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To Be, Or Not To Be, Will Long COVID Be Reasonably Accommodated Is the Question

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TO BE, OR NOT TO BE, WILL LONG COVID BE REASONABLY ACCOMMODATED IS THE QUESTION

By Dr. Angélica Guevara*

ABSTRACT

To be, or not to be, that is the reasonable accommodation question: whether Long COVID will be reasonably accommodated now that it is covered under disability antidiscrimination law. Some manifestations of Long COVID will certainly be considered disabilities under the Americans with Disabilities Act (ADA). However, even if it is considered a disability, that does not mean the employer will provide reasonable accommodations because Long COVID, like any other

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disability, is susceptible to what an employer deems as reasonable.

Comparatively, Lyme Disease and Chronic Fatigue Syndrome are like Long COVID because they tend to have fatigue as a primary symptom. Therefore, given the historical lack of accommodations provided for Lyme Disease and Chronic Fatigue Syndrome, the question of reasonable accommodation under disability antidiscrimination law remains an ongoing concern. An additional factor embroiling the reasonable accommodation question is the reality that People of Color are not only at a higher risk of contracting, experiencing complications, and dying from COVID-19; they are also more susceptible to developing Long COVID and losing their jobs. Therefore, this Article encourages using a Disability Studies and Critical Race Theory (commonly referred to as “DisCrit”) lens to consider structural issues continually perpetuating disparities while exploring to what extent disability antidiscrimination laws assist those dealing with Long COVID.

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INTRODUCTION

To be, or not to be, that is the reasonable accommodation question: whether Long COVID will be reasonably accommodated now that it is covered under disability antidiscrimination law. Today, this question becomes relevant to all Americans since anyone is susceptible to contracting the COVID-19 virus and developing Long COVID. According to the Centers for Disease Control and Prevention (CDC), COVID-19 is a respiratory disease caused by SARS-CoV-2, a new coronavirus discovered in 2019.¹ Symptoms may appear two to fourteen days after exposure to the virus and can include fever, chills, and cough.² Some infected people may not have symptoms, but those who do may have a mild to severe case of the illness.³ Those over the age of 65 and people with underlying conditions are at higher risk of severe illness.⁴ Whereas, Long COVID⁵ is a disease that can manifest in a variety of ways among people who have recovered from COVID-19.⁶ Some individuals develop shortness of breath, fatigue, or brain fog impairing their ability to work continuously. Therefore, even if Long COVID is considered a bona fide disability, that does not mean employers will provide reasonable accommodations for several reasons. Depending on the accommodation, the small business employer may have the best intentions to want to provide accommodations but may not

1. *Coronavirus Disease 2019 (COVID-19)*, CDC, <https://www.cdc.gov/dotw/covid-19/index.html> (last visited Nov. 23, 2021).

2. *Id.*

3. *Id.*

4. *Id.*

5. For this article, Long COVID is the preferred term, and “long haulers” are defined as those Post-COVID-19 survivors or those suffering from Long COVID (Long COVID is also known as Post-Acute COVID-19 Syndrome (PACS) and Post-Acute Sequelae SARS-CoV-2 infection (PASC)).

6. See A. V. Raveendran et al., *Long COVID: An Overview*, 15 *DIABETES & METABOLIC SYNDROME* 869, 870 (2021); Francis S. Collins, *NIH Launches New Initiative to Study “Long COVID”*, NAT’L INST. OF HEALTH (Feb. 23, 2021), <https://www.nih.gov/about-nih/who-we-are/nih-director/statements/nih-launches-new-initiative-study-long-covid> (“[S]ymptoms, which can include fatigue, shortness of breath, ‘brain fog’, sleep disorders, fevers, gastrointestinal symptoms, anxiety, and depression, can persist for months and can range from mild to incapacitating.”); Elisabeth Mahase, *Covid-19: What Do We Know About “Long Covid”?*, *BMJ* (Jul. 14, 2020), <https://www.bmj.com/content/370/bmj.m2815.long>.

survive with a smaller labor force that must significantly diversify their use of able-bodies.⁷ The employer may be more concerned with his profit for survival and see any cost towards accommodations, no matter how small, as a burden. Perhaps some jobs require essential workers and need an individual to perform the job's essential functions. Or the employer has an erroneous ideology in looking at people with disabilities as defective, and thus the disability is a personal tragedy that need not concern the business.⁸

If one survives COVID-19, some have to worry about both the aftermath of the illness and the social treatment (disability).⁹ Disability antidiscrimination law is limited in assisting those with Long COVID while operating under what is reasonable to accommodate given the challenging economic times amidst the COVID-19 pandemic compounded by the vast range of needs of the historically marginalized. For the reader to understand the previous challenges individuals have faced in receiving reasonable accommodations, Part I will compare Long COVID to Lyme disease and Chronic Fatigue Syndrome (CFS), two diseases that employers have struggled to accommodate. Part II will define disability and reasonable accommodations under the law. Unable to eradicate the social belief that created

7. Throughout the Article, the terms “able body,” “able-bodied,” or “able-bodies” includes both the physical and mental attributes of the body.

8. Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 420 (2011) (“[T]he ‘personal tragedy theory of disability’ . . . suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals.”); see also Angelica Guevara, *Ableness as Property*, 98 DENV. L. REV. F. 1, 10 (2020), https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5ee2821c4697a938378535fa/159190275312/Ableness+as+Property_Guevara_Final.pdf (explaining that the medical model treats disabilities as a personal tragedy or defects in need of treatment, and that in doing so, it reinforces the able body as the norm and perpetuates stigma and discrimination against people with disabilities).

9. Current disability law has been ineffective in overcoming the misleading understanding of human variation. These problems have sparked a discussion of disability rights law within the paradigm known as the medical model of disability. Dr. Angelica Guevara published an article that foregrounds the need to use the social model of disability. Angelica Guevara, *The Need to Reimagine Disability Rights Law Because the Medical Model of Disability Fails Us All*, 21 WISC. L. REV. 269 (2021) [hereinafter *The Need to Reimagine*]. The article first explains the medical model's failings as a framework for disability antidiscrimination law. *Id.* at 277–79. The root of the problem is that the medical model perpetuates “othering,” affecting us all but further impacting People of Color. *Id.* at 270. An illness is separate from the disability. *Id.* at 276.

the current laws that affect people with disabilities and perpetuate a disability binary, this Article has no choice but to engage with current law. Thus, Part III will discuss what is considered a reasonable accommodation for employers today and why the pandemic's racial and ethnic disparities are all the more reason for our laws to consider intersectionality¹⁰ and begin addressing the law using the tenets found in Disability Studies and Critical Race Theory (DisCrit).¹¹ Because even if an individual with Long COVID manages to be believed and obtain reasonable accommodations against all odds, one cannot ignore the disproportionate impact towards the essential workers of color on the frontlines. Lastly, as in previous Articles, this Article embraces poetic legal writing, meant to leave the reader to speculate about the use and location of some concepts and meaning. It has somewhat of an atypical, scattered flow—but still retains enough formal structure.

10. See Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–51 (1991). Kimberlé Crenshaw originally coined “structural intersectionality” to explain how non-white women experience domestic violence and rape differently than white women, taking into account other social structures such as race, class, and citizenship. *See id.*

11. See Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 9, 19 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) [hereinafter *DisCrit*] (“DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy . . . values multidimensional identities and troubles singular notions of identity such as race or dis/ability or class or gender or sexuality, and so on . . . emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms . . . privileges voices of marginalized populations, traditionally not acknowledged within research . . . considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens . . . recognizes Whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of White, middle-class citizens . . . [and] requires activism and supports all forms of resistance.”). *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY].

I. LONG COVID, LYME DISEASE, AND CHRONIC FATIGUE SYNDROME

In this Article, Long COVID is discussed alongside Lyme disease and CFS because much of the physical symptoms and psychological results found in COVID long haulers are similar to those found in Lyme disease and CFS. Thus, it helps to define what is Long COVID, Lyme disease, and CFS as well as list their prevailing symptoms.

A. WHAT IS LONG COVID?

While it is a recent disease, Long COVID is yet another health crisis created by the pandemic.¹² About 10% of people with COVID-19 have lingering symptoms for weeks or months after the initial recovery, now recognized as Long COVID.¹³ The percentage varies depending on what some studies are defining as Long COVID. The consensus among United States medical doctors is that those with Long COVID have survived the most debilitating effects of the COVID-19 disease and have tested negative for COVID-19.¹⁴ However, those debilitating symptoms are also relative depending on the original severity. Studies have found over 200 symptoms¹⁵ associated with Long COVID, creating an even broader range of people who may develop and qualify for disability protection under the law. While a case can be made for the severity of those who were hospitalized, it is important to note the debilitating symptoms of non-hospitalized COVID survivors which include but are not limited to brain fog,

12. See Fiona Lowenstein & Hannah Davis, *Long Covid Is Not Rare. It's a Health Crisis.*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/opinion/long-covid.html> (discussing the misconceptions of Long COVID).

13. *Long Haulers: Why Some People Experience Long-term Coronavirus Symptoms*, UC DAVIS HEALTH (updated Feb. 8, 2021), <https://health.ucdavis.edu/coronavirus/covid-19-information/covid-19-long-haulers.html> [hereinafter *Long Haulers*].

14. See *id.*

15. Linda Geddes, *Long Covid Has More than 200 Symptoms, Study Finds*, GUARDIAN (Jul. 15, 2021, 7:00 PM), <https://www.theguardian.com/society/2021/jul/15/long-covid-has-more-than-200-symptoms-study-finds>.

headache, numbness, dysgeusia,¹⁶ anosmia,¹⁷ myalgias,¹⁸ and fatigue.¹⁹ At times these lead to impairing a person's quality of life "in cognitive and fatigue domains."²⁰ Survivors often declined in their attention and working memory,²¹ brain fog being frequent.²² Some survivors had such prominent fatigue and cognitive issues that they closely resembled those with mild traumatic brain injury and CFS.²³ Take the case of pediatric nurse Jennifer Minhas, who expressed feeling like "a zombie for months, unable to do much of anything," describing what it felt like to have the flattening fatigue also known as "post-exertional malaise."²⁴ On the other hand, those still suffering from CFS, like Alison Sbrana from Fort Collins, Colorado, who contracted

16. See T. Maheswaran et al., *Gustatory Dysfunction*, 6 J. PHARMACY & BIOALLIED SCI. S30, S31 (2014) (explaining that dysgeusia is an unpleasant perception of a water-soluble chemical that produces a taste sensation, a form of taste dysfunction); see also Jeyasakthy Saniasiaya, *Prevalence and Characteristics of Taste Disorders in Cases of COVID-19: A Meta-analysis of 29,349 Patients*, 165 OTALARYNGOLOGY-HEAD & NECK SURGERY 33, 38 (2021) (observing that dysgeusia has the highest prevalence among taste disorders for patients with COVID-19).

17. See Xiangming Meng et al., *COVID-19 and Anosmia: A Review Based on Up-to-Date Knowledge*, 41 AM. J. OTOLARYNGOLOGY 1, 1 (2020) (explaining that anosmia is an olfactory dysfunction causing a loss of the sense of smell); see also Sanne Boesveldt et al., *Anosmia—A Clinical Review*, 42 CHEM. SENSES 513, 513 (2017).

18. Adem Kucuk et al., *Can COVID-19 Cause Myalgia with a Completely Different Mechanism? A Hypothesis*, 39 CLINICAL RHEUMATOLOGY 2103, 2103 (2020) (explaining that myalgia is muscle inflammation and pain).

19. See Edith L. Graham et al., *Persistent Neurologic Symptoms and Cognitive Dysfunction in Non-Hospitalized Covid-19 "Long Haulers"*, 8 ANNALS CLINICAL & TRANSLATIONAL NEUROLOGY 1073, 1073 (2021) (observing that 85% of COVID-19 long haulers experienced fatigue).

20. *Id.*

21. *Id.* at 1081.

22. Kathleen Doheny, *Neurologic Symptoms Frequent in COVID Long-Haulers*, WebMD, <https://www.webmd.com/lung/news/20210323/neurologic-symptoms-frequent-covid-long-haul-patients> (last visited Nov. 23, 2021).

23. *Id.*; see Leonard A. Jason et al., *Myalgic Encephalomyelitis: Symptoms and Biomarkers*, 13 CURRENT NEUROPHARMACOLOGY 701, 701 (2015) (synthesizing key discussion in the literature of Myalgic Encephalomyelitis); *Myalgic Encephalomyelitis/Chronic Fatigue Syndrome*, CDC, <https://www.cdc.gov/me-cfs/index.html> (last updated May 3, 2021) (describing the symptoms of Myalgic Encephalomyelitis and Chronic Fatigue Syndrome).

24. Kevin Cool, *Long-Haul Covid Cases Cast New Light on Chronic Fatigue Sufferers* (Feb. 1, 2021), <https://californiahealthline.org/news/article/long-haul-covid-cases-cast-new-light-on-chronic-fatigue-sufferers/>.

mono years ago, are hopeful that Long COVID will help unlock clues to poorly understood conditions like CFS.²⁵

In the most recent findings, the most affected by COVID were younger adults (74.9%), members of the Hispanic ethnicity (52.1%), essential workers (54.0%), and unpaid caregivers for adults (66.6%).²⁶ There were also higher levels of psychiatric symptoms amongst healthcare workers,²⁷ not to mention the decrease in the psychological well-being of the general public.²⁸ These percentages are important to understand why the most common psychiatric symptoms found in long haulers²⁹ were post-traumatic stress disorder, depression, anxiety, and insomnia.³⁰ One in four COVID-19 cases become long haulers regardless of severity, which means this number will increase as more Americans continue to become infected.³¹ The CDC reports

25. Frances Stead Sellers, *Could Long Covid Unlock Clues to Chronic Fatigue and Other Poorly Understood Conditions?*, WASH. POST (Nov. 7, 2021, 7:00 AM), <https://www.washingtonpost.com/health/2021/11/07/long-covid-fatigue-research/>.

26. Mark E. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020*, 69 MORBIDITY AND MORTALITY WKLY. REP. 1049, 1051 (2020).

27. See Nina Vindegaard & Michael Eriksen Benros, *COVID-19 Pandemic and Mental Health Consequences: Systematic Review of the Current Evidence*, 89 BRAIN, BEHAV. & IMMUNITY 531, 531 (2020) (“Studies investigating healthcare workers found increased depression/depressive symptoms, anxiety, psychological distress and poor sleep quality.”).

28. *Id.*; see *How COVID-19 Impacts People with Disabilities*, AM. PSYCHOL. ASS’N. (May 6, 2020), <https://www.apa.org/topics/covid-19/research-disabilities> (“Emerging research on COVID-19 shows that the coronavirus pandemic has increased psychological distress both in the general population and among high-risk groups.”); see also Michael S. Saag, Gitendra Uswatte & Kristine Lokken, *Post COVID – The Long Haul Webinar*, DISABILITY:IN (June 29, 2021, 10:00 AM), <https://disabilityin.org/event/in-al-post-covid-19the-long-haul-webinar-no-cost/> (discussing “the medical and psychological impacts of having had COVID-19” and how we can “assist workers with new limitations in being able to perform the essential functions of their jobs in a post-COVID world.”).

29. Tae Chung et al., *COVID ‘Long Haulers’: Long-Term Effects of COVID-19*, JOHNS HOPKINS MED. (Apr. 1, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-long-haulers-long-term-effects-of-covid19> (“People living with post-COVID syndrome are sometimes known as ‘long haulers.’”).

30. See Mario Gennaro Mazza et al., *Anxiety and Depression in COVID-19 Survivors: Role of Inflammatory and Clinical Predictors*, 89 BRAIN, BEHAV. & IMMUNITY 594, 594 (2020).

31. *Studies Show Long-Haul COVID-19 Afflicts 1 in 4 COVID-19 Patients, Regardless of Severity*, UC DAVIS HEALTH (Mar. 30, 2021), <https://health.uc>

that 68,671,563 cases have been reported as of January 19, 2022 with a seven-day moving average of about 744, 616 daily new cases.³²

A study using electronic health records found that one in three long haulers have Neurological Psychiatric Problems.³³ A study done in Norway found that chronic insomnia was a risk factor for developing anxiety and depression.³⁴ Thus, given these results, it is understandable that a vicious cycle prevalent in long haulers showed the depression caused anxiety, the anxiety caused the cognitive disturbance, which led to fatigue, which then led to insomnia, thus perpetuating the depression.³⁵

Furthermore, there were neuropsychiatric complications of COVID-19 infections, not knowing its full effects. About 60% of hospitalized patients developed some form of neurologic symptom.³⁶ About 94% of patients had some neurologic complaints such as headaches, loss of smell, loss of taste, muscle pain, dizziness, and nerve pain to name a few.³⁷ Although rare, some had strokes, seizures, delirium/encephalopathy, memory

davis.edu/newsroom/news/headlines/studies-show-long-haul-covid-19-afflicts-1-in-4-covid-19-patients-regardless-of-severity/2021/03.

32. *Covid Data Tracker Weekly Review*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last updated Jan. 28, 2022).

33. Maxime Taquet et al., *6-Month Neurological and Psychiatric Outcomes in 236,379 Survivors of COVID-19: A Retrospective Cohort Study Using Electronic Health Records*, 8 LANCET PSYCHIATRY 416, 416 (2021); Kate Kelland, *A Third of COVID Survivors Suffer Neurological or Mental Disorders: Study*, REUTERS (Apr. 6, 2021, 5:37 PM), <https://www.reuters.com/article/us-health-coronavirus-brain/a-third-of-covid-survivors-suffer-neurological-or-mental-disorders-study-idUSKBN2BT2ZI>; Ernie Mundell & Robert Preidt, *1 in 3 Have Neurological, Psychiatric Problems Post-COVID*, WEBMD (Apr. 7, 2021), <https://www.webmd.com/lung/news/20210407/1-in-3-covid-survivors-have-ongoing-mental-health-issues#1>.

34. Dag Neckelmann et al., *Chronic Insomnia as a Risk Factor for Developing Anxiety and Depression*, 30 SLEEP 873, 873 (2007).

35. *See A Vicious Cycle: Insomnia, Anxiety, and Depression*, DUKE HEALTH (Aug. 27, 2013), <https://www.dukehealth.org/blog/vicious-cycle-insomnia-anxiety-and-depression> (evaluating how insomnia, anxiety, and depression are linked).

36. Carlos Manuel Romero-Sanchez et al., *Neurologic Manifestations in Hospitalized Patients with COVID-19: The ALBACOVID Registry*, 95 NEUROLOGY e1060, e1060 (2020).

37. Anna R. Yousaf et al., *A Prospective Cohort Study in Non-Hospitalized Household Contacts with Severe Acute Respiratory Syndrome Coronavirus 2 Infection: Symptom Profiles and Symptom Change Over Time*, 73 CLINICAL INFECTIOUS DISEASES e1841, e1843 (2021), <https://pubmed.ncbi.nlm.nih.gov/32719874/>; Romero-Sanchez et al., *supra* note 36, at e1060.

loss, or Ataxia.³⁸ Many of these symptoms closely resemble symptoms found in Lyme disease. For those unfamiliar with Lyme disease, it is beneficial to describe and define the illness as follows.

B. WHAT IS LYME DISEASE?

Many do not realize that before the COVID-19 pandemic, there was the Lyme disease pandemic³⁹ which was well hidden and often ignored.⁴⁰ Lyme disease is the most common vector-borne disease in the United States,⁴¹ also known as borreliosis. It has also been known as “the great imitator” because it can resemble Chronic Fatigue Syndrome, Fibromyalgia, Multiple Sclerosis, Depression, or Rheumatoid Arthritis, to name a few.⁴² Lyme disease comes from a bacterial infection spread by deer ticks⁴³ which first became widespread and described in 1975 in

38. See Sana Somani et al., *De Novo Status Epilepticus in Patients with COVID-19*, 7 ANNALS CLINICAL & TRANSLATIONAL NEUROLOGY 1240, 1240 (2020) (observing two cases of de novo status epilepticus (SE) in two patients with laboratory-confirmed SARS-CoV-2 virus); Ross W. Paterson et al., *The Emerging Spectrum of COVID-19 Neurology: Clinical, Radiological and Laboratory Findings*, 143 BRAIN 3104, 3104–05 (2020).

39. See Marcus Davidsson, *The Financial Implications of a Well-Hidden and Ignored Chronic Lyme Disease Pandemic*, 6 HEALTHCARE 16, 16 (2018) (“The objectives of this article are to investigate the incidence rate of Lyme disease in the USA and Europe, to investigate the financial cost of chronic Lyme disease and to find the most cost-efficient way for the governments to solve the current chronic Lyme disease pandemic.”); Dale R. Hamilton, *Lyme Disease: The Hidden Pandemic*, 85 POSTGRADUATE MED. 303 (2016).

40. Davidsson, *supra* note 39, at 43.

41. Thomas S. Murray & Eugene D. Shapiro, *Lyme Disease*, 30 CLINICS LAB’Y MED. 311, 311 (2010); *Lyme Disease*, CDC, <https://www.cdc.gov/lyme/index.html> (last updated May 28, 2021).

42. *About Lyme Disease*, LYMEDISEASE.ORG, <https://www.lymedisease.org/lyme-basics/lyme-disease/about-lyme/> (last visited Oct. 28, 2021) [hereinafter *About Lyme Disease*]; see Andrew R. Pachner, *Neurologic Manifestations of Lyme Disease, the New “Great Imitator”*, 6 REVS. OF INFECTIOUS DISEASES S1482, S1483–85 (1989) (discussing diagnosis problems related to Lyme disease); B. W. Stechenberg, *Lyme Disease: The Latest Great Imitator*, 7 PEDIATRIC INFECTIOUS DISEASE J. 402, 405 (1988) (discussing cases of Lyme disease manifesting as arthritis).

43. *Lyme Disease: Transmission*, CDC, <https://www.cdc.gov/lyme/transmission/index.html> (last updated Jan. 29, 2020).

Lyme, Connecticut.⁴⁴ Today, approximately 476,000 people are diagnosed with Lyme disease per year.⁴⁵

Similar to COVID, some of the symptoms are not readily apparent, including fatigue, chills, fever, headache, joint pain, muscle pain and/or stiff neck.⁴⁶ A rash may or may not occur in some people who contract Lyme disease, making it all the more challenging to diagnose.⁴⁷ Untreated Lyme disease can therefore resemble Long COVID with chest pain, shortness of breath, arthritis, heart problems, numbness, or pain, again a disability with symptoms that are not readily apparent. A prevalent symptom—fatigue—found in both Long COVID and Lyme disease is highlighted in the analysis of reasonable accommodations later in the Article.

C. WHAT IS CFS?

CFS, also known as myalgic encephalomyelitis, assuming no other underlying factors are causing the fatigue, is a disorder that causes extreme fatigue, which worsens with mental or physical activity and does not improve with rest.⁴⁸ The Institute of Medicine reports that about 836,000 to 2.5 million Americans are living with this debilitating condition.⁴⁹ The disease does not discriminate as it affects all ages, races, and socioeconomic status.⁵⁰ The fatigue, of which there is still no cure, can last up to six months or years.⁵¹ Often an individual with CFS has

44. *Lyme Disease—Connecticut*, 37 MORBIDITY AND MORTALITY WKLY. REP. 1, 1 (1988).

45. *How Many People Get Lyme Disease?*, CDC, <https://www.cdc.gov/lyme/stats/humancases.html> (last updated Jan. 13, 2021).

46. Murray & Shapiro, *supra* note 41, at 313; *see About Lyme Disease, supra* note 42.

47. Murray & Shapiro, *supra* note 41, at 315.

48. Mateo Cortes Rivera et al., *Myalgic Encephalomyelitis/Chronic Fatigue Syndrome: A Comprehensive Review*, 9 DIAGNOSTICS 91, 93–96 (2019); *Chronic Fatigue Syndrome*, MAYO CLINIC (Sep. 24, 2020), <https://www.mayoclinic.org/diseases-conditions/chronic-fatigue-syndrome/symptoms-causes/syc-20360490> [hereinafter *Chronic Fatigue Syndrome*].

49. Rivera et al., *supra* note 48.

50. *Id.* at 92.

51. *See* Molly M. Brown et al., *Understanding Long-Term Outcomes of Chronic Fatigue Syndrome*, 68 J. CLINICAL PSYCHOL. 1028, 1028 (2012) (“[A]lthough many patients do have some improvement in functioning over time . . . the vast majority of individuals who develop [Chronic Fatigue Syndrome] do not attain a premorbid level of functioning.”).

difficulties with memory, focus, or concentration,⁵² as is the case for the long haulers who develop cognitive disturbance and fatigue. As is the case with many non-apparent disabilities, these disabilities evoke a level of skepticism as to whether the disability exists or whether the alleged disability is a real disability.⁵³

As many Americans learn to adjust to their new normal, especially those diagnosed with Long COVID, Lyme disease, and CFS, many Americans consider the protection and implications of accessing disability antidiscrimination laws. The Rehabilitation Act of 1973 Section 504 and the Americans with Disabilities Act (ADA), and its 2008 amendment define what is considered a disability and a reasonable accommodation. The following legal definitions are important to understand disability antidiscrimination law.

II. WHAT IS A DISABILITY AND A REASONABLE ACCOMMODATION?

Before COVID-19 and the 2008 ADA Amendment, a disability and a reasonable accommodation were significantly different than what they are thought of today. The ADA Amendment of 2008 made it easier to be covered under the law because it broadened what could be considered a disability. However, the amendment did not eradicate the hurdles some people with disabilities encounter when having to deal with fighting for what they consider a “reasonable accommodation” under the law, or an “undue hardship” to the employer, in order to obtain the necessary tools and opportunities that would allow them to become successful in the workforce.⁵⁴ To that end, this section will explain what a disability is and what a reasonable accommodation is.

52. *Chronic Fatigue Syndrome*, *supra* note 48.

53. Shanna K. Kattari et al., “You Look Fine!”: *Ableist Experiences by People With Invisible Disabilities*, *AFFILIA* (May 22, 2018), <https://journals.sagepub.com/doi/10.1177/0886109918778073>.

54. 42 U.S.C. § 12112(b)(5)(A) (2018) (defining discrimination under the ADA as “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

A. WHAT IS A DISABILITY?

The increase in the number of COVID-19 cases leave many to wonder if disabilities are resulting and if they are being reasonably accommodated as the law prescribes. The passing of Section 504 of the Rehabilitation Act of 1973 gave the courts, educational institutions, and employers increased discretion as to which individuals and what disabilities to accommodate.⁵⁵ The Rehabilitation Act of 1973 only protected people in federally funded spaces, thus Congress passed the Americans with Disabilities Act (ADA) in 1990.⁵⁶ The ADA is intended to protect individuals in all public spaces, the scope was no longer limited to federally funded institutions.⁵⁷ Significantly, the ADA banned disability-based discrimination in employment, education, transportation, and places that are open to the public.⁵⁸

The ADA does not contain a list of disabilities covered under the law, instead what constitutes a disability is left up to interpretation.⁵⁹ However, more people are covered under the

55. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2018)); *see* 42 U.S.C. § 12112(a) (2018) (“No [gatekeeper] 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.”); 42 U.S.C. § 12111(8) (2018) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position”); 42 U.S.C. § 12112(b)(5)(A) (2018) (“[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” constitutes discrimination “unless [the gatekeeper] can demonstrate that the accommodation would impose an undue hardship”); *see The Need to Reimagine*, *supra* note 9.

56. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213 (2018)); *see* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1089 (1995) (describing how Title II of the Act “specifically prohibited disability discrimination by state and local government”).

57. *See* Weber, *supra* note 56, at 1089.

58. *See* 42 U.S.C. § 12112(a); 42 U.S.C. § 12132 (2018) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

59. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified as amended at 42 U.S.C. §§ 12101–213 (2018)).

law after the 2008 ADA Amendment.⁶⁰ Even though more people are covered, that does not mean people would surpass the hurdles of loopholes embedded in the law that allow employers not to provide “reasonable accommodations” if they present an “undue burden.”⁶¹

Under the ADA, “a physical or mental impairment that substantially limits one or more major life activities of such individual” is considered a disability.⁶² For those unfamiliar with disability studies, the term “disability” with a lower case “d” embodies the social treatment that disables individuals.⁶³ The disability is separate from the illness or impairment, and the social treatment is the source of the differences that preserve the social oppression of people with disabilities.⁶⁴ Acknowledging the social construction of disability does not negate the pain or suffering of an impairment or illness that may need treatment. Therefore, under these standards, Long COVID is considered a disability because a long hauler has to deal with the social treatment as well as the symptoms that tend to interfere with one or more major life activities like thinking, breathing, and walking.⁶⁵ According to the United States Department of Labor, a person is entitled to reasonable accommodations if they meet the prescribed requirements of a disability under the law as stated above.⁶⁶ Given all the symptoms aforementioned, Long COVID, Lyme disease, and

60. *See id.*

61. 42 U.S.C. § 12112(b)(5)(A) (2018).

62. 42 U.S.C. § 12102(1)(A) (2018).

63. The concept of uppercase “D” and lowercase “d” arose from the distinction made in the deaf community where uppercase “D” is meant to signify an identity, and lowercase “d” signifies an impairment. Mairian Corker, *Disability Discourse in a Postmodern World*, in *THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES*, 221, 225–31 (Tom Shakespeare ed., 1998); Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 *J. DEAF STUD. & DEAF EDUC.* 291, 291 (2005); Deborah Marks, *Models of Disability*, 19 *DISABILITY & REHAB.* 85, 88–89 (1997).

64. *See* Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 *J. SOC. ISSUES* 39, 41 (1988) (“Minority groups have been subjected to various forms of exploitation and oppression, and the sources of their treatment may be traced to pervasive social values of the dominant majority.”).

65. *Long Haulers*, *supra* note 13, at 2.

66. Linda Carter Batiste, *Workers With Long COVID-19: You May Be Entitled to Workplace Accommodations*, U.S. DEP’T. OF LABOR BLOG (July 6, 2021), <https://blog.dol.gov/2021/07/06/workers-with-long-covid-19-may-be-entitled-to-accommodations>.

CFS are considered disabilities because they each impact one or more major life activities largely affected by the fatigue symptom and are thus entitled to reasonable accommodations.⁶⁷

Since the 2008 ADA Amendment broadened the definition of “disability,” it now protects those who mitigate their disability by, for example, taking medication or using prosthetics, and regards them as having a bona fide disability under the law.⁶⁸ This Amendment abrogated the Court’s earlier decisions in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*⁶⁹ and

67. *See id.*

68. *See* 42 U.S.C. § 12102(4)(E)(i) (2018) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures”); *see also* Batiste, *supra* note 66 (describing how an individual may qualify for workplace accommodations if they have “a physical or mental impairment that substantially limits major life activities, ha[ve] a record of such an impairment, or is regarded as having such an impairment.”).

69. 534 U.S. 184 (2002), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified as amended at 42 U.S.C. §§ 12101-12213 (2018)). In this case, Ella Williams was terminated due to her poor attendance record, as she was suffering from carpal tunnel syndrome due to performing her assembly line duties for Toyota. *Id.* at 187–90. She filed suit under the ADA, alleging she was not given reasonable accommodations for her carpal tunnel. *Id.* at 190. Toyota then filed a motion for summary judgment, declaring no genuine issue to be tried since her carpal tunnel syndrome was not considered a disability under the ADA. *Id.* at 190–91. William’s carpal tunnel syndrome did not substantially limit any of William’s major life activities, for she continued to perform manual tasks (e.g., eating, bathing, etc.). *Id.* The Sixth Circuit Court of Appeals ruled in favor of Williams, finding that the carpal tunnel syndrome was a disability because it was substantially limiting her ability to perform her work. *Id.* at 191–92. The Supreme Court determined that the Court of Appeals did not use the proper standard in determining what is a disability under the ADA. *Id.* at 192–93. Thus, the Court of Appeals was wrong in only examining whether Williams could perform her work, limiting the class of manual tasks to those she would perform at work instead of determining whether her daily life activities outside of work were impacted. *Id.* at 199–203. The Court went on to say that, under the ADA, a disability had to be permanent or long-term. *Id.* at 196, 198. As such, *Toyota* established a narrow standard for determining whom the ADA covered, leaving people with mental or physical disabilities that “substantially limited a major life activity” mainly covered by Section 504. *See* 42 U.S.C. § 12102(1)(A) (2018). As a result, disabilities such as cancer, diabetes, HIV/AIDS, intellectual disabilities, amputations, epilepsy, and multiple sclerosis were not readily protected. *See also* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL’Y J. 5, 11 (2013) (noting subsequent cases at the lower courts where “the better you manage your medical condition, the less likely you are to be protected from discrimination based on that condition”). After the 2008 ADA amendment, the condition no longer had to meet such a demanding standard requiring the disability to be

*Sutton v. United Air Lines, Inc.*⁷⁰ The Amendment had a significant impact in broadening the definition of disability, covering more people with disabilities and giving people with disabilities more legal recourse and protection—or so one thought. Although it covered more people, there is no getting around the inadequate subjective language such as “reasonable accommodations” and “undue hardship” that is largely dependent on the awareness of those in positions of power making these determinations.⁷¹

Even with this Amendment, the law still falls short of providing equity for people with disabilities because the loopholes created by the unreasonable accommodation and undue hardship standards, explained in the following section, allow institutions to avoid providing accommodations.⁷² The effects are otherwise limited because the base of disability antidiscrimination law originally intended to provide people with disabilities opportunities in social spaces like the

permanent or long-term. See 42 U.S.C. § 12102(4)(D) (2018) (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”).

70. 527 U.S. 471 (1999), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified as amended at 42 U.S.C. §§ 12101-12213 (2018)). In this case, identical twins with myopia brought a lawsuit against United Airlines under the ADA when the airline did not hire them as commercial pilots. *Id.* at 475–76. Their uncorrected vision did not meet the airline’s minimum requirements to have visual acuity of twenty/one hundred or better. *Id.* The Court held the twins were not *disabled* under the ADA because they could correct their eyesight with eyeglasses or contact lenses. *Id.* at 475. They were not *regarded as disabled*, arguing that the airline’s allegation that they were unable to satisfy a job’s requirements was not enough to qualify the twins as being regarded as persons with a disability. *Id.* at 481–94 (citing 42 U.S.C. § 12102). In the end, the Court in *Sutton* held that people who could mitigate their impairments (such as wearing eyeglasses to correct poor vision) were not “disabled.” *Id.* at 475. Therefore, under *Sutton* anyone mitigating their disability with medication or prosthetics was not considered disabled. *Id.*

71. See 42 U.S.C. § 12111(9)–(10) (2018).

72. See *id.* Discrimination against a “qualified individual” includes “not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . .” 42 U.S.C. § 12112(b)(5)(A); see also RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS* 81 (2014) (citing Judge Posner’s discussion of § 12112(b)(5)(A) in *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995)). See generally IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) (discussing inequities that persist from the perspective of those living with disabilities).

workforce, rather than equity in our society.⁷³ Unfortunately, the root of the issue is distinguishing people with and without disabilities in the first place,⁷⁴ perpetuating the disability binary.

B. WHAT IS A REASONABLE ACCOMMODATION?

A reasonable accommodation under Section 504 is any “change, adaptation or modification to a policy, program, service, . . . or workplace which will allow a qualified person with a disability to participate fully in a program, take advantage of a service, . . . or perform a job.”⁷⁵ This law was supposed to prohibit discrimination against people with disabilities in institutions that received federal funding.⁷⁶ But, by applying subjective standards in the employment sector to determine who is considered a qualified individual⁷⁷ with a disability, what is considered a reasonable accommodation,⁷⁸

73. See 29 U.S.C. § 794(a) (2018) (explaining how the remedies, procedures, and rights of the Civil Rights Act of 1964 are available for disability discrimination claims in the workplace).

74. See SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 34 (2009) (noting that “the ADA protects only those individuals who have a ‘disability’”).

75. *Reasonable Accommodations and Modifications*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications [<https://perma.cc/DNK4-L72V>] (last visited Mar. 2, 2021); *The Need to Reimagine*, *supra* note 9.

76. See Donald Jay Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 172–76 (1980) (describing how the law was based off civil rights legislation that insured compliance by ending support of institutions that segregated or excluded African American participants).

77. 42 U.S.C. § 12111(8) (2018) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgement as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”).

78. 42 U.S.C. § 12111(9) (“The term ‘reasonable accommodation’ may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with

and an undue hardship,⁷⁹ the law circumvents this protection by continually moving the mark, evidenced further with the COVID pandemic.⁸⁰

The language in Section 504 inadvertently created numerous loopholes with words such as “reasonable accommodations” and “undue hardship,” giving discretion to the entity providing the accommodations and defining undue burden. This vague language has been used time and time again in disability law, forcing individuals with disabilities to fit into existing systems rather than in fixing the systems that use an able body standard.⁸¹ The goal behind Section 504 and the Americans with Disabilities Act that followed was, in part, to seek reasonable accommodations to help people enter the

disabilities.”); see COLKER & GROSSMAN, *supra* note 72, at 77 (defining “reasonable accommodation”).

79. 42 U.S.C. § 12111(10) (“The term ‘undue hardship’ means an action requiring significant difficulty or expense, when considered in light of . . . (i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.”); see COLKER & GROSSMAN, *supra* note 72, at 78 (defining “undue hardship”).

80. See Katherine O. Beattie, *Return to Work Resistance: Navigating the ADA Interactive Process and COVID-19 Disability Accommodation Requests*, NAT’L L. REV. (May 17, 2021), <https://www.natlawreview.com/article/return-to-work-resistance-navigating-ada-interactive-process-and-covid-19-disability> (describing best practices and considerations for employers to take into account as employees covered by the ADA increasingly return to in-person workspaces as a result of vaccination); Gary D. Finley, *COVID-19 and Reasonable Accommodations Under the ADA*, SCHWARTZ HANNUM PC (June 2020), <http://www.shpclaw.com/covid19-and-reasonable-accommodations-under-the-ada?p=11399> (describing how individuals considered high risk for severe health problems as a result of COVID-19 may not qualify for workplace accommodations under the ADA).

81. See, e.g., Erin Grewe, *Justice May Be Blind, but There Is No Justice for the Visually Disabled: A Guide to the Administration of A Format-Neutral Bar Examination*, 21 TEMP. POL. & CIV. RTS. L. REV. 543, 545 (2012) (“[I]ndividuals who are denied reasonable accommodations for the bar examination face the miserable choice between taking the test in a disadvantaged format now—by using a human reader, for example—or postponing their legal careers indefinitely while the ADA litigation proceeds through the courts.”).

employment sector and places of public accommodation.⁸² In practice, however, the law has done little to improve access to places of public accommodation⁸³ or to improve the employment rate of people with disabilities.⁸⁴ This lack of improvement is due to the “inherent limitations of antidiscrimination laws in eliminating deep-rooted structural barriers to work,”⁸⁵ as well as in eliminating barriers to having an independent livelihood and also seeing those deemed “severely disabled” as able to make the necessary adjustments to maximize their human potential.

C. LACK OF REASONABLE ACCOMMODATIONS FOR LYME DISEASE AND CHRONIC FATIGUE SYNDROME

Assuming an individual is able to maintain a job after being diagnosed with Lyme Disease or Chronic Fatigue Syndrome, it is challenging for employees to receive reasonable accommodations because when they request the accommodations there is a question as to whether they are a *qualified individual* able to perform the *essential functions* of the job, as in the case of *Davenport v. Del Toro* (2021)⁸⁶ and *Morin v. Hannaford Bros. CO., LLC*.⁸⁷ The job responsibilities and

82. John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 519 (2011) (“[T]he ‘basic purpose’ of the ADA and Section 504 ‘is to ensure that [disabled] individuals are not denied jobs or other benefits because of the prejudic[ial] attitude[] or the ignorance of others.’ Or, as stated by one district court, ‘[t]he ADA and Rehabilitation Act are interrelated Congressional mandates designed to remedy discrimination against disabled individuals.’” (alterations in original)); *The Need to Reimagine*, *supra* note 9.

83. See, e.g., Anne Quito, *Poorly Designed Public Toilets Aren’t Just Annoying, They’re Dehumanizing*, QUARTZ (Aug. 13, 2017), <https://qz.com/1048117/bathroom-design-and-disability-rights-poorly-designed-public-toilets-arent-just-annoying-theyre-dehumanizing/> [<https://perma.cc/H7S5-ETJL>] (illustrating how ADA-compliant facilities can still fail to be accessible to certain individuals). *But see* U.S. DEPT OF JUST., ACCESS FOR ALL: FIVE YEARS OF PROGRESS 22–26 (2006) (illustrating how three American cities with diverse accommodation challenges have improved access to public parks).

84. See RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 69–70 (2005) (noting that the ADA did not significantly increase the number of people with disabilities in the workforce); BAGENSTOS, *supra* note 74, at 1 (“[T]he employment rate for people with disabilities has remained stagnant at best.”).

85. BAGENSTOS, *supra* note 74, at 35.

86. No. 1:16-VD-0494, 2021 U.S. Dist. LEXIS 166956 (M.D. Pa. Sept. 2, 2021).

87. No. 1:17-CV-50-GZS, 2018 LEXIS 95733 (D. Me. June 7, 2018).

necessities do not adjust to the illness. Society and the law has not yet adjusted to assist those in such health fluctuations.

In addition, since the language used in Section 504 was the foundation for the ADA, it renders the same effects of discrimination through “othering.”⁸⁸ Thus, those with Lyme Disease and Chronic Fatigue Syndrome become othered. Both laws define individuals with disabilities once again using essentially the same definition: “a physical or mental impairment” that “substantially limits one or more major life activities” or “results in a substantial impediment to employment.”⁸⁹ Unfortunately, by building upon the language used in Section 504, the ADA continued to view people with disabilities as defective; this is known as the medical model view.⁹⁰ The general public remains unaware of the difference between impairment and disability.⁹¹ Sadly, today’s social

88. See GOFFMAN, *supra* note 72, at 5.

89. 42 U.S.C. § 12102(1)(A) (2018); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 394 (1973) (codified as amended 29 U.S.C. § 705(9)(A) (2018)).

90. See SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 11–12 (1998) (describing the difference between definitions of disability: its medical definition, which has a negative connotation, and its definition as a social/political category, which relates to the identity of “a group bound by common social and political experience”).

91. See Hahn, *supra* note 64, at 39 (“Although a ‘minority-group’ model has emerged to challenge the traditional dominance of the ‘functional-limitations’ paradigm for the study of disability, research on attitudes toward disabled people has not produced a theoretical orientation that reflects these developments.”); Guevara, *supra* note 8, at 10 (“Unlike the medical model and the individual model . . . under the social model there is nothing deficient or wrong with an individual with a disability because there are diverse ways of existing in the world.”); Kanter, *supra* note 8, at 420 (describing how the medical model of disability treats disabilities as defects in need of treatment while the individual model lends itself to treating disabilities as a “personal tragedy . . . which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals”); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT 4–6 (1990). Accordingly, the medical model fixates the “problem” within the individual while simultaneously absolving society from any further consideration. *Id.* It also ultimately perpetuates stereotypes, perceiving people with disabilities as incomplete or damaged and needing fixing to accomplish any task at hand. *Id.* See also LINTON, *supra* note 90, at 11–12 (describing the different definitions of disability); DEBORAH A. STONE, THE DISABLED STATE 107–17 (1984) (discussing the medical evaluation of impairment where the medical model views individuals as defective, and as having an impairment that must be eliminated, treated, or cured); DAN GOODLEY, DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM 16 (2014) (“Disability is established in the *World Report* as a problematic dynamic

treatment of an individual with an illness or an impairment is the general view of a disability.⁹² This view reinforces the able body⁹³ as the norm, perpetuating stigma and discrimination against people with disabilities by “othering” and limiting an individual’s value to “reasonable accommodations.”

Furthermore, the law only protects those deemed disabled, trying to find ways to protect them rather than addressing how society is disabling them through its categorization.⁹⁴ The unintended consequence of highlighting a person’s disability when having to determine who cannot qualify for services leads to “othering.”⁹⁵ Martha Minow calls attention to “the dilemma of difference,” describing how “[t]he stigma of difference may be recreated by both ignoring and by focusing on [the disability].”⁹⁶ To receive services or benefits and obtain the necessary accommodations to thrive and succeed, the disability is highlighted, while the claimant is simultaneously yearning for equal treatment and attempting to avoid feeling like the “other.”⁹⁷ Eradicating the stigma and reimagining other alternatives to reduce discrimination start by shifting the paradigm away from an individual’s abilities and focusing instead on how society disables⁹⁸ while also embracing

phenomenon requiring the immediate response of nations states, their governments and their citizens.”).

92. See LINTON, *supra* note 90, at 12–13 (“While retaining the term *disability*, despite its medical origins, a premise of most of the literature in disability studies is that *disability* is best understood as a marker of identity. As such, it has been used to build a coalition of people . . . that make them targets of discrimination.” (emphasis in original)).

93. See *supra* note 7 and accompanying text.

94. See 29 U.S.C. § 701(b) (2018) (“The purposes of this chapter are — (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through — (A) statewide workforce development systems . . . that include, as integral components, comprehensive and coordinated state-of-the-art programs of vocational rehabilitation . . .”).

95. See generally GOFFMAN, *supra* note 72 (“By definition, of course, we believe the person with a stigma is not quite human.”).

96. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

97. See generally GOFFMAN, *supra* note 72 (discussing how individuals might respond to being stigmatized).

98. See Tania Burchardt, *Capabilities and Disability: The Capabilities Framework and the Social Model of Disability*, 19 DISABILITY & SOC’Y 735, 736 (2010) (“The emphasis on society as the cause of disability leads to a rejection of the idea of disability as a personal tragedy.”).

temporary disabilities and human variation. Shifting this intent begins to address stigma and discrimination against people with disabilities in a more holistic way, something the current law fails to do.⁹⁹

Moreover, the ableness' property interest is essential to this shift, as accounting for possible resistance toward any future change may alter society's approach and tactics.¹⁰⁰ The focus should shift to maximizing everyone's human potential without room for exclusion to determine whether a person has a disability,¹⁰¹ whether an accommodation is reasonable or not, or

99. See S. REP. NO. 93-1297, at 37 (1974), as reprinted in 1974 U.S.C.C.A.N. 6373, 6388 ("It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term 'handicapped individual' in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services under Titles I and III (in the case of both section 503 and 504) of the Act."); see also Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOCIO. 517, 517, 527 (1999) (explaining that the civil rights movement created a "paradigmatic shift" in antidiscrimination law necessary to dismantle group-based subordination). See generally Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (discussing the ADA broadly in the context of anti-discrimination legislation).

100. Guevara, *supra* note 8, at 1 (describing for the first time the idea of property interest in ableness as an inherent social influence exercised by gatekeepers—who have limited exposure to disability—when they make decisions that tend to manufacture disability); see LINTON, *supra* note 90, at 39 (describing the power dynamics of the "dominant group" as "nondisabled people determin[ing] what resources, if any, will be made available to disabled people"); Kanter, *supra* note 8, at 409 (arguing that "disability is a social construct derived from a history of stigmatization and exclusion"); Mike Oliver, *The Politics of Disability*, 4 CRITICAL SOC. POL'Y 21, 22–23 (1984) (noting the social model of disability puts forth the idea that society disables and, thus, the structures of our society create disabilities); see also JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS: UNDERSTANDING OUR PAST, CHANGING OUR FUTURE* 19–20 (1996) (describing the shift to the social model and subsequent positive change in the political mobility of organizations founded by disabled individuals); Tom Shakespeare, *Disability, Identity, and Difference*, in *EXPLORING THE DIVIDE: ILLNESS AND DISABILITY* 94, 106 (Colin Barnes & Geoff Mercer eds., 1996) (proposing that the social model may cause disabled individuals to define themselves in comparison with non-disabled individuals); Marks, *supra* note 63, at 86–89 (discussing the difficulty of defining disability due to the constantly changing nature of qualifying factors).

101. See Gordon Good, Comment, *The Americans with Disabilities Act: Short-Term Disabilities, Exceptions, and the Meaning of Minor*, 37 U. DAYTON L. REV. 99, 104 (2011) (noting the "actual" and "regarded as" prongs account for the clear majority of disability cases, so a large portion of litigation involving disability deals with determining whether a plaintiff has a disability).

whether such an accommodation is an undue hardship.¹⁰² To provide an accommodation to one individual and not another signals to others that the individual receiving the accommodation is worth more and worthy of investment. The “reasonable accommodation” standard helps justify providing for one person with a disability but not another.¹⁰³ This “othering” loophole is also evident under the “undue hardship” defense¹⁰⁴ for entities that are unwilling to provide the accommodations. This categorization creates insiders and outsiders¹⁰⁵ in social spaces, leaving room for discrimination and making this dynamic all the more important to explore in the midst of a pandemic that is resulting in Long COVID diagnosis.

Perhaps what is happening with Long COVID—as rates increase and more people become disabled—is that it is creating a pathway to shift the paradigm and design adjusting to those in need of maximizing their potential amidst a pandemic by providing what is needed rather than distinguishing who needs what. Maximizing all human potential can shift the value placed on all human life in the public and private spheres, especially for those currently viewed as a social burden.¹⁰⁶ By focusing on

102. Undue hardship and undue burden are used interchangeably. Undue hardship is a defense to a reasonable accommodation claim used by an employer. 42 U.S.C. §§ 12111(10), 12112(b)(5)(A).

103. See 42 U.S.C. § 12111(9) (defining reasonable accommodation).

104. See 42 U.S.C. § 12111(10) (defining undue hardship).

105. See generally GOFFMAN, *supra* note 72 (explaining the social dynamics on in-groups and out-groups).

106. See, e.g., Liz Essley Whyte, *State Policies May Send People with Disabilities to the Back of the Line for Ventilators*, CTR. FOR PUB. INTEGRITY (Apr. 8, 2020), <https://publicintegrity.org/health/coronavirus-and-inequality/state-policies-may-send-people-with-disabilities-to-the-back-of-the-line-for-ventilators/> [https://perma.cc/X2ZU-JXJX]. Whyte describes an Alabama policy, which was only ended after advocates complained, that stated that people living with intellectual disabilities “‘may be poor candidates’ for a ventilator if hospitals run short during th[e COVID] pandemic.” *Id.* The mother of Matthew Foster, a thirty-seven-year-old with Down Syndrome living in Alabama, said, “I was outraged and still am that any decision-maker or policy-maker in our state would think so little of people with intellectual disabilities that they would actually say an IQ score determines whether you live or die.” *Id.* Alabama is not the only state with such policies. See Daniel Moran & Anita Chabria, *Coronavirus Frays the Safety Net for People with Severe Disabilities, Leaving Many at Risk*, L.A. TIMES (Apr. 5, 2020, 7:00 AM), <https://www.latimes.com/california/story/2020-04-05/coronavirus-services-disabled-families-california> (describing a similar situation in California). To settle related investigations, Alabama and Pennsylvania had to update their COVID-19 triage protocols for ventilator use. See Whyte, *supra*.

maximizing human potential, instead of being limited by the disability binary perpetuated by the law, the value of life and work product of anyone considered different would change since everyone would partake in the benefits and resources; this would eliminate the prevalent rational discrimination against people with disabilities, the very discrimination disability antidiscrimination law tries to combat.¹⁰⁷

If the framework of disability law were to intentionally invest in people's differences for the collective long-term good of all, rather than the short-term benefit of the individual, society would begin to view people with disabilities as part of human variation with no prescribed standard way of being. If the adage is true that necessity is the mother of invention,¹⁰⁸ then inventions to maximize all human potential that benefit us all will launch society into new technological waves and create new markets. For example, Ronald Mace thought inclusively by designing products that could be used to the greatest extent possible by all people, not just people with disabilities; this was also known as universal design.¹⁰⁹ Thus, if Americans were to find a way to maximize human potential to benefit all, then the universal design concept would no longer be a theory, but a reality.¹¹⁰

III. WHAT IS A REASONABLE ACCOMMODATION TODAY?

Given the aforementioned definition of reasonable accommodation, what may have seemed like a reasonable accommodation yesterday may not seem reasonable today.

107. See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 848 (2003) ("The prohibition of rational discrimination is the central component of antidiscrimination doctrine.").

108. PLATO, *THE REPUBLIC OF PLATO* 49 (Benjamin Jowett, trans., 2017) ("[T]he true creator is necessity, who is the mother of our invention.").

109. See *Ronald L. Mace Papers 1974-1998*, NC STATE UNIV. LIBRS., <https://www.lib.ncsu.edu/findingaids/mc00260/> [<https://perma.cc/YRN5-9XVE>] (last visited Mar. 2, 2021) (describing how Mace contracted polio as a child and quickly realized the challenges people with disabilities face, leading him to pioneer the concept of universal design and creating aesthetically pleasing buildings with an inclusive design that most people could use regardless of ability). Universal design is associated with the barrier-free concept—a concept of making buildings, products, and environments accessible to all. *Id.*

110. See *id.* See generally SELWYN GOLDSMITH, *DESIGNING FOR THE DISABLED: THE NEW PARADIGM* (1997) (looking at disabilities from an architectural perspective).

Factoring in the effect of the COVID-19 pandemic on the economy and the social disparities it has highlighted in communities of color, the term “reasonable” is up to interpretation. In some instances, the concept of reasonable accommodations has improved because employers had to become flexible in allowing their employees to work from home whether they believed in the reality of the pandemic or not.¹¹¹

Before COVID, working remotely would be considered an enormous ask for an accommodation for people with disabilities, almost considered a luxury afforded to few.¹¹² Today, however, working remotely is the new “curb cut” for a large portion of the employment sector.¹¹³ The curb cut effect embraces a universal design concept where an adjustment that seemingly benefits the few actually impacts and benefits the masses.¹¹⁴ Although curb cuts were in place in 1940 in Kalamazoo, Michigan, to assist veterans in wheelchairs, they were not made widely available until after disability rights activist Ed Roberts passed away in

111. Alison Green, *Ask a Manager's Alison Green on What to Do If Your Company or Boss Isn't Taking the Coronavirus Seriously*, INSIDER (May 15, 2020, 10:38 AM), <https://www.businessinsider.com/what-to-do-if-your-company-isnt-handling-coronavirus-well-2020-3>; see also Nicole Carroll, *Backstory: Why Do People Deny the Seriousness of COVID-19? I Asked Them. Here's What They Said.*, USA TODAY (Dec. 4, 2020, 5:30 AM), <https://www.usatoday.com/story/opinion/2020/12/04/covid-conspiracy-why-people-dont-believe-deadly-pandemic-misinformation/3803737001/> (comparing claims made about the COVID-19 pandemic with the truth).

112. See Danielle Campoamor, *Disabled People React to Coronavirus Work From Home Accommodations*, TEENVOGUE (Mar. 24, 2020), <https://www.teenvogue.com/story/disabled-people-react-to-coronavirus-work-from-home-accommodations> (“Seeing the accommodations provided around COVID-19 has been heartbreaking. I [believe] that it wasn't the level of difficulty of the accommodations I was requesting: it was that these institutions didn't want to provide them.”).

113. See, e.g., Rachel Martin et al., *As Companies Look to Bring Remote Workers Back to the Office, a Writer Asks: Why?*, NPR (Nov. 1, 2021, 2:42 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/11/09/1053793602/future-of-work-author-says-its-time-to-ask-if-offices-are-worth-it> (“Many millions of people, especially those in white-collar jobs, have been working from home for the past 20 months. It's a radical change in the nature of work. And despite predictions and surveys, no one knows for sure how long it will last or what the future of work will look like.”).

114. See Campoamor, *supra* note 112 (“During a pandemic, non-disabled people are disabled by the requirement to work-from-home. When the organization provides them with what they need to do their jobs appropriately, they're able to accomplish as much as they could at the office, thus no longer experiencing their environmental disability.”).

1995.¹¹⁵ The curb cuts were primarily meant to assist those in wheelchairs but also helped mothers with strollers and bicyclists, to name a few.¹¹⁶

Similarly, telework became the curb cut for the employment sector, where many businesses save money by not paying overhead expenses.¹¹⁷ Businesses no longer renewed their building leases because they realized telework was more economical, saving real estate costs.¹¹⁸ Working from home would not be considered a significant accommodation as it would be normalized and readily accepted. However, this curb cut effect is only possible for industries that may still operate with email, phone, and zoom meetings. It is not the case with the raw materials, manufacturing, and construction industries, and a sector of the service industry.¹¹⁹

According to the Fair Labor Standards Act of 1938 (FLSA), an employer must pay an individual for the actual hours worked.¹²⁰ Thus, the employer is not responsible for reduced hours due to the impact of the COVID-19 pandemic.¹²¹ Similarly,

115. See Vicki Leeper, *History of Curb Cuts – 99% Invisible*, DISABILITY ACTION CTR. NW (June 5, 2018), <https://dacnw.org/newsletter/history-of-curb-cuts-99-invisible/> (“Roberts was central to a movement that demanded society see disabled people in a new way.”).

116. See *The Curb Cut Effect: How Making Public Spaces Accessible to People with Disabilities Helps Everyone*, DISABILITY SCI. REV. (Dec. 11, 2016), <https://mosaicofminds.medium.com/the-curb-cut-effect-how-making-public-spaces-accessible-to-people-with-disabilities-helps-everyone-d69f24c58785> (“If you’ve ever pushed a stroller, carried heavy bags, had joint pain, [or] walked with crutches or a cane . . . curb cuts have helped you.”).

117. See Kristen Senz, *How Companies Benefit When Employees Work Remotely*, HARV. BUS. SCH. (July 29, 2019), <https://hbswk.hbs.edu/item/how-companies-benefit-when-employees-work-remotely> (“Companies that let their workers decide where and when to do their jobs—whether in another city or in the middle of the night—increase employee productivity, reduce turnover, and lower organizational costs, new research suggests.”).

118. *Id.*

119. See Kim Parker et al., *How the Coronavirus Outbreak Has – and Hasn’t – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/> (“To be sure, not all employed adults have the option of working from home, even during a pandemic. In fact, a majority of workers say their job responsibilities cannot be done from home. There’s a clear class divide between workers who can and cannot telework.”).

120. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C §§ 201–219 (2018)).

121. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/flsa/pandemic> (last visited

if an employee cannot work resulting from the fatigue symptom, the employer is not required to pay for hours not worked.¹²² However, the employer and employee can construct an arrangement to be paid when they feel better and can work. This arrangement is uncertain because fatigue impacts people differently and the needs of a particular job are also different. Some industries allow for this flexibility, such as those who usually work from an office desk can now work from home, while others, such as restaurant servers or healthcare workers, do not have such a privilege. It is important to note that People of Color, especially Black employees who are not entering the white collar sector, work at higher rates in blue collar employment where working from home accommodations are not possible.¹²³ White people are the majority in poverty because they compose the majority of the population size. It is easier for a white individual in the blue collar sector to enter the white collar sector given that their whiteness is property¹²⁴ which they can leverage, something not afforded to People of Color.¹²⁵ It becomes

Aug. 9, 2021) (explaining an employer does not need to pay for hours an employee would have worked if not for COVID-19).

122. *COVID-19 and the Family and Medical Leave Act Questions and Answers*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fmla/pandemic> (last visited Nov. 12, 2021) ("Currently, federal law generally does not require employers to provide paid leave to employees who are absent from work because they are sick with COVID-19, have been exposed to someone with COVID-19, or are caring for someone with COVID-19.").

123. Michael Gee, *Why Aren't Black Employees Getting More White-Collar Jobs?*, HARV. BUS. REV. (Feb. 28, 2018), <https://hbr.org/2018/02/why-arent-black-employees-getting-more-white-collar-jobs>; Tracy Jan & Scott Clement, *Hispanics Are Almost Twice as Likely as Whites to Have Lost Their Jobs Amid Pandemic, Poll Finds*, WASH. POST (May 6, 2020), <https://www.washingtonpost.com/business/2020/05/06/layoffs-race-poll-coronavirus/> ("Black and Hispanic workers are bearing the brunt of the economic crisis because they are overrepresented in industries that were hit first by social distancing mandates and stay-at-home orders, economists say.").

124. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1734 (1993) (explaining how whiteness is a status property); see also Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOC. 649, 649–653, (2006) (explaining whiteness is separate from white people since whiteness is a social construct; thus, white people benefit from white privilege afforded through the social construct of whiteness).

125. *Poverty Rate by Race/Ethnicity*, KFF, <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Aug. 10, 2021); *Are Most People in Poverty Non-White?*, U.S.

challenging for both the employee and the employer to navigate the economic uncertainties brought on by a pandemic and the uncertainties of a disability. Employees turn to Jobs Accommodation Network (JAN) for assistance,¹²⁶ while employers, unsure of the law or the appropriate standard of the practice, turn to the Equal Employment Opportunity Commission (EEOC).¹²⁷

A. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the wake of the pandemic, to assist employers, the EEOC created a guide entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*.¹²⁸ This guide explains to employers how much information they can request from an employee.¹²⁹ While the ADA prohibits an employer from making disability-related inquiries and requiring medical examinations, there are limited exceptions related to job necessities.¹³⁰ Making disability-related inquiries and conducting medical examinations are prohibited before a conditional offer.¹³¹ However, after the offer is made, but before work commences, the ADA permits employers to make disability-related questions and conduct medical examinations, if all entering employees in the same job category are subject to the same inquiries and examinations.¹³² Therefore, all entering employees can be asked questions related to their COVID-19 status and their Long COVID prognosis.

CENSUS BUREAU, https://www.census.gov/newsroom/cspan/households_and_businesses/20120720_cspan_hh_bus_slides_3.pdf (last visited Aug. 10, 2021).

126. See Batiste, *supra* note 66 (answering questions about workplace accommodations for workers with Long COVID); Rachel Feintzeig, *Coronavirus and the New Workplace: Your Rights, Your Responsibilities*, WALL ST. J. (Mar. 26, 2021), <https://www.wsj.com/articles/coronavirus-and-the-new-workplace-your-rights-your-responsibilities-11585215000>.

127. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated on Oct. 28, 2021) [hereinafter *What You Should Know*].

128. U.S. EQUAL EMP. OPPORTUNITY COMM'N, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2020), https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf.

129. *Id.* at 2.

130. *Id.* at 3.

131. *Id.* at 4.

132. *Id.*

According to EEOC, “employers are not required to provide telework as an accommodation to employees who have no disability-related limitations.”¹³³ As a result, these employees are not guaranteed remote work if they want to stay home to reduce the risk of contracting COVID-19 to keep their loved ones, who are at higher risk of illness, safe.¹³⁴ This reality increases exposure to the virus thus increasing the risk of contracting and spreading COVID-19 and developing Long COVID. Those employees with a disability that would like to continue working from home do not automatically get telework as a “reasonable accommodation.”¹³⁵ Once again, the loopholes in disability antidiscrimination law, “reasonable accommodation” and “undue hardship,” come into play. The employee and employer are to engage in an “interactive process” to “find a ‘reasonable accommodation’ that does not cause an undue hardship on the employer;”¹³⁶ assuming that the employer is willing and able to engage in such a process. However, multiple factors may prevent an employer from engaging in this process, including lack of business or profit from the outfall of the pandemic, needing fewer people to do more work, and thus, being unwilling to accommodate anyone. The employer may buy into the stereotype and stigma often encountered by people with disabilities which sees them as burdens or something to “deal” with.

The employment rates of people with disabilities were already dire before the pandemic, when people with disabilities were making 64¢ on the dollar, and the reality is that not much has changed in the employment rates for people with disabilities after the passage of the ADA in 1990.¹³⁷ Therefore, it is not

133. Michelle Perez-Yanez, *Will Working From Home Be a Reasonable Accommodation Post-COVID?*, ABA (Nov. 23, 2020), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_report/2020/november-2020/will-working-home-be-reasonable-accommodation-post-covid/; *What You Should Know*, *supra* note 127.

134. Perez-Yanez, *supra* note 133.

135. *Id.*; *What You Should Know*, *supra* note 127.

136. Perez-Yanez, *supra* note 133; *What You Should Know*, *supra* note 127.

137. *Closing the Pay Gap for Workers with Disabilities*, AIR (Jan. 25, 2015), <https://www.air.org/event/closing-pay-gap-workers-disabilities> (explaining people with disabilities earn 64¢ on the dollar their colleagues make); see COLKER, *supra* note 84 and accompanying text; *News Release, U.S. Dep’t of Lab., Persons with a Disability: Labor Force Characteristics—2020* (Feb. 24, 2021), <https://www.bls.gov/news.release/pdf/disabl.pdf> (“In 2020, 17.9 percent of persons with a disability were employed, down from 19.3 percent in 2019.”);

surprising that with these loopholes embedded in the law, while it has not led to direct job losses for people with disabilities, it has made it significantly more challenging to obtain a job. COVID created economic insecurity. In general, people were losing their jobs over Zoom,¹³⁸ often impacting marginalized groups¹³⁹ at higher rates, with many losing their jobs simultaneously with their colleagues.¹⁴⁰

Unfortunately, the anecdotes about people losing their jobs across the country became all too familiar. When people with disabilities come onto the scene looking for employment in these businesses, employers use “direct threat” as an excuse not to bring on new employees who will likely require reasonable accommodations.¹⁴¹ Thus, as discussed below, some employers began to use any tangible association with “direct threat” not to provide accommodations.

Rebecca Vallas, Shawn Fremstad & Lisa Ekman, *A Fair Shot for Workers with Disabilities*, CAP (Jan. 28, 2015, 9:09 AM), <https://www.americanprogress.org/issues/poverty/reports/2015/01/28/105520/a-fair-shot-for-workers-with-disabilities/> (“[T]he most recent available data put the poverty rate for working-age people with disabilities at 34.5 percent in 2013, compared with 12.2 percent for those without disabilities.”); *see also* BAGENSTOS, *supra* note 74 and accompanying text.

138. Deborah Copaken, *I Got Fired Over Zoom*, ATLANTIC (May 12, 2020), <https://www.theatlantic.com/business/archive/2020/05/fired-zoom-layoffs-coronavirus/611509/>.

139. *See* Michelle Lee Maroto, David Pettinicchio & Martin Lukk, *Working Differently or Not at All: COVID-19’s Effects on Employment Among People with Disabilities and Chronic Health Conditions*, SOCIO. PERSPS. 1, 1 (2021) (emphasizing the “potential for growing economic insecurity as the pandemic continues to wreak havoc on employment situations among marginalized groups”).

140. *See* Ally Markovich, *It Was Very Sudden: Berkeley Locals Talk About Losing Their Jobs Due to COVID-19*, BERKELEYSIDE (July 21, 2020, 3:49 PM), <https://www.berkeleyside.org/2020/07/21/it-was-very-sudden-berkeley-locals-talk-about-the-impact-of-losing-their-jobs-because-of-covid-19/> (“Young and old, from all walks of life, nine people — including a rabbi, a sound engineer and a student — share how they are coping since being made unemployed.”).

141. Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377, 380 (2018) (explaining that employers have a direct threat defense when they do not extend jobs to or retain disabled individuals that pose a danger to others’ health that cannot be reduced with a reasonable accommodation; these employees are not protected by the ADA).

B. COVID-19 AS A DIRECT THREAT NOT COVERED UNDER DISABILITY ANTIDISCRIMINATION LAW

Disability antidiscrimination law does not cover “direct threat.”¹⁴² What does this mean in the time of COVID-19? It becomes another tool to “other” people, compounding the stigma already felt by those with positive COVID-19 tests and the long haulers. Under the law, a “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”¹⁴³ Employers can make the case that those once diagnosed with COVID-19 pose a direct threat to fellow employees and the rest of the public.

An employer can provide or modify equipment or devices, provide part-time work or modify work schedules, reassign to a vacant position, adjust or modify examinations, training materials, or policies.¹⁴⁴ However, employers do not have to remove essential job functions, lower production standards, or provide personal need items (e.g., hearing aids, wheelchairs).¹⁴⁵ They do not have to “provide any accommodation that creates an undue hardship,” nor “provide the employee’s preferred accommodation.”¹⁴⁶ Providing an effective accommodation is enough, although not ideal.¹⁴⁷ Accommodations for front-line workers are non-existent because under the law an employer need not accommodate an employee if these accommodations interfere with the “essential job functions.”¹⁴⁸ A person is only qualified for the job if the person has the ability to perform the essential job functions of the job, with or without reasonable

142. 29 C.F.R. § 1630.2(r) (2020); *see also* Befort, *supra* note 141, at 379–87 (discussing the background of the “direct threat” exception).

143. 29 C.F.R. § 1630.2(r) (2020).

144. *See* Batiste, *supra* note 66 (answering questions about workplace accommodations for workers with Long COVID).

145. *Id.*

146. *Id.*

147. *See id.* (listing accommodations that employers must make, and accommodations employers are not required to make).

148. *See* Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 568–69 (1999) (explaining that an employer that required its drivers to meet basic vision standards set and mandated by the United States Department of Transportation did not need to accommodate potential employee from an uncorrectable vision condition in one eye because the employer was entitled to enforce that standard as defining an “essential job function” of the employment position).

accommodations.¹⁴⁹ This standard highlights why blue collar workers are not covered under the law once they contract COVID-19 and are unable to attend to their work.

However, the vagueness of what is considered a disability under the ADA leaves plenty of room for discretion. While accommodating an employee is the right thing to do, it is not always the most profitable, nor the easiest—both possibly helping or harming the employee depending on the intent and motivation of the employer. Thus, whether true or not, an employer can argue that a disability poses a direct threat or that hiring and keeping a person with Long COVID is unreasonable because no reasonable accommodation could be provided. Thus, some small business employers advise their employees with Long COVID that they can go on disability.¹⁵⁰ Stories of people with Long COVID being denied accommodations have become all too common.¹⁵¹ As of April 21, 2021, lawsuits are still being filed against employers for failure to provide accommodations during the COVID-19 pandemic.¹⁵²

Courts have seen an increase in lawsuits against the employer by the employee.¹⁵³ Take the case of Tony Robbins's employee as an example.¹⁵⁴ After contracting COVID-19, all the

149. See 42 U.S.C § 12111(8) (2021) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”).

150. See Wilhelm Schnotz, *Can My Boss Force Me onto Disability?*, CHRON., <https://smallbusiness.chron.com/can-boss-force-onto-disability-12435.html> (last visited Aug. 11, 2021) (discussing protections from discrimination through the ADA and insurance).

151. See, e.g., Azi Paybarah & Michael Levenson, *Lawsuit Accuses Tony Robbins of Discriminating Against Employee Who Got Covid*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/24/business/tony-robbins-covid-lawsuit.html> (describing an employee's attempt to get accommodations while recovering from COVID-19).

152. See Lisa Koblin, *EEOC Files First Lawsuit Against Employer for Failing to Accommodate Work Request due to COVID-19*, JD SUPRA (Sept. 15, 2021), <https://www.jdsupra.com/legalnews/eec-files-first-lawsuit-against-8086395/> (discussing the factual background of a lawsuit and what it means for employers).

153. See, e.g., Sara Weissman, *Universities Face Digital Accessibility Lawsuits as Pandemic Continues*, DIVERSE (Sep. 8, 2020), <https://www.diverseeducation.com/demographics/disabilities/article/15107724/universities-face-digital-accessibility-lawsuits-as-pandemic-continues> (“There's been an uptick in lawsuits by students with disabilities against colleges and universities since the coronavirus pandemic shifted higher education online.”).

154. Paybarah & Levenson, *supra* note 151.

employee wanted was more time to recover and to work from home.¹⁵⁵ The employer denied this.¹⁵⁶ Employers in California are not accommodating for physical or mental illness related to an illness.¹⁵⁷ In November 2020, Jonathan Pantani from California asked his employer for three accommodations recommended by his healthcare provider.¹⁵⁸ Upon requesting (1) extended time off around Thanksgiving, (2) time off work to meet with a therapist, and (3) to set working hours with limited responsibilities during non-working hours and on weekends, Pantani was terminated.¹⁵⁹ The employer argued that they terminated Pantani for “lack of alignment” and “general unhappiness at work.”¹⁶⁰ Instead, the employer could have had a dialogue with the employee about what is considered a reasonable accommodation under the circumstances and what accommodations could not be provided because they present an undue burden.

Under employment litigation, from January 2020 until July 2021, about 2,875 cases across the United States have been filed related to COVID-19.¹⁶¹ Most of these cases entail issues related to remote work and leave conflicts, especially in the healthcare industry.¹⁶² Claims have been filed for failure to accommodate disabled employees during the pandemic’s height in the healthcare industry.¹⁶³ For example, in the Yale-New Haven Hospital, an “administrative associate” diagnosed with cancer, who previously worked from home during the height of the pandemic, was denied the reasonable accommodation of

155. *See id.* (providing factual details about the lawsuit).

156. *See id.*

157. J. Russell Blakey & Jeffrey Thurrell, *COVID-19 Employment Litigation Continues Based on Failure to Accommodate Virus-Related Illnesses*, JD SUPRA (Apr. 28, 2021), <https://www.jdsupra.com/legalnews/covid-19-employment-litigation-7476414/>.

158. *Id.*

159. *Id.*

160. *Id.*; *see* Complaint for Damages, *Pantani v. Instapage, Inc.*, Cal. Super. (Feb. 2, 2021) (No. CGC-21-589593), 2021 WL 2190937.

161. *COVID-19 Employment Litigation Tracker and Insights*, FISHER PHILLIPS, <https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html> (last visited Aug. 13, 2021).

162. *Id.*

163. *Litigation Trend in the Healthcare Industry Reveals Claims of Failure-to-Accommodate Disabled Employees During Pandemic’s Height*, FISHER PHILLIPS (May 10, 2021), <https://www.fisherphillips.com/news-insights/litigation-trend-healthcare-industry-reveals-claims-of-failure.html>.

continuing to work from home.¹⁶⁴ In California, someone with asthma was denied being exempt from treating COVID-19 infected patients,¹⁶⁵ and the list goes on. If this is what is happening to employees with COVID-19 who are expected to eventually recover, what is to be expected for those who have Long COVID where there is no end in sight to the disability?

Recently, several states have enacted workers compensation legislation in light of COVID-19. Minnesota created a law that established a rebuttable presumption that “an employee who contracts COVID-19 is presumed to have an occupational disease arising out of and in the course of employment.”¹⁶⁶ This is a rebuttable presumption if the employee meets two criteria: 1) the employee is a frontline worker, and 2) the employee has produced a positive test or diagnosis for COVID-19. Both Minnesota and Wisconsin have limited their laws to “frontline healthcare workers and first responders.”¹⁶⁷ California and Wyoming have enacted laws that cover all workers.¹⁶⁸ Illinois, New Jersey, and Vermont, cover workers that meet the designation “essential worker.”¹⁶⁹ Clearly there are disparities in state laws pertaining to the pandemic which may similarly impact long haulers.

Therefore, there are unique challenges that present themselves when getting COVID long haulers back to work.¹⁷⁰ White collar work has been more flexible and thus the following may only apply to industries where these adjustments are possible.¹⁷¹ For example, the chronic symptoms such as brain fog prevent many from performing the basic functions of their job.¹⁷² Thus, it would be a good idea to allow for people to work from

164. *Id.*

165. *Id.*

166. Robb P. Enslin, *Covid, 'Long-Covid,' and Workers Compensation*, 78 BENCH & B. MINN. 33, 33 (2021).

167. *Id.*

168. *Id.*

169. *Id.*

170. Krithika Varagur, *The Challenges of Getting Long-Covid Patients Back to Work*, WALL ST. J. (Feb. 14, 2021, 8:00 PM), <https://www.wsj.com/articles/the-challenges-of-getting-long-covid-patients-back-to-work-11613350801>.

171. *See id.* (“Larger organizations and those that employ more white-collar workers generally have more leverage to make accommodations for their workers . . .”).

172. *Id.*

home so that they may take longer breaks or naps.¹⁷³ Eliminating the commute of long haulers also may make a difference.¹⁷⁴ The long hauler could communicate difficulties with certain tasks like answering emails and find a different solution like sending a voice message as a reply. Perhaps, part-time arrangements could help both the employer and employee so that the employee can have some time to focus on recovery.¹⁷⁵ Taking maximum disability benefits in the job is also wise as well as going to the local vocational rehabilitation center which can help an individual find another job or train for a different job where the disability does not interfere significantly.¹⁷⁶ It is much easier to qualify for vocational rehabilitation services than social security disability benefits.¹⁷⁷

Ethical dilemmas arise for employers in the blue-collar sector as employees with disabilities figure out what to do next.¹⁷⁸ If employees turn to one of the last resorts for people with disabilities, known as Social Security Disability Insurance (SSDI), they have to be severely disabled because SSDI has a set of standards as to what qualifies as a disability to receive assistance.¹⁷⁹ While there are court cases being filed to cover both Long COVID as a disability and the long haulers who

173. *Id.*

174. *Id.*

175. *Id.*

176. See *Vocational Rehabilitation / Employment*, IN.GOV, <https://www.in.gov/fssa/ddrs/rehabilitation-employment/vocational-rehabilitation-employment/> (last visited Nov. 12, 2021) (listing services that vocation rehabilitation can provide).

177. See Stanley Denman, *Vocational Rehabilitation for Social Security Disability Claimants: A Good Idea?*, DISABILITY APPROVED, <https://www.disabilityapproved.com/blog/vocational-rehabilitation-a-good-idea/> (last updated June 20, 2021) (“Qualification for social security disability requires an inability to do any work of any kind.”).

178. See Maya Sabatello et al., *Disability, Ethics, and Health Care in the COVID-19 Pandemic*, 110 AM. J. PUB. HEALTH 1523, 1523–27 (2020) (“[T]he absence of strong national policies to accommodate the needs of this population significantly disadvantages the ability of many people with disabilities to protect themselves from COVID-19. This neglect may result in many people with disabilities being left behind.”).

179. See *Disability Evaluation Under Social Security*, SOC. SEC., <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm> (last visited Aug. 13, 2021) (“The law defines disability as the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”).

experience Long COVID under federal disability laws because they are too sick to make it back to work,¹⁸⁰ that does not mean an employer can or will provide reasonable accommodations. Many People of Color are still trying to be recognized as long haulers adding yet another layer of toxic stress to their lives.

C. TOXIC STRESS VIEWED THROUGH A DISABILITY STUDIES AND CRITICAL RACE THEORY (DISCRIT) LENS

Chimère Smith, a 39-year-old woman from Baltimore was still struggling with Long COVID 400 days after contracting COVID-19.¹⁸¹ Smith told congress, “I am now a poor, Black disabled woman living with [L]ong COVID,” and she also reported feeling disrespected by her doctors.¹⁸² Two other black women, Ashanti Daniel and Ashley Jackson came forward to expose medical providers who either ignored or diminished their experience.¹⁸³ Their stories highlight medical racism,¹⁸⁴ a relevant issue because, while experts cannot prove that People of Color were disproportionately affected by Long COVID, experts do suspect that is largely the case because People of Color are among the groups hardest hit by the pandemic.¹⁸⁵

The COVID-19 pandemic largely exposed the health inequalities between white Americans and People of Color. The life expectancy changed significantly—“[f]rom 2019 to 2020,

180. *Federal Court Allows COVID-Based Disability Discrimination Lawsuit to Proceed*, FISHER PHILLIPS (Oct. 6, 2021), <https://www.fisherphillips.com/news-insights/federal-court-allows-covid-based-disability-discrimination-lawsuit.html> (“[C]ases of ‘[L]ong COVID’ can qualify as a disability for purposes of the ADA. But . . . an individualized assessment is necessary to determine whether a person’s [L]ong COVID condition or any of its symptoms substantially limits a major life activity in particular cases.”); *see also* Gabrielle Emanuel, *When Does COVID-19 Become a Disability? ‘Long-Haulers’ Push for Answers and Benefits*, NPR (Feb. 22, 2021, 7:00 AM), <https://www.npr.org/sections/health-shots/2021/02/22/966291447/when-does-covid-19-become-a-disability-long-haulers-push-for-answers-and-benefit> (“Disability advocates and lawmakers are calling on the Social Security Administration (SSA) to study the issue, update their policies and offer guidance for applicants [on whether long-haulers will qualify for disability benefits].”).

181. Chelsea Cirruzzo, *Meet 3 Black Women Fighting for Long COVID Recognition*, U.S. NEWS (July 7, 2021, 6:45 AM), <https://www.usnews.com/news/healthiest-communities/articles/2021-07-07/black-long-haulers-demand-recognition>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

Hispanic people experienced the greatest drop in life expectancy—three years—and Black Americans saw a decrease of 2.9 years. White Americans experienced the smallest decline of 1.2 years.”¹⁸⁶

To understand the concept of toxic stress one first needs to understand what is causing this toxic stress in the first place. People of different backgrounds may experience stress differently since it manifests itself in different forms and various people have different support systems or coping strategies that can mitigate the stress.¹⁸⁷ Given these disparities, the use of a Disability Studies and Critical Race Theory (DisCrit) lens should be encouraged to help deconstruct the deeper-goings on. The pandemic has brought to light that no one lives in isolation, and what happens to one individual can impact the rest of the world. A trauma-informed approach to the workforce and working from home has now been at the forefront when before these two subjects were not considered nor readily available.¹⁸⁸ Racial trauma¹⁸⁹ is an accumulating experience that some People of Color experience. Racial trauma and mental health issues¹⁹⁰ are

186. Julie Bosman et al., *U.S. Life Expectancy Plunged in 2020, Especially for Black and Hispanic Americans*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/us/american-life-expectancy-report.html>.

187. See Danielle Render Turmaud, *Why Stress Affects People Differently*, PSYCH. TODAY (Mar. 31, 2020), <https://www.psychologytoday.com/us/blog/lifting-the-veil-trauma/202003/why-stress-affects-people-differently> (“Some of the[] factors [that affect how stress affects people] may include neurobiological differences, different levels of internal and external resources (e.g. support systems, cognitive self-talk, access to mental health care, etc.), differing coping strategies, and trauma history.”).

188. See SAMHSA’s *Concept of Trauma and Guidance for a Trauma-Informed Approach*, SAMHSA’S TRAUMA & JUST. STRATEGIC INITIATIVE 1, 3 (July 2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf (“There is an increasing focus on the impact of trauma and how service systems may help to resolve or exacerbate trauma-related issues. These systems are beginning to revisit how they conduct their business under the framework of a trauma-informed approach.”).

189. See MARYAM M. JERNIGAN ET AL., #RACIALTRAUMAISREAL 1 (2015), <https://www.bc.edu/content/dam/bc1/schools/lsoe/sites/isprc/racialtraumaisreal.pdf> (“Racial trauma is one term used to describe the physical and psychological symptoms that People of Color often experience after being exposed to stressful experiences of racism.”).

190. Rochaun Meadows-Fernandez, *The Little Understood Mental-Health Effects of Racial Trauma*, THE CUT (June 23, 2017), <https://www.thecut.com/2017/06/the-little-understood-mental-health-effects-of-racial-trauma.html>.

causing the toxic stress.¹⁹¹ Keeping these factors in mind, DisCrit becomes more useful.

D. DISCRIT

DisCrit, it is not conclusory—it is a lens that addresses: [F]orces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy . . . values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on . . . emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms . . . privileges voices of marginalized populations, traditionally not acknowledged within research . . . considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens . . . recognizes Whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of White, middle-class citizens . . . [and] requires activism and supports all forms of resistance.¹⁹²

The physical presence of individuals is essential to accomplishing some industries' demands where telework is not an option. Thus, the employer in these industries may struggle to stay afloat given the COVID restrictions and, as a result, alter the previous conception of what is considered a reasonable accommodation. DisCrit helps in viewing what has happened within the blue-collar and white-collar industries, regarding disparities in contraction of COVID, diagnosis of Long COVID, loss of jobs for frontline workers, and lack of accommodations for employees who have lost a job or who work in an industry where accommodations are not as flexible.

191. See Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 COUNSELING PSYCH. 13 (2007) (“The purpose of this article is to discuss the psychological and emotional effects of racism on People of Color. Psychological models and research on racism, discrimination, stress, and trauma will be integrated to promote a model to be used to understand, recognize, and assess race-based traumatic stress to aid counseling and psychological assessment, research, and training.”). See generally AMERICAN PSYCHOLOGICAL ASSOCIATION, TRAUMA AND HEALTH: PHYSICAL HEALTH CONSEQUENCES OF EXPOSURE TO EXTREME STRESS (Paula P. Schnurr & Bonnie L. Green eds., 2004) (examining how “trauma and PTSD could lead to poor physical health through correlates such as depression, hostility, and maladaptive coping and health behaviors”).

192. *DisCrit*, *supra* note 11, at 19; see CRITICAL RACE THEORY, *supra* note 11 and accompanying text.

CONCLUSION

The Long COVID health crisis is flagging the inadequacy of current disability antidiscrimination law and the importance of addressing structural inequalities impacting the livelihood and lives of some but impacting the future of all. President Joe Biden, like many Americans, believes the disability antidiscrimination law is working. This is evident by his July 26, 2021, speech,¹⁹³ where he addressed those suffering from Long COVID. Apropos, this day marked the thirty-first Anniversary of the Americans with Disabilities Act (ADA). He suggested Long COVID could be covered under disability law.¹⁹⁴ However, drawing on the aforementioned loopholes and the recent increase in Long COVID employees filing lawsuits,¹⁹⁵ it is clear that even if an individual qualifies as disabled under the disability antidiscrimination law, that does not mean they will get reasonable accommodations.

The loopholes have rendered disability antidiscrimination law almost ineffective. Americans have a false sense of confidence in the Americans with Disabilities Act and its 2008 Amendment. Given the recent pandemic, it is the perfect time to expose its ineffectiveness as more and more Americans develop disabilities. People with disabilities, whether they are People of Color or not, are always the last ones in and the first ones out of the workforce. To be, or not to be, is no longer a question, but a

193. See Shira Stain, *Covid Long-Haulers Get Disability Civil Rights Protections*, BLOOMBERG L. (July 26, 2021), <https://news.bloomberglaw.com/health-law-and-business/covid-long-haulers-get-disability-civil-rights-protections> (“We’re bringing agencies together to make sure Americans with [L]ong Covid who have a disability have access to the rights and resources that are due under the disability law, which includes accommodations and services in the workplace and school, and our health care system so they can live their lives in dignity and get the support they need as they continue to navigate these challenges,” Biden said at the White House.”).

194. *Id.*

195. Paige Smith, *Long-Haul Covid Discrimination Emerges as Workplace Legal Risk*, BLOOMBERG L. (Aug. 2, 2021) <https://news.bloomberglaw.com/daily-labor-report/long-haul-covid-discrimination-emerges-as-workplace-legal-risk> (“Attorneys and disability rights proponents said most ADA workplace litigation risk involving Covid long-haulers will arise when workers and employers engage in an interactive process to determine whether a job modification is reasonable and should be granted. Already during the pandemic, ADA accommodation requests generally have spiked and workers have gone to court when they’ve been denied.”).

reality that those with Long COVID are not adequately protected under the law to receive reasonable accommodations.