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Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought under the Americans with Disabilities Act

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Discrimination against persons with disabilities[1] permeates American society.[2] This is especially true in the context of employment. Employers often reject highly qualified job applicants,[3] deny promotions and other employment opportunities to

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1. Recent commentary on the rights of disabled persons has distinguished between the words "handicap" and "disability." "Some commentators . . . assert that disability refers to a medical condition and that handicap refers to one's status as a result of a disability." UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 5 (1983) [hereinafter SPECTRUM]. Other commentators prefer the phrase "person with a disability," because it focuses on the individual more than the disability. *See* Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy For People With Disabilities*, 40 UCLA L. REV. 1341, 1342 n.2 (1993). This Note will primarily use the phrase "persons with disabilities" because it emphasizes the person rather than the disability.

2. Congress, in passing the Americans with Disabilities Act, found:

> [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.

42 U.S.C. § 12007(a)(1), (7) (Supp. V 1993).

3. *See, e.g.*, School Bd. v. Arline, 480 U.S. 273, 283 n.9 (1987) (citing remarks of Sen. Walter Mondale regarding a woman crippled by arthritis who was denied a job as a teacher because college trustees thought students should not see her); Prewitt v. United States Postal Serv., 662 F.2d 292, 298-99 (5th Cir. 1981) (discussing the Postal Service's refusal to hire an individual because a war injury prevented him from lifting his arms above his head); Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607,

existing employees,[4] and terminate employees,[5] because of their disabilities. In response to the substantial discrimination against persons with disabilities and the failure of existing federal legislation to address such discrimination,[6] Congress passed the Americans with Disabilities Act of 1990 ("ADA").[7] The ADA, for the first time, comprehensively prevents private, as well as public, employers from discriminating based on disability.[8]

The ADA differs significantly from federal legislation proscribing other forms of employment discrimination, such as Title VII of the Civil Rights Act of 1964.[9] The ADA defines discrimination differently than Title VII,[10] and places on employers an additional duty to reasonably accommodate the needs of workers with disabilities.[11] Despite these differences, some courts interpreting the ADA have applied the test the United States Supreme Court developed in *McDonnell Douglas Corp. v.*

1612 (1991) (describing the situation of a disabled graduate of Harvard Law School who was rejected more than 600 times before being hired as a corporate counsel).

4. Meisser v. Howe, 872 F. Supp. 507, 520-22 (N.D. Ill. 1994) (finding employer's failure to reasonably accommodate plaintiff's blindness denied him the opportunity to compete effectively for promotions).

5. *Arline*, 480 U.S. at 275-76 (holding that school board's dismissal of a teacher on the basis that she had tuberculosis, which was in remission, was unlawful disability discrimination).

6. The National Council on the Handicapped first presented a proposal for comprehensive federal legislation prohibiting discrimination against persons with disabilities in 1986. *See* NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES WITH LEGISLATIVE RECOMMENDATIONS (1986) [hereinafter TOWARD INDEPENDENCE]. The report found that the "[c]omplexities, inconsistencies, and fragmentation in the various Federal laws and programs that affect Americans with disabilities might suggest that the United States has no coherent Federal policy on disability." *Id.* at 7. Another flaw in federal policies regarding persons with disabilities was that federal programs overemphasized income support and underemphasized programs promoting opportunities and independence. *Id.* at vi.

7. 42 U.S.C. § 12101 (Supp. V 1993).

8. The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* § 12101(b)(1)-(2).

9. *See infra* part II.B (describing differences between the ADA and Title VII).

10. *See infra* part II.A.2 (describing differences in definitions of discrimination used in the ADA and Title VII).

11. *See infra* notes 72-76 and accompanying text (describing the duty to reasonably accommodate under the ADA).

Green,[12] which allocates the burden of proof in discrimination cases brought under Title VII.[13] Under the *McDonnell Douglas* test, a plaintiff can establish a prima facie case of employment discrimination, even though no direct evidence of discrimination exists, which the defendant must rebut to avoid liability.[14] Applying the *McDonnell Douglas* test to ADA actions, however, does not provide persons with disabilities with adequate protection from employment discrimination.

This Note addresses why the *McDonnell Douglas* test does not provide an appropriate allocation of the burden of proof for employment discrimination cases brought under the ADA. Part I discusses the extent and causes of employment discrimination against persons with disabilities, federal responses to this discrimination in the Rehabilitation Act of 1973 and the ADA, and the various allocations of the burden of proof under the *McDonnell Douglas* test and the Rehabilitation Act. Part II contends that courts should not apply the *McDonnell Douglas* test in ADA cases because of the unique causes of disability discrimination[15] and the substantial affirmative duty the ADA places on employers to accommodate the needs of disabled workers.[16] Furthermore, it argues that courts applying the *McDonnell Douglas* test in ADA cases will unduly burden plaintiffs who bring employment discrimination cases under the ADA. Finally, Part III offers an alternative allocation of the burden of proof that better meets the ADA's goal of ensuring that the workplace remains free of disability discrimination.

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12. 411 U.S. 792, 802-03 (1973).

13. *See, e.g.*, Deluca v. Winer Indus., No. 93-C-6535, 1994 WL 374197 (N.D. Ill. July 13, 1994); Flasza v. TNT Holland Motor Express, No. 93-C-7315, 1994 WL 529392 (N.D. Ill. Sept. 27, 1994); Braverman v. Penobscot Shoe Co., 859 F. Supp. 596 (D. Me. 1994); Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994); Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300 (E.D. Va. 1993); Tyndall v. National Educ. Ctr., No. CIV.A.3:93CV369, 1993 WL 730727 (E.D. Va. Oct. 26, 1993).

14. *McDonnell Douglas*, 411 U.S. at 802-03.

15. *See infra* part I.A.1 (comparing causes of discrimination against the disabled to other types of discrimination).

16. *See infra* notes 72-76 and accompanying text (outlining the duty to reasonably accommodate under the ADA).

I. EMPLOYMENT DISCRIMINATION AGAINST PERSONS WITH DISABILITIES AND THE CONGRESSIONAL RESPONSE

A. THE SCOPE OF DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

Persons with disabilities constitute one of the largest, most discriminated against groups within American society.[17] Based on the ADA's definition of disability, Congress estimated approximately forty-three million Americans have a disability.[18] Statistics demonstrate this population is "the poorest, least educated, and largest minority in America."[19] To begin to comprehend the nature of discrimination and its impact against the disabled, one must first understand how society defines disabilities and how this definition encourages society to discriminate against persons with disabilities.

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17. *See, e.g.*, H.R. REP. No. 101-485(II), 101st Cong., 2d Sess. 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (quoting Justin Dart, the chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, testifying before the House Subcommittees on Select Education and Employment Opportunities, July 18, 1989). Dart argued that despite the considerable progress society has made toward recognizing the rights of persons with disabilities, "our society is still infected by the ancient, now almost subconscious assumption that disabled persons are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right." *Id.*

18. 42 U.S.C. § 12101(a)(1) (Supp. V 1993). According to experts, it is difficult to estimate accurately the number of Americans with disabilities. No national database of this type exists. SPECTRUM, *supra* note 1, at 10. "Instead, . . . information must be culled from four distinct sources: service eligibility statistics, service delivery statistics, population surveys, and ad hoc studies." *Id.* Each of these sources has deficiencies. Not all of them use the same definition of disability, and many base their numbers on people defining themselves as disabled or on people who seek services. *Id.* at 10-13.

According to the National Center for Health Statistics, in the civilian, noninstitutionalized population, 18.4 million people have orthopedic impairments, 17 million have hearing impairments, 8.2 million have visual impairments, 2.1 million suffer from speech impediments, and 1.2 million are partially or completely paralyzed. TOWARD INDEPENDENCE, *supra* note 6, at 6. Of the 9.5 million people regarded as having a developmental disability in 1978, approximately 60% were mentally retarded, 25% had epilepsy, and 10% had cerebral palsy. SPECTRUM, *supra* note 1, at 15-16.

19. H.R. REP. No. 101-485(II), *supra* note 17, at 32-33, *reprinted in* 1990 U.S.C.C.A.N. at 314 (quoting a statement by Vice President Bush on March 31, 1988).

1. Causes of Discrimination Against Persons With Disabilities

Persons with disabilities encompass a diverse group of individuals who experience a multitude of ailments.[20] Even though persons with disabilities do not share many similar traits,[21] society lumps them into one, all-inclusive category based on their perceived inability to function in the mainstream way.[22] In fact, the ADA defines a disabled person as a person who has "a physical or mental impairment that substantially limits one or more of the major life activities . . . ; [has] a record of such an impairment; or . . . [is] regarded as having such an impairment."[23]

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20. Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1438 (1986). Rebell argues that unlike other protected classes, persons with disabilities do not share common physical, psychological, or cultural characteristics:

> Rather, "the handicapped" include persons from all racial, sexual, age, and class categories, who exhibit disabilities as diverse as blindness, cerebral palsy, and emotional disturbances. Within each disability category is a wide diversity of conditions and needs. These range, for example, from the severely mentally retarded to the mildly learning disabled, from wheelchair-bound paraplegics to clubfoot sufferers with mild mobility impairments.

Id.

Even certain diseases or impairments present a wide range of disorders. Epilepsy, for example, contains a range of seizure disorders. Some seizures, such as grand mal, may last for several minutes, causing the person to become unconscious, fall to the ground, and experience shaking movements. By contrast, people who experience petit mal seizures have an almost unnoticeable loss of consciousness. SPECTRUM, *supra* note 1, at 88 n.5. Medical professionals and advocates for persons with disabilities also do not agree on what constitutes a disability. *See* THE BUREAU OF NATIONAL AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 79-80 (1990) [hereinafter LEGAL GUIDE] (contrasting four categories of disabilities that the National Council of Disability has created with the 10 general categories of disabilities other authorities have created). Furthermore, medical professionals have repeatedly changed the definitions of disabilities and continue to do so. For example, the American Association on Mental Deficiency redefined "mental retardation" in 1973. Before 1973, the mentally retarded included people whose scores on standardized tests were one standard deviation below the norm. After redefinition, the group encompassed only those who scored two standard deviations below the norm. As a result, about eight million Americans, whom society formerly considered mentally retarded, no longer belonged to that group. SPECTRUM, *supra* note 1, at 95.

21. SPECTRUM, *supra* note 1, at 4.

22. FRANK G. BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE 109 (1978). Bowe argues that the only characteristic persons with disabilities share is a societal belief that they are different than able-bodied individuals. *Id.*

23. 42 U.S.C. § 12102(2) (Supp. V 1993).

This socially constructed dichotomy divides people into two groups: those who are able bodied and those who are not.[24]

The inaccurate stereotypes[25] generated by this ability-centered dichotomy are one cause of discrimination against persons with disabilities.[26] The focus on an individual's inability to perform a certain task in the mainstream way ignores the person as an individual and his or her abilities.[27] According to some commentators, by focusing on a person's limitations and not the person as an individual, society views persons with disabilities as less than fully human.[28] This leads able-bodied people to believe persons with disabilities have greater limitations on their abilities than actually exist[29] and that they are unable to

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24. SPECTRUM, *supra* note 1, at 87-89. This dichotomy, however, is not based on reality. "Instead of two separate and distinct classes . . . there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional." *Id.*

25. Some psychologists have attempted to categorize the most common stereotypes nondisabled persons assign to people with disabilities. These stereotypes include: "1) the Subhuman Organism 2) the Menace 3) the Unspeakable Object 4) the Object of Pity 5) the Holy Innocent 6) the Diseased Organism 7) the Object of Ridicule, and 8) the Eternal Child." SPECTRUM, *supra* note 1, at 25 (quoting WOLF WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICE 16-24 (1972)).

Such inaccurate assumptions make it difficult for nondisabled people to see the individual through the disability and recognize their full potential to work. *Id.* at 93. In this sense, discrimination against persons with disabilities is similar to discrimination against people of color or women. *See* Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1427 (1991) (arguing social bias causes both discrimination against persons with disabilities and discrimination based on race, sex, religion, or national origin).

26. *See* BOWE, *supra* note 22, at viii-x (arguing that America, by designing the nation for over 200 years without thinking about the needs of persons with disabilities, has handicapped its people); Rebell, *supra* note 20, at 1452 (claiming most barriers that the disabled face result from outdated assumptions about their abilities).

27. SPECTRUM, *supra* note 1, at 89-91.

28. *See, e.g.*, BOWE, *supra* note 22, at 127. According to Bowe:

> [M]any people refer to disabled individuals as "the deaf," "the blind," and "the mentally ill," as though all deaf people were alike, all blind people similar, and all mentally ill persons identical. That more than a mere quirk of language is involved may be seen in the fact that the adjective-as-noun usage conspicuously deletes the humanizing "people."

Id.

29. Because a person with a disability differs from the physical or mental norm, people often make a value judgment that the difference is significant and very negative. "Far from being a response to an inflexible fact about biology, our perception of a handicap nearly always reflects an arbitrary, unconscious decision to treat normal social function and the possession of any handicap as

work.[30] Studies, however, have disproved these beliefs. These studies have also shown that workers with disabilities have equal or better job performance than their nondisabled coworkers.[31]

Another source of discrimination against persons with disabilities is the basic structure of society.[32] American society tends to meet the needs of able-bodied individuals,[33] and only recently has it begun to consider the needs of persons with disabilities. Although society has not consciously excluded persons with disabilities, persons with disabilities nevertheless live in a world not suited to or designed for them.

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mutually exclusive." SPECTRUM, *supra* note 1, at 27 (quoting JOHN GLIEDMAN & WILLIAM ROTH, THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA 24, 30 (1980)). *Cf.* Drimmer, *supra* note 1, at 1356-58 (arguing that limitations on persons with disabilities are not inevitable, rather they result from societal policies).

30. As the Supreme Court recognized in *School Bd. v. Arline*, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. 273, 284 (1987). Indeed, according to the House Report:

> The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities, and being deemed an "unfit parent."

H.R. REP. No. 101-485(II), *supra* note 17, at 41, *reprinted in* 1990 U.S.C.C.A.N. at 323 (quoting Arlene Mayerson of the Disability Rights Education and Defense Fund).

31. The United States Civil Service Commission studied appointments of severely handicapped workers in federal agency jobs over a 10-year period. It found the employment records of the disabled employees to be excellent. SPECTRUM, *supra* note 1, at 30. E.I. DuPont de Nemours & Co., in conducting a study of its disabled workers, concluded that its employees with disabilities "are equivalent to [DuPont's] other employees in job performance, attendance, and safety". LEGAL GUIDE, *supra* note 20, at 3 (quoting the DuPont report).

32. *Cf.* Murphy, *supra* note 3, at 1613 (arguing society often constructs limitations on a disabled person's ability to work). "Jobs and buildings are designed around the norm of average, able-bodied adults, to the detriment of those who do not fit this description." *Id.*

33. BOWE, *supra* note 22, at viii, 74. "For two hundred years, we have designed a nation for the average, normal, able-bodied majority, little realizing that millions cannot enter many of our buildings, ride our subways and buses, enjoy our educational and recreational programs and facilities, and use our communication systems." *Id.* at viii.

2. Employment Discrimination Against Persons With Disabilities

The vast majority of persons with disabilities would like to work, but only a small percentage of them actually do.[34] Despite their desire to work, persons with disabilities are less likely to hold jobs now than they were a decade ago, and those who do work have lost earning power.[35] Persons with disabilities experience limited job opportunities because they can only get part-time work,[36] and only certain types of employers, such as those in the service industry, will hire them.[37]

Such bleak employment prospects persist because large numbers of persons with disabilities face frequent employment discrimination.[38] Surveys indicate twenty-five percent of disabled Americans have encountered employment discrimination because of their disability.[39] More important, however, seventy-five percent of managers and businesses reported that persons with disabilities "often encounter job discrimination from em-

34. Unemployment rates for the disabled are estimated to be between 50% and 75%. SPECTRUM, *supra* note 1, at 29. According to a Louis Harris poll, two-thirds of "all disabled Americans between the age of 16 and 64 are mot [sic] working at all; yet, a large majority of those not working say they want to work." H.R. REP. No. 101-485(II), *supra* note 17, at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314. Sixty-six percent of working-age persons with disabilities who are not working say that they would like to have a job. *Id.*

35. *Study on Disabled and Jobs Finds Work and Good Pay Are Scarce*, N.Y. TIMES, Aug. 16, 1989, at A22. "The percentage of disabled men who work full time dropped from 29.8 in 1981 to 23.4 in [1988]." *Id.* In 1980, men with disabilities earned 23% less than men with no work disability, and by 1988, this difference increased to 36%. H.R. REP. No. 101-485(II), *supra* note 17, at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314. In 1980, women with disabilities earned 30% less than women with no disabilities, and by 1988, this difference had increased to 38%. *Id.*

36. Disabled workers are more than twice as likely to work part time than are nondisabled workers. BOWE, *supra* note 22, at 31. Most disabled workers, however, can work eight-hour days, five days a week. *Id.*

37. Persons with disabilities are much more likely to work below their abilities, as measured by their education levels, than are nondisabled individuals. In addition, a far greater percentage of disabled workers are in the secondary labor force. BOWE, *supra* note 22, at 28. For disabled people who have less than 12 years of education, the average wage rate is below minimum wage. SPECTRUM, *supra* note 1, at 31. Even persons with disabilities who have been through vocational rehabilitation programs are likely to obtain employment that is seasonal or part-time and pays at or below minimum wage. *Id.* at 179.

38. *See supra* notes 3-5 and accompanying text (discussing cases concerning various types of employment discrimination).

39. LEGAL GUIDE, *supra* note 20, at 27. In addition, 47% of the participants in the survey who were not employed or not employed full time said that they were not working full time largely because "employers would not recognize they were capable of holding a full-time job because of their disability." *Id.* at 27-28.

ployers."[40] Claims brought under the Rehabilitation Act,[41] which prevents disability discrimination in federal employment, substantiate this fact. In these cases, employers readily admit they discriminated against the disabled plaintiff.[42]

Yet even though employers admit to discriminating against persons with disabilities, nondisabled people deny being prejudiced against them. Studies have revealed that most able-bodied persons mask their true feelings about persons with disabilities.[43] Although nondisabled people claim they do not harbor ill feelings toward the disabled, their behavior reveals they are uncomfortable around, embarrassed by, or afraid of persons with disabilities.[44] These attitudes appear when employers make business decisions regarding persons with disabilities.[45]

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40. *Id.* at 28. Another survey of businesses in Los Angeles found "employer attitudes toward persons with disabilities were less favorable than those toward any other prospective group of applicants surveyed, including elderly individuals, minority-group members, ex-convicts, and student radicals." BOWE, *supra* note 22, at 175.

41. 29 U.S.C. §§ 710-796 (Supp. V 1993).

42. *See* Judith W. Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 433 n.95 (1984) (arguing that the lack of nonintentional discrimination case law under the Rehabilitation Act reflects the fact that defendants often readily admit that the individual's handicap gives grounds for exclusion or other discriminatory conduct, thus clearly evidencing intent); Murphy, *supra* note 3, at 1637 (arguing that in most cases brought under the Rehabilitation Act, employers use the plaintiff's disability as a justification for a particular employment action). Likewise, in Doe v. New York University, 666 F.2d 761, 776 (2d Cir. 1981), the court found that in most cases brought under the Rehabilitation Act, the defendant acknowledged taking the plaintiff's handicap into account in making its decision.

43. In one study, interviewers asked participants about their views of disabled people. At least 50% "express[ed] attitudes toward disability that are at least mildly positive, almost half express[ed] neutral feelings, and few admitted negative reactions." BOWE, *supra* note 22, at 126. The researchers then exposed participants to persons with disabilities and studied their physiological reactions, such as pulse rate, sweating, and eye movements. *Id.* In this case, "most exhibited considerable discomfort, nervousness, avoidance of eye contact, and other symptoms of negative reactions." *Id.*

44. *Id.*

45. *See supra* notes 3-5 and accompanying text (citing examples of employment discrimination against the disabled).

B. Federal Responses to Employment Discrimination Against the Disabled

1. The Rehabilitation Act

Although persons with disabilities have long been victims of employment discrimination, Congress only recently prohibited employers from discriminating based on disability. By enacting Title VII of the Civil Rights Act of 1964, Congress outlawed employment discrimination based on race, religion, sex, and national origin, but not discrimination based on disability.[46] In fact, Congress defeated attempts to amend Title VII to protect persons with disabilities.[47] Persons with disabilities finally received some legal redress when Congress enacted the Rehabilitation Act of 1973, ("Act"),[48] which protected federal employees with disabilities from discrimination.[49]

The Act[50] prohibits all federal government employers, contractors with the federal government, and other employers who receive federal funds from discriminating against persons with disabilities.[51] Such an employer may not "limit, segregate, or classify applicants or employees or participants in any way that adversely affects their opportunities or status because of handi-

46. 42 U.S.C. § 2000e-2 (1988). Under Title VII, it is unlawful for an employer to "refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

47. In 1972, Rep. Charles Vanik tried to amend Title VII to "make discrimination because of physical or mental handicap in employment an unlawful employment practice, unless there is a bona fide occupational qualification reasonably necessary to the normal operations of that particular business or enterprise." Legal Guide, *supra* note 20, at 13-14.

48. 29 U.S.C. §§ 710-796 (1988).

49. Because of the lack of case law on the ADA, courts have looked to how other courts have interpreted the Rehabilitation Act for guidance. *See, e.g.*, Vande Zande v. Wisconsin Dep't of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994) (noting how courts should look to Rehabilitation Act in interpreting the ADA); Easly v. Snider, 841 F. Supp. 668, 671-72 (E.D. Pa. 1993) (same); EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993) (same). In addition, the Rehabilitation Act was amended in 1992 to read, "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act." 29 U.S.C. § 794(d) (Supp. V 1993). The Rehabilitation Act and the ADA also define terms similarly and prohibit the same types of discrimination against the disabled. *See infra* note 66 and accompanying text (citing both ADA's and Rehabilitation Act's definition of a person with a disability).

50. 29 U.S.C. §§ 790-794 (Supp. V 1993).

51. This was the first federal act to prohibit employment discrimination against the disabled. *See id.* § 794(a).

cap."[52] The Act outlaws intentional discrimination as well as actions or policies that disproportionately impact persons with disabilities.[53]

The Act places an affirmative duty on employers to "make reasonable accommodation to the known physical or mental limitations of an [applicant or employee]."[54] Employers must accommodate an employee's disability unless they can demonstrate that the accommodation would impose an undue hardship on their operations.[55] Reasonable accommodations do not include "mak[ing] 'fundamental' or 'substantial' modifications to accommodate the handicapped."[56]

The Rehabilitation Act, however, does not apply to private employers.[57] The Act did not significantly decrease discrimination against the disabled.[58] Perhaps this is because the Act's differing burdens on different employers confused people. For example, under § 504 of the Act, private employers receiving federal funds had to make reasonable accommodations for their disabled workers.[59] On the other hand, § 501 required the same of all federal agencies, but it also required that federal agencies create affirmative action plans to increase the number of dis-

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52. 29 C.F.R. § 32.12(a)(2) (1994). The regulations go on to list the specific activities of employers to which the Rehabilitation Act applies. *Id.* § 32.12(b)(1)-(9).

53. Alexander v. Choate, 469 U.S. 287, 297 (1985). The Court, however, refused to hold that all disparate-impact showings constitute a prima facie case under the Act. Instead, the Act "reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* at 299.

54. 29 C.F.R. § 32.13(a) (1994); *see also* School Bd. v. Arline, 480 U.S. 273, 288 (1987) (noting that one necessary inquiry by the court is "whether the employer could reasonably accommodate the employee under the established standards").

55. 29 C.F.R. § 32.13(a). In determining whether an accommodation would be an undue burden, the court should consider the following factors:

> (1) The overall size of the recipient's program with respect to number of employees, number of participants, number and type of facilities, and size of budget;
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> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce, and duration and type of training program; and
>
> (3) The nature and cost of the accommodation needed.

Id. § 32.13(b).

56. *Alexander*, 469 U.S. at 300.

57. 29 U.S.C. § 794(a).

58. LEGAL GUIDE, *supra* note 20, at 26-27 (discussing how federal laws prior to the ADA did not significantly reduce widespread discrimination against the disabled).

59. *See* 29 U.S.C. § 794(a).

abled workers they employed.[60] In 1990, Congress enacted the Americans with Disabilities Act to combat these shortcomings.[61]

2. The Americans with Disabilities Act

Congress intended the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[62] To achieve this goal, the ADA prevents private as well as public employers from discriminating against persons with disabilities.[63] Specifically, title I of the ADA prohibits employers with more than fifteen workers[64] from discriminating against a qualified applicant or employee on the basis of disability.[65] As defined by the ADA, a person with a disability is any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.[66] The ADA does not prohibit all discrimination

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60. *Id.* § 791.

61. 42 U.S.C. § 12101 (Supp. V 1993).

62. *Id.* § 12101(b)(1).

63. *Id.* § 12111(5)(A).

64. *Id.* "The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* Congress phased in the ADA to apply to more and more employers. From 1992 to 1994, the ADA applied to employers with 25 or more employees. *Id.*

65. *Id.* § 12112(a). This protection extends to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

66. *Id.* § 12102(2). The ADA defines a "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). The term "substantially limits" means being:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. § 1630.2(j). A person is "regarded as having a record of such an impairment" if he or she:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

against persons with disabilities, but only discrimination against "qualified individuals."[67] A "qualified individual" is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position."[68]

To help clarify what activities the ADA proscribes, the ADA lists many actions that constitute discrimination based on disability. For example, an employer cannot limit, segregate, or classify an applicant or employee in an adverse manner based on disability.[69] It cannot "use standards, criteria, or methods of administration . . . that have the effect of discriminating on the basis of disability."[70] Finally, employers cannot "use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual . . . or class of individuals" based on their disabilities.[71]

The ADA also places on employers the affirmative duty to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability.[72] Reasonable accommodations consist of modifying or adjusting the application process, the work environment, or the

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(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment.

Id. § 1630.2(l). "Major life activities" consist of "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i).

67. 42 U.S.C. § 12112.

68. *Id.* § 12111(8). Thus, the ADA rejects the Court's interpretation under the Rehabilitation Act of what constitutes a qualified individual with a disability. *See* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (defining an otherwise qualified person with a disability as "one who is able to meet all of a program's requirements in spite of his handicap"). Instead of requiring that a disabled individual be able to perform the essential functions of his job in spite of his impairment, the ADA requires employers to consider the abilities of a disabled applicant or employee after it has made reasonable accommodations to meet the needs of his disability.

"Essential functions" of the employment position are "the fundamental job duties of the employment position . . . . [The term] does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n). Courts should give consideration, however, "to the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8).

69. *Id.* § 12112(b)(1).

70. *Id.* § 12112(b)(3).

71. *Id.* § 12112(b)(6).

72. *Id.* § 12112(b)(5)(A). The ADA prohibits refusing to hire a job applicant who is otherwise qualified because the employer does not wish to make reasonable accommodations for her disability. *Id.* § 12112(b)(5)(B).

responsibilities of the position such that an individual with a disability can perform the job.[73]

An employer does not have to make these accommodations if it can show that the required adjustments would impose an undue hardship on the operation of the business.[74] The ADA defines undue hardship as an "action requiring significant difficulty or expense" on the part of the employer.[75] In determining whether an accommodation would impose an undue hardship, the ADA instructs courts to consider the nature and the cost of the necessary accommodation, the overall financial resources of the facility, the impact the accommodation would have on the facility, and the type of the employer's operations.[76]

C. Burden of Proof of Discrimination Under the ADA

The ADA does not state clearly what a plaintiff must prove to prevail on a claim of intentional employment discrimination.[77] Recognizing the similarities between the Rehabilitation Act and the ADA, courts have looked to cases construing the Re-

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73. The ADA provides several examples of what constitutes "reasonable accommodation." 42 U.S.C. § 12111. For example, such accommodation might include making existing facilities readily accessible, acquiring or modifying equipment, restructuring job duties, modifying work schedules, adjusting training materials or policies, or providing qualified readers or interpreters. *Id.* The federal regulations interpreting the ADA further describe "reasonable accommodation" as:

> (1) Modifications or adjustments to a job application process that enable a qualified individual with a disability to be considered for the position;
> (2) Modifications or adjustments to the work environment or to the manner or circumstances under which the position held or desired is customarily performed . . . ; or
> (3) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1) (1994).

74. 42 U.S.C. § 12112(5)(A).

75. *Id.* § 12111(10). The ADA applies the same standard as the Rehabilitation Act for when a business can refuse to make a reasonable accommodation. *See supra* note 55 and accompanying text (describing the definition of undue hardship under the Rehabilitation Act).

76. *Id.* § 12111(10)(B). Employers might argue that any expenditure on accommodations for persons with disabilities creates an undue hardship because such expenditures would not be necessary for able-bodied employees. However, the ADA rejects this interpretation of undue hardship by requiring that courts consider the cost of an accommodation in conjunction with the employer's financial resources. *See id.*

77. *See id.* § 12112(a).

habilitation Act for guidance in interpreting the ADA.[78] Unfortunately, the Supreme Court has not addressed the issue of the proper allocation of the burden of proof in employment discrimination cases brought under the Rehabilitation Act. Some circuit courts apply the *McDonnell Douglas*[79] allocation of the burden of production for Title VII claims to employment discrimination cases brought under the Rehabilitation Act.[80] Other circuit courts allocate the burden of proof without regard for the *McDonnell Douglas* test.[81] Out of this murky precedent, some recent court decisions have relied on the *McDonnell Douglas* test in allocating the burden of proof in claims brought under the ADA.[82]

1. The *McDonnell Douglas* Test

Title VII plaintiffs initially struggled to establish a prima facie case of discrimination because direct evidence of employment discrimination often did not exist.[83] To eliminate this problem, the Supreme Court, in *McDonnell Douglas Corp. v.*

78. *See supra* note 49 and accompanying text (citing similarities between the Rehabilitation Act and the ADA).

79. 411 U.S. 792, 802 (1973) (establishing the four-part test for determining whether the plaintiff has established a prima facie case of discrimination).

80. *See* Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (holding that the *McDonnell Douglas* analysis is appropriate for claims brought under the Act when employer asserts that it failed to hire or promote plaintiff for reasons unrelated to his or her handicap), *cert. denied*, 114 S. Ct. 1538 (1994); Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1242 (8th Cir. 1991) (holding that the *McDonnell Douglas* guidelines apply to cases arising under the Rehabilitation Act); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987) (upholding the elements of prima facie case of discrimination established under *McDonnell Douglas* applied to claims broaught under Rehabilitation Act).

81. *See, e.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 (6th Cir. 1985) (holding that once plaintiff establishes a prima facie case, the employer must prove the "challenged criteria are job related and required by business necessity and that reasonable accommodation is not possible"); Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983) (same); Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981) (holding that an employer has burden to prove that it cannot reasonably accommodate plaintiff because doing so would cause an undue hardship); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1386 (10th Cir 1981) (holding that once plaintiff establishes prima facie, that the employer has the burden of proving that the plaintiff was not otherwise qualified or that her rejection was for reasons other than her handicap).

82. *See supra* note 13 and accompanying text (listing cases that have applied the *McDonnell Douglas* test to ADA cases).

83. "[The] entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

Green,[84] created a structure for plaintiffs to establish a prima facie case of intentional employment discrimination without direct evidence of discrimination.[85]

Under the *McDonnell Douglas* analysis, a Title VII plaintiff may establish a prima facie case of discrimination even absent direct evidence by showing that she belongs to a protected class, that she was qualified for, applied for, and was denied a position or promotion, and that after her rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications.[86]

If the plaintiff establishes her prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.[87] The employer need not persuade the court that its proffered reasons motivated its actions.[88] Instead, the employer only needs to produce admissible evidence upon which the jury could reasonably conclude that discriminatory animus had not motivated the employer.[89]

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84. 411 U.S. 792 (1973).

85. *Id.* at 802.

86. *Id.* The Court noted that this standard is not inflexible. "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13. Courts interpreting the Rehabilitation Act have used this four-part test to establish a prima facie case of disability discrimination as well. *See, e.g.*, Doe v. New York Univ., 666 F.2d 761, 774 (2d Cir. 1981).

87. *McDonnell Douglas*, 411 U.S. at 802. "Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1980).

88. *Burdine*, 450 U.S. at 254

89. *Id.* at 255 n.8. The Court stated the rationale behind allocating the burdens of proof in this manner was "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*

Some courts interpreting the Rehabilitation Act have followed this exact analysis when the defendant has denied taking the plaintiff's disability into account while making its employment decision. Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1985). In *Norcross*, the school board claimed it did not hire a visually impaired plaintiff because she had less experience than the nondisabled person the board hired. *Id.* Although the school board admitted to discussing her disability, it claimed the plaintiff was its second choice. *Id.* The court found this explanation to be a legitimate reason for not hiring the plaintiff. *Id.*

Some courts have also followed this analysis in Rehabilitation Act claims where the defendant admitted to relying on the plaintiff's disability in making its employment decision. *See* Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (upholding placing the burden of persuasion on plaintiff to prove that she can

If the employer alleges a legitimate reason for its actions, the employer rebuts the presumption of discrimination and it drops from the case.[90] The trier of fact must then decide the ultimate question of the case: "whether . . . the defendant intentionally discriminated against [the employee]."[91] At all times, the plaintiff retains the ultimate burden of persuasion to prove by a preponderance of the evidence that the employer intentionally discriminated against her.[92] To persuade the fact finder on this issue, the plaintiff can present evidence demonstrating that the employer's proffered reason is unworthy of credence.[93] A rejection of the employer's reason, however, does not compel a judgment for the plaintiff.[94]

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perform the essential functions of the job with or without reasonable accommodations, and giving the defendant only the burden of production to show plaintiff is not qualified for the position), *cert. denied*, 114 S. Ct. 1538 (1994); Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981). In *Doe*, the defendant claimed the plaintiff was not qualified because of her disability and, therefore, the University did not have to attempt to reasonably accommodate her disability. *Id.* at 769-70. The court held that once a plaintiff established a prima facie case, "the institution or employer . . . [has to go] forward with evidence that the handicap is relevant to qualifications for the position sought." *Id.* at 776. Under this analysis, the University had to offer evidence that the plaintiff's mental illness affected her qualifications for medical school. *Id.* at 777. The University did not, however, have to address whether it could reasonably accommodate the plaintiff so that she would be able to perform in medical school. *Id.*

90. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993) (quoting *Burdine*, 450 U.S. at 255 n.10 (1980)). This does not mean, however, that the jury cannot consider evidence the plaintiff already introduced as part of her prima facie case.

91. *Id.* at 2749.

92. *Id.*

93. *Burdine*, 450 U.S. at 256. In *Norcross*, the school board discussed the plaintiff's disability. Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1982). However, the Court of Appeals for the Eight Circuit found this evidence insufficient to prove the employer intentionally discriminated against her based on her disability or to cast sufficient doubt upon the employer's proffered reason for its decision. *Id.* The plaintiff could have argued that the school board's discussion of her disability was evidence that it relied on her disability in making its decision. Furthermore, she could have presented evidence that the person eventually hired did not have more experience than she did.

94. *Hicks*, 113 S. Ct. at 2749 In *Hicks*, the district court, in a bench trial, found that the reasons the defendant gave were not the real reasons for the plaintiff's demotion and discharge. *Id.* at 2748 n.2. Despite this finding, the court was not persuaded that the plaintiff was the victim of intentional race discrimination. *Id.* Several considerations led to this conclusion, "including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not disciplined, and that 'the number of black employees at St. Mary's remained constant.'" *Id.*

2. Alternative Methods of Allocating the Burden of Proof

Some courts do not apply the *McDonnell Douglas* test to Rehabilitation Act cases.[95] Rather, they apply alternative allocations of the burden of production and the burden of persuasion that vary depending on the type of discrimination the plaintiff alleges. If the employer admits it did not hire the plaintiff because of her disability,[96] these courts require the plaintiff to first make her prima facie case by establishing that she is a qualified individual with a disability who can perform the essential functions of the job, with or without reasonable accommodations.[97] The employer can avoid liability only by showing that it would be an undue hardship to reasonably accommodate the plaintiff.[98] As with other affirmative defenses, the employer has the burden of persuasion.[99]

Another approach involves an employer who admits taking the plaintiff's disability into account, but claims the plaintiff is not qualified for the job.[100] To establish a claim of disability discrimination under this approach, a plaintiff must first show he is otherwise qualified for the position sought and the defendant rejected him solely because of his handicap.[101] If the plaintiff successfully proves he is otherwise qualified for the position, the

95. Jasany v. United States Postal Serv., 755 F.2d 1244, 1249-50 (6th Cir. 1985); Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983); Prewitt v. United States Postal Serv., 662 F.2d 292, 305-07 (5th Cir. 1981); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1386 (10th Cir 1981).

96. *See, e.g.*, *Prewitt*, 662 F.2d at 308.

97. *See id.* at 306.

98. School Bd. v. Arline, 480 U.S. 273, 288-89 (1987) (holding that the ultimate issue was whether the defendant could reasonably accommodate the plaintiff's tuberculosis); Barth v. Gelb, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993) (holding that when an agency invokes the affirmative defense of inability to reasonably accommodate, the defendant should have the burden of proving undue hardship), *cert. denied*, 114 S. Ct. 1538 (1994); *Prewitt*, 662 F.2d at 308. The *Prewitt* court goes on to state that once the employer meets its burden, "the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence." *Id.*

99. *See supra* note 98 and accompanying text.

100. The Court of Appeals for the Tenth Circuit created an alternative analysis for a Rehabilitation Act claim in Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1386-87 (10th Cir. 1981), because it believed disability discrimination differs significantly from other types of discrimination and thus demands a different approach.

101. *Id.* at 1385. In *Pushkin*, the plaintiff demonstrated his qualifications for a position in the psychiatric residency program, despite his multiple sclerosis, by proving that he met the necessary requirements and that he had been practicing medicine at the time he applied. *Id.* at 1387.

employer then has the burden of proving that the applicant was not otherwise qualified regardless of his handicap, or that his rejection from the position was for reasons other than his handicap.[102]

II. THE SHORTCOMINGS OF *MCDONNELL DOUGLAS* IN ADA CASES

A. Comparing Discrimination Against Persons With Disabilities to Other Forms of Discrimination

Discrimination against persons with disabilities differs greatly from the type of discrimination Title VII proscribes. As such, it is inaccurate to assume courts should apply Title VII's burden of proof allocations to ADA cases simply because they both deal with employment discrimination. Unfortunately, courts have applied the *McDonnell Douglas* framework to ADA cases without taking into account these differences and without considering whether another framework for the burden of proof might be more appropriate.[103]

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102. *Id.* The defendant in this case, the University of Colorado, failed to meet this burden because its hiring committee ranked Pushkin low based on its belief that his disability would upset patients or would prevent him from performing the job. *Id.* at 1388-89. The court in *Barth v. Gelb* used the same analysis, but held the employer only had to produce evidence to refute that the plaintiff could perform the job. 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1538 (1994). In the end, the burden of persuasion remained with the plaintiff to prove by a preponderance of the evidence that she could perform the job, with or without reasonable accommodation. *Id.*

103. Unfortunately, most courts applying *McDonnell Douglas* to both the Rehabilitation Act and the ADA have failed to do this. *See infra* part II.C (discussing lack of analysis in cases applying the *McDonnell Douglas* test under the Rehabilitation Act); Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. Rev. 881, 887-88 (1980). Martin argues that courts, in interpreting the Rehabilitation Act, "have not based their decisions on an explicit analysis of the meaning of discrimination against the handicapped." *Id.* at 887. As a result, the case law fails to adequately explore the implications of preventing discrimination on the basis of disability.

Recently, courts interpreting the ADA have failed in similar respects. *See supra* note 13 and accompanying text (listing courts that have applied the *McDonnell Douglas* test to employment discrimination claims brought under the ADA). Not one of these courts discusses why it was appropriate to apply the *McDonnell Douglas* test to the ADA claims. *See id.* The closest a court has come to addressing this issue was in Doe v. Kohn Nast & Graf, No. CIV.A.93-4510, 1994 WL 454813 (E.D. Pa. 1994). After indicating that the Supreme Court and the Court of Appeals for the Fourth Circuit had not yet set out the elements of a prima facie case of discrimination under the ADA, the district court chose to follow the precedent of Title VII because it believed that the stat-

1. Comparing Causes of Disability Discrimination With Causes of Race and Gender Discrimination

The causes of discrimination against persons with disabilities are similar to those of race and gender discrimination, such as inaccurate assumptions and stereotypes.[104] Just as an employer might refuse to hire female managers because he thinks women are too emotional and cower under pressure, an employer might also refuse to hire persons with disabilities because he assumes, based on stereotypes, that they will be unable to perform the job satisfactorily.[105] Because of stereotypes and inaccurate assumptions, employers erroneously believe a disability limits a person's ability to work more than it actually does.[106]

Despite these similarities, discrimination against persons with disabilities and other forms of discrimination also have very distinct causes. Frequently, hatred fuels discrimination against people of color and women.[107] Evil intent, however, does not usually motivate people when they discriminate against individuals with disabilities.[108] For example, when the Postal Service refused to rehire a disabled worker,[109] it did so because the employee could not lift his arms above his head, not because it harbored ill will towards persons with disabilities. As a result, the Postal Service erroneously believed that it was impossi-

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utes were "in pari materia guidance," that is, they were related to the same purpose and should be construed together. *Id.* at *18 n.5.

104. *See supra* notes 25-26 and accompanying text (discussing how stereotypical attitudes cause discrimination against both persons with disabilities and people of color).

105. *See supra* notes 34-40 and accompanying text (detailing the pervasiveness of employment discrimination against the disabled).

106. *See supra* notes 29-30 and accompanying text (noting that employers often believe persons with disabilities are more limited than they actually are).

107. *See* Wegner, *supra* note 42, at 429. Wegner argues that malevolence motivates people to deny people of color equal opportunity, while ill will does not motivate people to deny persons with disabilities equal opportunity. *Id.* Instead, society denies disabled individuals equal opportunity by failing to consider how policies might affect them, or by feeling awkward around persons with disabilities. *Id.*

108. *See, e.g.*, Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) (discussing evil intent). According to the Tenth Circuit:

> It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.

Id.

109. Prewitt v. United States Postal Serv., 662 F.2d 292, 297-98 (5th Cir. 1981).

ble for the disabled employee to perform the job.[110] Thus, benign neglect or ignorance of the needs of persons with disabilities is a primary cause of discrimination against the disabled.[111]

2. Comparison of the Definitions of Discrimination Under the ADA and Title VII

Not only do unique factors cause disability discrimination, but Congress also defines an act of discrimination against persons with disabilities differently it does an act of discrimination against women or persons of color. In passing Title VII, Congress believed that race, sex, religion, and national origin were usually unrelated to an individual's ability to perform a job.[112] According to the definition of discrimination used in Title VII, race or gender cannot motivate employers to any extent when they make employment decisions.[113] Although Title VII allows reliance on protected traits in narrow circumstances, such as when bona fide occupational qualifications exist,[114] such affirmative defenses do not apply to all of the protected classes. For

110. *Id.* In this case, the Postal Service required that its employees be able to lift their arms above their shoulders because mail carriers have to remove stacks of mail off a six-foot high ledge. *Id.* at 305. The Postal Service admitted, however, that Prewitt could be accommodated simply by lowering the legs to which the shelves are attached. *Id.* Because the Postal Service did not consider the needs of an individual with a mobility limitation, it designed six-foot shelves.

111. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 295-96 (1985) (discussing society's neglect of persons with disabilities).

112. *See* Wegner, *supra* note 42, at 441-42. Wegner argues that disability discrimination differs from race discrimination because, while race is irrelevant to ability, disability is not. *Id.* at 442. As a result, a finely tuned inquiry is necessary to develop an antidiscrimination scheme directed at eliminating discrimination against persons with disabilities. *Id.*

113. Congress amended Title VII in 1991 to clearly state that any consideration of these protected traits is illegal. Civil Rights Act of 1991 § 107(a), 42 U.S.C. § 2000e-2(m) (Supp. V 1993). The act now contains a provision that states, "except as otherwise provided . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

114. Title VII allows employers to defend discrimination claims based on a classifications of sex, religion, or national origin if the employer can prove that such a classification is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* § 2000e-2(e) (Supp. V 1993). As implied by the language of Title VII, race will never be considered a bona fide occupational qualification ("BFOQ").

example, an employer cannot claim race or color as a bona fide occupational qualification.[115]

By contrast, in passing the ADA, Congress recognized that a disability may legitimately affect an individual's ability to perform a job. This characteristic, unlike a person's gender or race, becomes relevant in determining whether a person is qualified for the position.[116] The ADA's definition of discrimination allows employers to consider an individual's disability when making employment decisions.[117] The ADA would not, for example, require a bus company to hire a blind driver. Instead, the ADA prohibits an employer's excessive reliance on the disability; an employer cannot assume, based on stereotypes, that a disability makes a person unqualified for the job.[118] Unlike the bus company, a school district may not, per se, refuse to hire a visually impaired school teacher. A visual impairment does not prevent an individual from performing a teacher's job,[119] nor does it pose threat to the safety of the students.[120] Recognizing that such

115. *See supra* note 114 and accompanying text (discussing Title VII's BFOQ defense).

116. Some courts, in interpreting the Rehabilitation Act, have commented on this distinguishing factor. In *Doe v. New York University*, the court noted:

> [S]ince an institution or employer is permitted to take into consideration an applicant's handicap in deciding whether he or she is qualified, a section 504 action frequently does not lend itself easily to the analysis used for allocation of burdens and order of presentation of proof used in suits alleging discrimination based on impermissible factors . . . in violation of Title VII.

666 F.2d 761, 776 (2d Cir. 1981).

117. The ADA prevents employers from discriminating against a "qualified individual with a disability." *See supra* notes 66-68 and accompanying text (explaining the ADA's definition of these terms). An employer may, in certain circumstances, consider an individual's disability in determining whether or not that person is qualified for the job. If, however, the individual can perform the job, with or without reasonable accommodation, the employer may not base its employment decision on the fact that the applicant has a disability.

118. Additionally, an employer must assess whether alternative methods exist to perform the job such that a disabled employee could discharge these duties. *See supra* notes 72-76 and accompanying text (describing the duty to reasonably accommodate persons with disabilities). The entire process of reasonable accommodation requires that an employer recognize a disability and treat that person differently because of her disability.

119. *See* Gurmankin v. Costanzo, 556 F.2d 184, 187 (3d Cir. 1977) (holding that a school district's policy of refusing to allow blind applicants to take a teaching qualifying exam violated the Due Process Clause of the Fourteenth Amendment by creating an irrefutable presumption that blind individuals are incompetent to teach sighted students).

120. The ADA does not require employers to hire an individual if the applicant poses a direct threat to the health or safety of others. A direct threat is "a significant risk to health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

limitations are inherent in disabilities, the ADA permits employers to consider a person's disability in making employment decisions.

3. The Impact of These Differences in Determining the Applicability of the *McDonnell Douglas* Test to the ADA

Disability discrimination and race or gender discrimination are significantly different types of discrimination. As a result, it is problematic to apply tests developed specifically for proving race or gender discrimination to disability discrimination claims.[121] The Court did not design the *McDonnell Douglas* test to acknowledge the complex interaction between a person's disability and that person's ability to perform a job. As scholars have noted, "[d]iscrimination against the handicapped poses unique problems because the trait that gives rise to the protected status also limits an individual's ability to function."[122] Courts, therefore, must scrutinize an employer's explanations for not hiring a disabled person more strictly than they scrutinize an employer's decisions under Title VII claims. In particular, courts presiding over ADA cases must strive to discover whether the employer accurately concluded, without prejudice, that the applicant did not possess the qualifications for the job; or whether inaccurate assumptions that the disability might limit an applicant's ability to perform the job influenced the employment decision.

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121. One judge aptly commented that "attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole." Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981).

122. Martin, *supra* note 103, at 883. Professor Martin further explained that "[t]his link suggests that discrimination against the handicapped, unlike discrimination against other groups, necessarily encompasses more than differential treatment caused by prejudicial attitudes. A full definition of discrimination must address both the problem of prejudicial attitudes and the limitation caused by the handicap itself." *Id.* People with disabilities encounter four different classes of exclusionary barriers. *Id.* Like other victims of discrimination, society excludes them because of social bias and prejudice. *Id.* In addition, neutral standards that may not have been designed to exclude persons with disabilities, nevertheless, when applied, tend to screen out persons with disabilities. *Id.* "Surmountable impairment barriers" are exclusionary barriers caused by the individual's disability that would not prevent the person from performing the job if the employer reasonably accommodated him. *Id.* "Insurmountable impairment barriers" are exclusionary barriers caused by an individual's disability that an employer cannot overcome with accommodation. *Id.* at 883-84.

Although any plaintiff has difficulties proving discrimination without direct evidence, a disabled plaintiff faces a virtually insurmountable barrier under the *McDonnell Douglas* test because its allocation of the burden of proof is too rigid. The Supreme Court designed the *McDonnell Douglas* test to expose an employer's reliance on certain protected traits.[123] Thus, the test determines an "either/or" proposition: either the defendant relied on a protected class in making its employment decision, or it did not.

This either/or dichotomy is often inappropriate for an ADA plaintiff who must not only show that his disability motivated the defendant, but also how and to what degree it influenced the employer's decision.[124] Thus, an appropriate framework must compel employers to demonstrate that they did not rely on inaccurate stereotypes about persons with disabilities in making their employment decision.

Because of its inadequacies, the *McDonnell Douglas* test will never provide an appropriate framework. In ADA cases, *McDonnell Douglas*'s low burden of production on the defendant defers too much to a defendant's explanations for its actions.[125] This low burden of production allows employers to make stereotypical assumptions about persons with disabilities[126] and grants too much deference to employment decisions based on those stereotypes. To end discrimination against persons with disabilities, courts must place a higher burden on employers requiring them to demonstrate that they did not make their decision based on flawed assumptions.

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123. *See supra* text accompanying notes 83-85 and accompanying text (describing purpose of the *McDonnell Douglas* test).

124. *See supra* notes 69-71 and accompanying text (describing the nature of discrimination prohibited by the ADA).

125. *See infra* notes 163-164 and accompanying text (explaining why defendants should receive limited deference in explaining their treatment of persons with disabilities); *see also infra* note 147 and accompanying text (explaining that the *McDonnell Douglas* test would allow an employer to avoid its duty to reasonably accommodate).

126. Because of these stereotypes, it is difficult to accurately assess when a disability truly prevents an individual from performing a job. "Unfortunately, it is easy to draw unsupported conclusions concerning the ability of a handicapped individual to function safely in circumstances in which his impairment is irrelevant." Wegner, *supra* note 42, at 441. Because a disability may affect a person's ability to perform a job, an employer's reasons for not hiring a person with a disability may seem legitimate and accurate. To combat this problem, one commentator advocates using the civil rights model for disability discrimination. *See* Drimmer, *supra* note 1, at 1355-59. This model recognizes that the barriers facing the disabled community do not result solely from physical limitation, but from social standards created by an able-bodied society. *Id.*

Furthermore, the different causes of discrimination against persons with disabilities add to the insurmountable barrier for disabled plaintiffs. Under *McDonnell Douglas*, even if a disabled plaintiff can prove the defendant lied about its alleged reasons for not hiring her, she is not in a significantly better position to win her case.[127] She still has to persuade a jury that the employer intentionally discriminated against her.[128] Because benign neglect and ignorance are often causes discrimination against persons with disabilities, a defendant's actions do not readily appear intentional, hostile, or even prejudicial. Instead, their actions appear reasonable and normal because our society often does not consider the needs of persons with disabilities.[129] Therefore, a disabled plaintiff might have difficulty convincing a jury that intentional discrimination occurred.

B. Comparison of Burdens of Proof Under the ADA and Title VII in Light of Their Different Purposes

The ADA and Title VII are distinct statutes dealing with substantially different types of discrimination. They differ primarily in how they attempt to achieve equal employment opportunities. The ADA places on employers the affirmative duty to reasonably accommodate disabled workers and applicants.[130] This affirmative duty represents a conceptual shift from other civil rights legislation.[131] Thus, in essence, the ADA's duty to

127. *See supra* part I.C.1 (explaining the *McDonnell Douglas* analysis).

128. *See supra* text accompanying notes 92-94 (explaining the plaintiff's ultimate burden of persuasion under *McDonnell Douglas*).

129. *See supra* notes 32-33 and accompanying text (discussing how society has failed to take into account the needs of persons with disabilities).

130. *See supra* notes 72-76 and accompanying text (describing employers' duty under the ADA to reasonably accommodate disabled workers). The ADA's unique, affirmative duty to reasonably accommodate employees can be substantial. For example, it might require some employers to pay out significant amounts of money to reasonably accommodate an employee with a disability. *See supra* text accompanying notes 74-76 (noting that the cost of accommodation and an employer's ability to pay are factors courts consider in determining whether reasonable accommodation creates an undue hardship). Under Title VII, employers do have a duty to reasonably accommodate workers' needs based on their religion. *See* Trans World Airlines v. Hardison, 432 U.S. 63 (1977). This duty, however, is less substantial by comparison. Employers do not have to accommodate for religious beliefs if it would entail more than a "de minimis cost." *Id.* at 84. The drafters of the ADA specifically rejected this limited view of the duty to reasonably accommodate. *See* H.R. Rep. No. 101-485(II), *supra* note 17, at 31-32, *reprinted in* 1990 U.S.C.C.A.N. at 350. Because of this important difference, the duty to reasonably accommodate under the ADA is unique.

131. *See* Cooper, *supra* note 25, at 1427-31. Because society believes race, religion, sex, and national origin are irrelevant to job performance, an employer

reasonably accommodate mandates that employers treat persons with disabilities differently than nondisabled persons.[132] The ADA recognizes that because of the structural barriers impeding persons with disabilities, treating them in a manner similar to nondisabled workers will not alleviate most of the discrimination they encounter.[133] By contrast, Title VII proscribes differential treatment of employees for any reason.[134] In fact, the Supreme Court has rejected the notion that Title VII

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cannot in any way base an employment decision on these traits. *See supra* part II.A (comparing disability discrimination to race and gender discrimination).

The ADA does not prevent employers from considering a disability completely. *See id.* (discussing complex interaction between a disability's effects on an individual's ability to perform and the limitations on persons with disabilities caused by prejudice). Instead, an employee must first be a "qualified individual with a disability." 42 U.S.C. § 12111(8). A qualified individual with a disability is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. *Id.* Thus, an employer may not consider a person's disability when the disability is irrelevant to performing a job.

132. In the context of disability discrimination, equal treatment will not yield equal opportunity. "The accommodation requirement [of the ADA] means that in the context of disability, nondiscrimination requires employers to do more than just treat employees equally; it requires employers to take positive steps toward including workers with disabilities." Murphy, *supra* note 3, at 1608. The Supreme Court realized this fact in the context of the Rehabilitation Act. "[To] assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." Alexander v. Choate, 469 U.S. 287, 301 (1985).

133. While treating disabled and nondisabled workers equally might eliminate some discrimination against persons with disabilities, this approach fails to challenge the structural and socially constructed barriers to persons with disabilities. "Such identical treatment, however, would not foster the provision of alternative ways of achieving given tasks or objectives so that handicapped people could have meaningful opportunities to participate." SPECTRUM, *supra* note 1, at 99. Such a view of equal opportunity does not involve treating persons with disabilities more favorably than nondisabled individuals. Instead, it recognizes social contexts are almost always structured for able-bodied people, and, as a result, these ablest perspectives must be challenged to provide equal opportunities for persons with disabilities.

134. Only in a few instances of race discrimination have the courts determined that equal treatment did not yield equal opportunity. *See* Lau v. Nichols, 414 U.S. 563, 566 (1974). In *Lau*, the plaintiffs challenged the practices of the San Francisco school system under Title VI of the 1964 Civil Rights Act. *Id.* The school system provided 1800 Chinese, non-English speaking students instructions and materials only in English. *Id.* The Court found that "[u]nder these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*

requires employers to treat workers differently or more favorably because they are a member of a protected class.[135]

Because the duty to reasonably accommodate represents a significant difference between the ADA and Title VII, the *McDonnell Douglas* test is inappropriate for discrimination claims brought under the ADA. Under the test, the employer has a limited burden of production. It simply has to produce evidence that it chose not hire the plaintiff for a legitimate reason, unrelated to race or sex.[136] This low burden is consistent with Title VII's statutory requirement of equal treatment. The ADA contains a more significant affirmative burden for the employer.[137] As a result, the minor burden the *McDonnell Douglas* test places on the defendant to rebut a presumption of discrimination goes against the nature of the scheme the ADA has established. Because the ADA requires more of employers than does Title VII, employers should have to meet a higher burden of proof to escape an ADA discrimination claim.

C. Critique of Decisions Applying the *McDonnell Douglas* Test to Disability Discrimination

With no mandate from the Supreme Court, circuit courts have split on how to allocate the burden of proof under the Rehabilitation Act.[138] Because of the similarities between the Rehabilitation Act and the ADA, courts should look to Rehabilitation Act cases, not to Title VII cases, when interpreting the ADA.[139] However, courts should also ignore Rehabilitation Act cases that apply the *McDonnell Douglas* test because they fail to recognize the need to treat persons with disabilities differently. For example, in *Doe v. New York University*,[140] the court declared that if a disability "provides a reasonable basis for finding the plaintiff not to be qualified," an employer's decision not to hire the dis-

135. *See, e.g.*, Trans World Airlines v. Hardison, 432 U.S. 63, 81 (1977) (stating Title VII does not require differential or preferential treatment of people because of their protected traits).

136. *See supra* notes 87-89 and accompanying text (discussing the *McDonnell Douglas* test).

137. *See supra* notes 72-76 and accompanying text (describing an employer's duty to reasonably accommodate employees).

138. *See supra* part I.C (discussing different approaches courts have taken in allocating the burden of proof under the Rehabilitation Act).

139. *See supra* notes 130-133 and accompanying text (comparing prohibitions on discrimination under Title VII and the ADA); *see also supra* note 49 and accompanying text (explaining why courts should look to the Rehabilitation Act for guidance in interpreting the ADA).

140. 666 F.2d 761 (2d Cir. 1981).

abled plaintiff is not discrimination.[141] The *Doe* court ignored the fact that the very structures of society often discriminate against persons with disabilities and, as a result, a disability will often provide a "reasonable basis" for believing the plaintiff cannot adequately perform the job.[142] Moreover, in *Prewitt v. United States Postal Service*,[143] the court could have found that the Postal Service acted reasonably by not hiring applicants with motor skill limitations because they could not reach the top shelf in the mail truck.[144] This overlooks that the Postal Service could have lowered the mail truck's shelves to accommodate the plaintiff.[145]

These types of cases also allow an employer to rebut a plaintiff's prima facie case merely by "going forward with evidence that the handicap is relevant to qualifications for the position sought."[146] As a result, an employer can easily circumvent the Rehabilitation Act's mandate to reasonably accommodate.[147]

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141. *Id.* at 776. In *Norcross v. Sneed*, the Court of Appeals for the Eighth Circuit accepted the rationale of the *Doe* court. 755 F.2d 113, 116-17 (8th Cir. 1985). The court said *Doe* "contains the most convincing analysis of employment discrimination suits under section 504." *Id.* at 116. The court failed, however, to give any reason why this analysis is the most convincing.

142. *See supra* notes 31-32 and accompanying text (explaining how society has been structured without taking into consideration the needs of people with disabilities).

143. 662 F.2d 292 (5th Cir. 1981).

144. The *Prewitt* court, in contrast with the *Doe* court, applied a much higher level of scrutiny to the defendant's hiring criteria. For the Postal Service to defend its hiring criteria, which disqualified applicants with limited motor skills, it had to prove that "the challenged criteria are job related, i.e. that they are required by business necessity." *Id.* at 306.

145. *Id.* at 305. The ADA, of course, requires employers to make reasonable accommodations for qualified disabled employees. *See supra* notes 72-76 and accompanying text (outlining the employer's duty to reasonably accommodate).

146. *Doe*, 666 F.2d at 776. The *Doe* court never mentioned the defendant's duty to reasonably accommodate the plaintiff or its duty to inquire whether it would be able to reasonably accommodate the plaintiff's disability. *Id.*

By 1981, when the *Doe* court had reached its decision, the Supreme Court required employers to make reasonable accommodations for the needs of disabled workers under the Rehabilitation Act. Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979). In *Davis*, the Court examined whether any reasonable accommodation could have allowed the plaintiff to participate in the nursing school program. *Id.* at 412-13. The Court found that any accommodation would lower the standards of the program and, because of this, the school did not discriminate against the plaintiff by refusing her admission. *Id.*

147. The affirmative burden to reasonably accommodate acknowledges that a disability is relevant to job performance. Because of structural barriers, a disabled employee may be unable to perform a job without the employer making some modifications. The ADA relieves an employer of the burden to reasonably accommodate only when it can prove that the accommodation would be an un-

For example, being able to answer the phone is a necessary qualification for a receptionist position. A person with limited use of her hands and arms may not be able to answer a standard telephone, thus, her disability is relevant to the job qualifications. Yet, modified equipment, such as a headset, could allow her to perform the job. Furthermore, courts that fail to require that an employer explore potential accommodations, as in *Doe*,[148] also allow employers to circumvent the Rehabilitation Act's clear mandate.[149]

The cases applying the *McDonnell Douglas* analysis to Rehabilitation Act claims have one final shortcoming: courts applying *McDonnell Douglas* fail to adequately address the differences between disability discrimination and race and gender discrimination.[150] In fact, some courts fail to mention this distinction altogether.[151] In *Doe*, the court admitted that the allocation of the burden of proof for employment discrimination claims "does not lend itself easily" to disability discrimination claims in which the employer admits to relying on the disability in making its employment decision.[152] In the end, however, the court adopted a modified test, but retained the same allocation of the burden of proof.[153]

III. ALLOCATION OF THE BURDEN OF PROOF IN ADA CLAIMS: RECOGNIZING THE UNIQUE CONTEXT OF DISABILITY DISCRIMINATION

Two general types of employment discrimination in ADA claims require an employer to consider making reasonable accommodations for persons with disabilities. First, a plaintiff might claim that she possessed the necessary qualifications for a job but that the employer rejected her because of her disability. The employer would then respond that it rejected the plaintiff because she could not perform the job, with or without reason-

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due hardship. *See supra* text accompanying notes 72-76 (explaining duty of employers to reasonably accommodate).

148. *Doe*, 666 F.2d 761.

149. *See supra* notes 54-56, 72-76 and accompanying text (outlining requirements of the Rehabilitation Act and the ADA to reasonably accommodate disabled workers).

150. *See supra* part II.A.3 (demonstrating why this analysis is vital to any discussion of an appropriate allocation of the burden of proof in disability discrimination cases).

151. *See, e.g.*, Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987); Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

152. 666 F.2d at 776.

153. *Id.*

able accommodations. In the second type of claim, the plaintiff would claim she is qualified for the job, but the employer did not hire her because it did not want to reasonably accommodate her disability. The defendant would respond by claiming that to reasonably accommodate this plaintiff would be an undue hardship.

Courts should not apply the *McDonnell Douglas* test to either of these ADA claims. The test is useless in such claims because it does not further its own purpose, namely, "to sharpen the inquiry into the elusive factual question of intentional discrimination."[154] The defendant has already admitted that it based its decision on the plaintiff's disability. Because of that disability, the defendant concluded either that the plaintiff was not qualified, or that it would be too great an inconvenience to accommodate that disability.

Instead, the allocations of burden of proof proposed below comport with the text of the ADA[155] and its legislative history[156] better than the *McDonnell Douglas* test. If an employer admits that it based its employment decision on the plaintiff's disability, courts should require that the plaintiff first establish a prima facie case by demonstrating that she is a qualified individual who can perform the essential functions of the job with or without reasonable accommodation. The employer then could defend itself in one of two ways. It could refute the plaintiff's prima facie case by proving that the plaintiff is not qualified for the position because he cannot perform the essential functions of

154. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

155. The ADA specifically prohibits employers from

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an 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.

42 U.S.C. § 12112(5)(A).

156. The legislative history of the ADA indicates that Congress intended the ADA to be interpreted in the same manner that courts have interpreted the Rehabilitation Act. "The Committee intends that the burdens of proof under each of the aforementioned sections [all of which refer to employment discrimination] be construed in the same manner in which parallel agency provisions are constructed under Section 504 of the Rehabilitation Act as of June 4, 1989." H.R. REP. No. 101-485(II), *supra* note 17, at 31-32, *reprinted in* 1990 U.S.C.C.A.N. at 354. Some courts interpreting the Rehabilitation Act have followed this analysis. *See supra* note 95 and accompanying text (citing these cases).

the job with or without reasonable accommodation.[157] Refusing to hire the plaintiff under such circumstances does not fall under the definition of discrimination under the ADA.[158] In the alternative, the employer could raise the affirmative defense that making a reasonable accommodation would create an undue hardship.

In response to the second type of claim, a claim of failure to reasonably accommodate, employers may also raise undue hardship as an affirmative defense.[159] As with most affirmative defenses, the defendant, as the party raising it, should have the burden of proving it.[160] The defendant is the party with the knowledge, experience, and resources to determine whether it can make reasonable accommodations for the plaintiff.[161] Furthermore, courts should allocate the burden of proof in this manner because it furthers the goals of the ADA. The ADA seeks to provide equal employment opportunities for persons with disabilities, and refusing to reasonably accommodate an individual

157. The defendant should have the burden of persuasion on this issue because of the complex interaction between a disability and a disabled person's ability to work. By placing the burden of persuasion on the defendant, courts will ensure that employers are truly looking at a disabled individual's abilities to determine whether she is qualified for a job, and not imputing too many limitations on her abilities because of her disability. "The goal of inclusion demands that employers carefully consider the extent to which they are measuring actual ability to perform a job as well as the alternative ways in which a traditional task could be performed." *See* Murphy, *supra* note 3, at 1642.

158. *See supra* text accompanying notes 69-71 and accompanying text (explaining the definition of discrimination under the ADA).

159. The federal regulations interpreting the ADA, as well as the ADA itself, imply that an undue hardship claim is an affirmative defense. *See* 42 U.S.C. § 12112(b)(5)(A) (stating that an employer must demonstrate undue hardship to avoid liability for employment discrimination for failure to reasonably accommodate); 29 C.F.R. § 1630.15(d) (1994) (same).

160. *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5122 (1977 & Supp. 1994). Wright contends that courts usually consider three factors in determining who has the burden of proof for a certain issue: policy, probability, and possession of proof. *Id.* at 556. For an undue hardship claim, each of these elements points toward the defendant having the burden of proof.

161. As one circuit court noted:

> The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources.

Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981).

with a disability thwarts this goal.[162] By placing the burden of persuasion on the employer to prove an undue hardship,[163] courts will ensure employers take the procedural duties of the ADA seriously. Employers will not be able to rebut the plaintiff's case with the stereotypes and generalities that Congress designed the ADA to prevent.[164]

CONCLUSION

Persons with disabilities encounter tremendous employment discrimination in our society. Structural barriers and inaccurate stereotypes about the limitations of persons with disabilities cause this pervasive discrimination. Congress designed the ADA to prevent disability discrimination by all employers. For the ADA to achieve its intended effect, courts must allocate the burden of proof for a cause of action under the Act differently than they have with other types of employment discrimination claims.

In particular, courts should not apply the *McDonnell Douglas* allocation of the burden of proof to ADA claims. Because of the unique relationship between a disability and an individual's ability to perform a job, and the unique affirmative burden on employers to reasonably accommodate workers with disabilities, courts should place higher burdens on employers who wish to escape liability in disability discrimination cases. Depending on the facts of a particular case, employers should have the burden to prove either that the plaintiff is not qualified for the job, or that reasonably accommodating the plaintiff would cause an undue hardship on the defendant. Without such an allocation of the burden of proof, persons with disabilities will continue to face employment discrimination which will prevent them from reaching their full potential as working Americans.

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162. *See supra* notes 131-133 and accompanying text (discussing the necessity of reasonable accommodation to achieve the goals of the ADA).

163. *See* Comment, *Section 504 of the Rehabilitation Act: Analyzing Employment Discrimination Claims*, 132 U. PA. L. REV. 867, 895-96 (1984). The author argues that if the defendant only has a limited burden of proof, courts will "grant[ ] excessive deference to the employment decisions of federally funded program administrators." *Id.* at 896.

164. *See id.* at 896. The author argues that placing a lesser burden on employers when they have failed to accommodate a worker with a disability reduces the law "to an admonition to employers that they should be able to come up with plausible justifications for their judgment that it would be difficult for a handicapped person to perform a particular job." *Id.*