998); Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209 at 213; Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995); Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998) (citing Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (quoting Carr v. Reno, 306 U.S. App. D.C. 217, 23 F.3d 525, 530 (D.C. Cir. 1994)); Law v. United States Postal Serv., 852 F.2d 1278, 1279–80 (Fed. Cir. 1988); Walders v. Garrett, 765 F. Supp. 303, 309–10 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990), *aff'd*, 928 F.2d 396 (3d Cir. 1991)).

114. *Tyndall*, 31 F.3d at 209. In *Tyndall*, the plaintiff, Mary Tyndall, suffered from lupus erythematosus, an auto-immune disorder. *Id.* at 211. Due to her disorder and other issues in her life, Tyndall began missing work frequently. *Id.* For example, in a six-month stretch, she missed nineteen days on account of helping a friend with a legal matter, her son's surgery, and her disorder. *Id.* When she requested a leave of absence to help her son with his post-operative problems, she was encouraged to resign her teaching position because the school administration was concerned that her disability and the other issues in her life would disrupt the operations of the school. *Id.* at 211–12.

115. *Gantt*, 143 F.3d at 1042. In *Gantt*, the plaintiff, Una Gantt, hurt her shoulder while working at her job. *Id.* at 1044. After several months without improvement, her doctor told her she required rotator cuff surgery. *Id.* She informed her employer that she would be out of work between six to twelve months. *Id.* After a little over a year on leave, she informed her employer that her doctor had not released her for work. *Id.* She was terminated because her employer's absence policy permitted a maximum of one year leave of absence. *Id.* at 1045. Two weeks after she was terminated, her doctor released her to go back to work with some restrictions. *Id.* at 1045. Gantt did not request a reasonable accommodation from her employer before or after her doctor released her. *Id.* at 1046-47.

116. *Hypes*, 134 F.3d at 721. In *Hypes*, the plaintiff, David Hypes, suffered from chronic obstructive lung disease, which he alleged made it difficult to get "started in the morning." *Id.* at 724–25. Hypes was chronically late and absent from work and he failed to supply medical documentation explaining why he was tardy and absent. *Id.* at 725. Hypes' job required him to conduct his work in his employer's office because he handled confidential loan documents. *Id.* at 726. Thus, working from home was not a feasible option. *See id.*

First, the court, quoting *Tyndall*, stated that "the employee 'must be willing to demonstrate [that she can satisfactorily perform the essential functions of her position] . . . by coming to work on a regular basis.'"[117] Despite the *Avaya* court's acknowledgement that it reviewed the district court's grant of summary judgment de novo, it is evident that Mason did not have a problem attending work regularly because she had the job for two years before Lunsford's actions, her job performance was satisfactory, and there was no mention that she had an attendance problem prior to the triggering of her disability. This is a very different situation from Tyndall who was frequently tardy or absent from work on account of her disability, her son's surgery, and because she helped a friend with a legal matter.[118] The *Tyndall* rule does not apply to the facts prior to the triggering of Mason's disability, and thus is not the best authority in light of the facts.

Second, the circuit court's reliance on *Gantt* is misplaced for similar reasons.[119] In *Gantt*, the appellee did not request telecommuting as a reasonable accommodation; rather, she was off work for one year with her disability, she failed to request *any* accommodation under the ADA, and she was fired because the company could not foresee when she would return.[120] *Avaya* and *Gantt* are vastly different regarding the material facts as to what is requested. Much like its reliance on the *Tyndall* holding, the Tenth Circuit blindly relies on the *Gantt* holding without consideration for the underlying facts in the case.

Third, the court's application of *Hypes* is misguided.[121] *Hypes* can be distinguished from this case in two ways: Hypes' job responsibilities required him to be physically present at the office because he handled confidential loan documents that could not be removed from the office, and he was chronically late or absent from work despite the requirement that he be physically present.[122]

Here, Mason did not handle confidential documents or other tasks that objectively need to be handled in the office. Rather, she fielded phone calls from customers, scheduled appointments, logged repair tickets, monitored the repair queue, and communicated with technicians by "computer, telephone, and fax."[123] These tasks do not appear to be facially confidential, and neither the case facts nor analysis mentioned that Mason's tasks, the information she accessed, or the documents she processed, were confidential in nature. In contrast, Hypes was required to be physically present in the office because he had to process documents that

117. *Avaya*, 357 F.3d at 1119–20 (citing *Tyndall*, 31 F.3d at 213).
118. *See supra* note 114.
119. *Avaya*, 357 F.3d at 1119.
120. *Gantt*, 143 F.3d at 1047.
121. *Avaya*, 357 F.3d at 1119.
122. *See Hypes*, 134 F.3d at 726.
123. *See Avaya*, 357 F.3d at 1117.

were confidential and thus could not be taken out of the office.[124] There is no similar constraint in Mason's case. Instead, the *Avaya* court relied on more subjectively drawn conclusions that the coordinators required teamwork and supervision.[125]

Hypes' circumstances can also be distinguished because he was chronically late or absent from work due to his disability,[126] but Mason was capable of working without incident as long as Lunsford was not in the building.[127] While Hypes could have conceivably woke up earlier to arrive at work on time, Mason had no choice regarding working at the Avaya service center. Her only viable options were (1) move to another city if she wanted to continue working for Avaya, (2) quit her job, or (3) work from home.

The application of this rule and the cited case authority imply that similarity of facts between the instant case and cases in other circuits was not dispositive to the Tenth Circuit. Instead, the court was swayed by Avaya's allegation that the position required teamwork and supervision—goals that could only be met on-site at Avaya's facility—and thus that physical attendance is an essential function of the job. Therefore, even when there is no dispute that the employee is disabled, the second prong of a prima facie showing of discrimination under the ADA, that the employee be qualified to perform the essential functions of the job, can be easily trumped by any employer if they make the argument that physical attendance is an essential function of the job. The court did not need to invoke such a rigid anti-ADA plaintiff approach; merely ruling that working from home *could be* a reasonable accommodation does not bind the court to making this determination as a conclusion of law. The *Avaya* court, however, made its objectivity clear when it stated, "[w]e will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity."[128]

B. Inconsistent Scrutiny

The Tenth Circuit applied inconsistent scrutiny to allegations made by Mason and Avaya, to Mason's detriment. Specifically, the court gives deference to Avaya regarding evidence supplied to the district court in accordance with EEOC regulations.

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124. *See Hypes*, 134 F.3d at 726.

125. *See Avaya*, 357 F.3d at 1120.

126. *See Hypes*, 134 F.3d at 725.

127. *See Avaya*, 357 F.3d at 1117 ("From January 1998 until March 2000, Mason worked for Avaya without incident. Her performance was satisfactory . . . . [Mason] could not work in the same building as Lunsford; however, Mason felt she could return to work in Lunsford's absence.").

128. *Id.* at 1119 (citing *Davidson*, 337 F.3d at 1191).

The EEOC has set forth seven types of evidence that can demonstrate how a job function may be considered "essential."[129] Avaya presented four pieces of evidence in conformity with § 1630.2(n), while Mason relied on firsthand experience and observed that the job description, one of the seven factors, did not support Avaya's allegations.[130] The court listed the four factors in which Avaya presented evidence to the district court in line with EEOC regulations. The first factor is "[Avaya] considers attendance at the administration center, supervision, and teamwork as essential functions of the service coordinator position . . . ."[131] While the court does not mention the form of this evidence, it states that the job description does not mention this factor, and thus is not based on an objective specification. The fourth factor, that "service coordinators cannot be adequately trained or supervised if they are not at the administration center,"[132] like the first factor, is an allegation. These are not objectively-based specifications; they are allegations made in support of Avaya's argument, and the court finds them compelling. In comparison, the court interprets Mason's evidence, which is based on firsthand experience after two years on the job, as "self-serving."[133] This reasoning begs the question how Avaya's showing is not "self-serving," especially since it is made in an adversarial litigation setting. Further, it answered Mason's argument that the job description did not support Avaya's allegations with the comment that:

> Avaya probably did not even consider informing its employees that they were actually required to show up at the workplace and work with co-employees under supervision when it drafted the service coordinator job description . . . . Consequently, we find the omission of physical attendance, teamwork, and supervision from the job description entirely unremarkable.[134]

This backhanded dicta supports the argument that the Tenth Circuit will grant deference to an employer who makes minimally substantiated allegations while granting an employee with a valid and undisputed factual point that directly applies to an EEOC factor, derision.

Additionally, the other factors Avaya brought forth are equally uncompelling, even though they are listed by the EEOC as reasons why a job function might be essential.[135] For example, factors two and three, that all coordinators work at their service centers and Avaya has never required them to work anywhere else, only reflect that Avaya has not placed its coordinators in other work locations; it does not demonstrate

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129. 29 C.F.R. § 1630.2(n)(3) (2004). *See supra* Section III(C).

130. *Avaya*, 357 F.3d at 1120.

131. *Id.*

132. *Id.*

133. *See id.* at 1121.

134. *Id.* at 1122.

135. *See* 29 C.F.R. § 1630.2(n)(3) (2004).

that it could not reasonably accommodate the unique employee who, like Mason, cannot physically work at the facility due to factors beyond her control.

C. Future Directions

In comparison to the *Avaya* analysis and holding, the Ninth Circuit took a vastly different approach in *Humphrey* that embraces the policy behind the ADA. In *Humphrey*, Carolyn Humphrey was a medical transcriptionist whose work performance exceeded her employer's "standards for speed, accuracy, and productivity."[136] She developed an obsessive compulsive disorder, she began to arrive late to work or missing work,[137] and as a result, she received warnings from her employer, Memorial Hospitals Association ("MHA").[138] As a reasonable accommodation, Humphrey dismissed as infeasible having family or a friend drive her to work, but she agreed to a flex-time arrangement.[139] After several months, Humphrey recognized that the flex-time arrangement was not working and asked to work from home as a reasonable accommodation.[140] MHA denied the request on grounds that employees who have received job performance warnings are not eligible for at-home work.[141] Even though Humphrey was given a stellar performance evaluation, she was fired less than a month later due to the problems caused by her disability.[142] *Humphrey* differed from *Avaya* in one key aspect: the Ninth Circuit's position that "attendance is not per se an essential function of all jobs,"[143] and therefore "an employer must consider requested accommodation of working at home."[144]

Much like Avaya's argument that physical attendance is an essential job function, MHA argued in *Humphrey* that she was not "qualified under the ADA because regular and predictable attendance is an essential function of the [transcriptionist] position."[145] Unlike Avaya, however, MHA supported their argument with clear evidence that Humphrey's unpredictability had a direct impact on her effectiveness in the workplace because she could not attend training sessions scheduled during certain days of the week.[146] Further, Humphrey concedes that "predictable job

136. *Humphrey*, 239 F.3d at 1130.
137. *Id.* at 1130–31.
138. *Id.* at 1130.
139. *Id.* at 1131. There was dispute whether a third option was presented. MHA alleges it offered Humphrey a leave of absence; Humphrey alleges MHA asked her if she would like to "continue working." *Id.* The Ninth Circuit noted that this factual point was not material to their analysis. *Id.*
140. *Id.* at 1131–32.
141. *Id.* at 1132.
142. *Id.* Her supervisor stated that outside of the problems caused by her disability, she was a model employee. Nevertheless, she received negative ratings due to these problems. *Id.*
143. *Id.* at 1135 n.11.
144. *Id.* at 1136–37 n.15 (citing *Langon*, 959 F.2d at 1060-61).
145. *Id.* at 1135.
146. *Id.*

performance is an essential function of the MHA medical transcriptionist position."[147] Despite these facts supporting MHA's case, the Ninth Circuit did not end its analysis. Instead, it stated that "attendance is not per se an essential function of all jobs"[148] and proceeded to analyze the reasonable accommodations Humphrey argued MHA could have made so that she could perform the essential functions of her job.[149]

In comparison, the *Avaya* court stated that it was required under the ADA to consider what the employer asserts are essential job functions. Like MHA in *Humphrey*, Avaya argued that attendence was an essential job function. Unlike the Ninth Circuit in *Humphrey*, however, the Tenth Circuit ruled that this inquiry was "not intended to second guess the employer . . ." and summarily ended its analysis on this disputed fact.[150] The effect was a rubber stamp on Avaya's allegations without any form of objective analysis.

This approach does not necessarily support the Tenth Circuit's statement in *Avaya* that is the *facts* that separates *Humphrey* from *Avaya*;[151] rather, it demonstrates that the two courts are vastly different in how they approach their respective *analyses*. Where the Tenth Circuit in *Avaya* states "[w]e will not second guess the employer's judgment,"[152] and cites *Vande Zande*'s holding that "an employer is not required to allow disabled workers to work at home except in extraordinary circumstances,"[153] the Ninth Circuit in *Humphrey* shifts the focus of inquiry because "an employer must consider requested accommodation of working at home"[154] and they "see no reason not to follow the approach taken by the EEOC in its Enforcement Guidance."[155] In other words, the Tenth Circuit applies a very restrictive scrutiny toward an employee's claim while the Ninth Circuit is far more permissive in its approach.

V. CONCLUSION

In *Mason v. Avaya Communications, Inc.*, the Tenth Circuit held that physical attendance in the workplace is an essential function of a job, and that working from home is not a reasonable accommodation under the ADA. The court relies on the statutes and valid case law for its factual analysis and legal conclusion, and its holding corresponds with those of most other circuits. However, this case demonstrates how a

147. *Humphrey*, 239 F.3d at 1135 n.11.
148. *Id. See also, id.* at 1136–37 n.15 (citing *Langon*, 959 F.2d at 1060–61).
149. *Id.* at 1135.
150. *Avaya*, 357 F.3d at 1119.
151. *See supra* note 110 (citing *Avaya*, 357 F.3d at 1124) (quoting *Tyndall* at 214).
152. *Avaya*, 357 F.3d at 1119.
153. *Humphrey*, 239 F.3d at 1136–37 n.15 (paraphrasing the holding in *Vande Zande*, 44 F.3d at 544–45). *See Avaya*, 357 F.3d at 1123 ("Many of our sister circuits have similarly held an employee's request for an at-home accommodation is unreasonable under the ADA.").
154. *Humphrey*, 239 F.3d at 1136–37 n.15 (citing *Langon*, 959 F.2d at 1060–61).
155. *Humphrey*, 239 F.3d at 1136–37 n.15.

person with a valid disability *could be* discriminated against in the workplace because of their disability. The federal courts in the Tenth Circuit would not likely invalidate the discrimination because the EEOC's regulations favor the employer, and the courts place high deference to evidence supplied by the employer regardless of whether the evidence is objectively-based.

Additionally, while ADA cases require fact-specific calculus, the notable difference in the approaches of the *Avaya* and *Humphrey* courts demonstrates that it is not just facts that drive these cases. When the *Avaya* court looked to case law in other circuits regarding whether working at home is a reasonable accommodation under ADA in the Tenth Circuit, it had a choice to make: should it follow the restrictive approach taken by the Seventh Circuit in *Vande Zande*,[156] or should it apply the more permissive *Langon/Buckingham*[157] approach utilized by the Ninth Circuit in *Humphrey*? It applied the *Vande Zande* holding, permitted Avaya great deference, and effectively dismissed any chance of Mason being considered qualified under the ADA despite that she had a valid disability and absolutely no other option for a remedy.

The policy that drove the enactment of the ADA is sameness; it is about "the promise of having the same opportunities on the same terms and in the same settings as people without disabilities."[158] The *Avaya* decision failed to achieve a result consistent with the spirit behind this policy. Instead, *Avaya* strengthened the growing view in circuits that physical presence in the workplace is an essential job function if the facts *minimally* support this conclusion. If the courts can find a kernel of facts supporting the *Avaya* holding, they can also find a kernel of facts supporting the *Humphrey* holding. Had the Tenth Circuit ruled that working from home could be a reasonable accommodation, it does not mean that they had to rule in Mason's favor; rather, it would have resulted in a less subjective analysis and it would have added flexibility in the law for future cases.

What will it take to swing the courts over to a more flexible *Humphrey* approach? As a starting point, the ADA must overcome widespread skepticism associated with its application of preferential treatment.[159] Critics of affirmative action complain that it is reverse discrimination that benefits a class at the expense of others.[160] The same argument is levied against preferential treatment, a feature of both affirmative action and reasonable accommodation.[161] Further, the argument that reasonable accommodation levels "the playing field" between disabled

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156. *See supra* note 153.
157. *See supra* notes 154–55.
158. Hubbard, *supra* note 7, at 1041.
159. *See* Ball, *supra* note 14, at 960.
160. *Id.* at 981.
161. *See id.* at 960.

and nondisabled employees[162] can be argued in reverse by its critics, that it advantages disabled employees over nondisabled employees.

These criticisms ultimately fail because they are based on the inaccurate premise that reasonable accommodation benefits a class at the expense of others. First, this is a circular argument because it presumes that discrimination against the disabled has less of a societal impact or, alternately, greater societal value, than requiring the employer to remove these barriers. These are not facts; they are allegations that would be hotly contested by ADA advocates. Second, reasonable accommodation benefits *individuals*, not an entire *class*, which means that if there is an ADA-related dispute, there is a fact-based analysis that must occur before the specific employee is entitled to receive a reasonable accommodation by the employer.[163] Additionally, if a reasonable accommodation is made, it permits a disabled employee an *equivalent* working condition to that of a nondisabled employee, but not an *advantaged* one.[164]

The resolution to this dispute begins with a balanced analysis by the judiciary. Not until the judiciary embraces the notion that the ADA advocates the ability of the disabled to work on an equal footing with their non-disabled colleagues,[165] rather than discriminatory "affirmative action with a vengeance,"[166] and the courts make rulings that support this policy, will the purpose behind the enactment of the ADA be realized.

The loser in this whole affair was appellant Mason who, due to a truly unusual set of circumstances, developed a disability that led to the loss of her job. The ADA sought in part to eliminate "unnecessary expenditures resulting from the dependency and non-productivity of persons with disabilities."[167] Hopefully, in the future, American business will more pervasively embrace the advantages of having disabled employees work from home as a reasonable accommodation and thus embrace their important role in reducing the unnecessary expenditures associated with the non-productivity of workers like Mason who could "per-

162. *Id.*

163. *See supra* notes 24, 61.

164. *See, e.g.*, Ball, *supra* note 14, at 960-61. The author presents a case demonstrating how a reasonable accommodation does not translate to unfair advantage of the disabled. *Id.* In the example, a disabled professional golfer requested a reasonable accommodation in the form of a golf cart because his degenerative circulatory condition forced him to endure severe pain when he walked. *Id.*

165. *Id.* at 963. Preferential treatment given by an employer to one disabled employee may have no relevance to another disabled employee because the nature of their disabilities may be different. For example, accommodations for a blind employee may have no value to an employee in a wheelchair. Thus, while the "disabled" are a class of individuals, treatments are not necessarily "fungible" between members of the class. *Id.* at 975.

166. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (Judge Posner clarifies his position on the "principle" behind the ADA).

167. ADA PUBLIC ACCOMMODATIONS, *supra* note 2, at 2.

form all the essential functions of her job"[168] provided that her employer make a reasonable accommodation.

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168. *Avaya*, 357 F.3d at 1119.

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