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Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function

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HOSTILE ENVIRONMENT ACTIONS, TITLE VII, AND THE ADA: THE LIMITS OF THE COPY-AND-PASTE FUNCTION

By Lisa Eichhorn*

Abstract: Two federal circuits, borrowing from Title VII jurisprudence, recently recognized a cause of action for a disability-based hostile environment under the Americans with Disabilities Act (ADA). Neither opinion, however, considered how the analysis of a disability-based hostile environment claim under the ADA might differ from that of a race- or sex-based hostile environment claim under Title VII. This Article examines the differing theories of equality underlying the two statutes and argues that, because the statutes prohibit discrimination in fundamentally different ways, courts must resist the temptation to copy and paste Title VII doctrine into ADA hostile environment opinions. This Article instead suggests an analysis of ADA hostile environment actions that is consistent with the specific combination of theories underlying that statute.

In the spring of 2001, for the first time, two federal circuit courts recognized claims for disability-based workplace harassment under the Americans with Disabilities Act (ADA).[1] While several district courts had previously recognized such claims,[2] and a few circuit courts had assumed in dicta that such claims could exist,[3] the Fifth Circuit, in

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1. 42 U.S.C. §§ 12101–12213 (1994). Title I of the ADA, §§ 12111–12117, prohibits disability discrimination in employment. *See* 42 U.S.C. § 12112(a). The U.S. Supreme Court has recently restricted the enforcement of this provision by holding that the Eleventh Amendment bars individual plaintiffs from suing state employers for damages under Title I. *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 960 (2001). This holding, however, does not affect Title I suits against other types of employers. *See id.* at 962 (describing scope of Eleventh Amendment).

2. *See, e.g.*, Hudson v. Loretex Corp., No. 95-CV-844, 1997 WL 159282, at *3–*4 (N.D.N.Y. Apr. 2, 1997); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1106 (S.D. Ga. 1995). *See generally* Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994) (arguing that hostile environment action exists under ADA).

3. *See, e.g.*, Conley v. Vill. of Bedford Park, 215 F.3d 703, 712–13 (7th Cir. 2000); Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 666–67 (3d Cir. 1999); Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 725 (8th Cir. 1999). *See also* Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998) (assuming implicitly that disability-based harassment is actionable but affirming summary judgment against plaintiff on ground that he had failed to establish that "the harassment he claims took place was severe enough to create an objectively hostile work environment").

Flowers v. Southern Regional Physician Services,[4] and the Fourth Circuit, in *Fox v. General Motors Corp.*,[5] each explicitly confirmed the availability of this cause of action and affirmed judgments for plaintiffs who had prevailed at trial under ADA hostile environment harassment theories.[6]

In *Flowers*, trial evidence had revealed that plaintiff Sandra Flowers's supervisor at Southern Regional had begun intercepting Flowers's telephone calls, eavesdropping on her conversations, and hovering around Flowers's desk soon after learning that Flowers was HIV-positive.[7] In addition, the supervisor stopped socializing and having lunch with Flowers, although the two had been close friends up until that time.[8] Similarly, Southern Regional's president suddenly refused to shake Flowers's hand and began using circuitous routes in the building to avoid passing by her office.[9] Further, after revealing her HIV-status, Flowers was required to undergo four random drug tests within a one-week period, whereas in her prior eighteen months at Southern Regional, she had been required to undergo only one.[10] The Fourth Circuit, reviewing the evidence presented at trial in its entirety, held that the jury could properly have found actionable harassment on the part of Southern Regional under the ADA.[11]

In *Fox*, the evidence produced at trial revealed that plaintiff Robert Fox had suffered even more severe harassment than Flowers. In 1994, Fox had returned to his job at GM following a disability leave.[12] Fox had suffered numerous back injuries, and his doctor had restricted him to light-duty work.[13] Nevertheless, two of his supervisors insisted that he

4. 247 F.3d 229 (5th Cir. 2001).

5. 247 F.3d 169 (4th Cir. 2001).

6. *Fox*, 247 F.3d at 172; *Flowers*, 247 F.3d at 235–38. Hostile environment and quid pro quo are two commonly recognized forms of workplace harassment. *See infra* notes 56–65 and accompanying text. Hostile environment harassment arises from objectively abusive workplace conditions. *See infra* notes 94–102 and accompanying text. Quid pro quo harassment, which arises only in the context of sex discrimination, involves requests for sexual favors in exchange for specific job-related benefits such as promotions and raises. *See infra* notes 56–61 and accompanying text.

7. *Flowers*, 247 F.3d at 236.

8. *Id.*

9. *Id.* at 237.

10. *Id.*

11. *Id.*

12. *Fox*, 247 F.3d at 172.

13. *Id.* at 173.

not work at the "light-duty table" but instead perform tasks that were beyond his physical ability.[14] When Fox tried to explain the reason for his medical restriction, a supervisor told him, "I don't need any of you handicapped M—F—'s."[15] Later, instead of letting Fox work at the light-duty table with other employees, another supervisor assigned Fox to a small individual table and chair in a hazardous area. Because the table was too low for Fox, he aggravated his back injury while working there.[16] The same supervisor routinely referred to disabled employees as "handicapped MFs" and "911 hospital people" and instructed other employees not to talk to them.[17] He also refused to permit disabled employees to work overtime.[18] Based on testimony regarding these and other incidents, the Fifth Circuit held that it could not disturb the jury's finding in Fox's favor because he had "presented evidence of objectively severe and pervasive workplace harassment."[19]

In both *Fox* and *Flowers*, the circuit courts began their examinations of whether hostile environment harassment could be actionable under the ADA by noting that the statute explicitly prohibits discrimination related to the "terms, conditions, and privileges" of employment.[20] Both opinions then observed that this statutory language echoes a prohibition in Title VII of the Civil Rights Act of 1964,[21] which proscribes workplace discrimination on the basis of race, sex, national origin, and religion.[22] Years before the ADA was drafted, the Supreme Court had held that the "terms, conditions, or privileges" language in Title VII

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14. *Id.*

15. *Id.* Several trial witnesses were reluctant to "repeat some of the language that their supervisors had used, so instead they just said the first letter of, or spelled out, the word in question." *Id.* at 173 n.2.

16. *Id.* at 173.

17. *Id.* at 174 (internal quotations omitted).

18. *Id.*

19. *Id.* at 179.

20. *Id.* at 175 (quoting 42 U.S.C. § 12112(a) (1994)); Flowers v. S. Reg'l Physician Servs., 247 F.3d 229, 233 (5th Cir. 2001) (same).

21. *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . .").

22. "Title VII provides that it is unlawful for an employer . . . 'to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin[.]'" *Flowers*, 247 F.3d at 233 (quoting 42 U.S.C. § 2000e-2(a)(1)) (emphasis and brackets added in *Flowers*). *See also Fox*, 247 F.3d at 175 (quoting "terms, conditions, or privileges of employment" language from Title VII).

entitled employees to be free from workplace harassment based on the characteristics protected by that statute.[23] The *Fox* and *Flowers* courts reasoned that Congress included the "terms, conditions, and privileges" language in the ADA to afford similar protections to employees with disabilities.[24] Indeed, lower courts specifically addressing the issue had arrived at the same conclusion through similar reasoning.[25]

Whether the ADA encompasses a workplace harassment theory was thus a relatively easy question. The ramifications of the *Fox* and *Flowers* holdings, however, are much more complex. While harassment actions under Title VII and the ADA stem from identical statutory terms, the theories of equality and notions of discrimination underlying the two statutes are quite different.[26] Title VII fosters workplace equality by requiring employers to ignore certain characteristics of employees such as race and sex, which do not normally affect job performance.[27] The ADA adopts this principle with respect to disability, requiring employers to ignore employees' disabilities that have no impact on job-related capabilities, but the statute goes further. Through its "reasonable accommodation" requirement, the ADA creates an affirmative duty on the part of employers to alter the conditions of employment, when necessary and reasonable, to allow disabled employees an equal

23. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–66 (1986).

24. *Fox*, 247 F.3d at 175–76; *Flowers*, 247 F.3d at 233.

25. *See, e.g.*, Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1106 (S.D. Ga. 1995). *See also* Rodriguez v. Loctite P.R., Inc., 967 F. Supp. 653, 663 (D.P.R. 1997) (stating that "hostile work environment claims should be actionable under the ADA, and that the analysis should borrow from hostile work environment claims under Title VII," but ultimately holding that plaintiff's alleged harassment was not sufficiently severe to support such a claim).

26. For analyses of the models of equality informing Title VII and the ADA, see generally Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001); Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535 (2001); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603 (2001); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000). *See also* Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 515–21 (1998) (comparing Title VII and ADA discrimination paradigms); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 492–522 (1991) (analyzing significant structural differences between the ADA and prior civil rights legislation).

27. *See generally* 42 U.S.C. § 2000e-2 (1994). For a detailed discussion of Title VII doctrine, see MARK ROTHSTEIN, ET AL., EMPLOYMENT LAW 131–302 (2d ed. 1999).

opportunity to perform in the workplace.[28] Therefore, in some instances, an employer must take account of employees' disabilities. Indeed, the employer may sometimes even be obligated to work with disabled employees individually to determine what types of workplace accommodations are appropriate in specific cases.[29] Thus, where under Title VII, equality requires similar treatment *despite* differences of race, sex, national origin, and religion, under the ADA it sometimes requires *different* treatment *because of* disability.

In addition, the ADA protects individuals not on the basis of universal characteristics like race or sex, but rather on the basis of their membership in a statutorily-limited class of individuals with disabilities.[30] Therefore, whether the ADA even applies to a given situation depends upon the often complex threshold issue of whether the plaintiff has an impairment that qualifies as a "disability" as that term is expressly defined by the statute.[31] A Title VII plaintiff, on the other hand, does not normally need to prove membership in any particular class to pursue a discrimination claim.[32] To the extent that some jurisdictions specifically list "membership in a protected class" as an element of a Title VII harassment action,[33] plaintiffs rarely if ever have difficulty establishing their sex, race, national origin, or religion.[34]

To date, no court has addressed whether these significant differences between the two statutes might have any bearing on hostile environment

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28. *See* 42 U.S.C. § 12112(b)(5)(A) (specifying that the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified [disabled] employee" is a form of discrimination).

29. *See* 29 C.F.R. § 1630.2(o)(3) (2000) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability . . . .").

30. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination against only a "qualified individual with a disability"); *id.* § 12111(8) (defining "[q]ualified individual with a disability").

31. *See id.* § 12102(2).

32. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–87 (1976) (holding that the race discrimination provision of Title VII prohibits discrimination against white people as well as black people); Young v. S.W. Sav. & Loan Ass'n, 509 F.2d 140, 1444–45 (5th Cir. 1975) (holding that religious discrimination provision of Title VII prohibits discrimination against members of specific religions as well as atheists); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1340–41 (D.C. Cir. 1973) (holding that sex discrimination provision of Title VII prohibits discrimination against men as well as women).

33. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 903–04 (11th Cir. 1982) (listing elements of a hostile environment sex discrimination case under Title VII).

34. *See* Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) (noting that whether plaintiff belongs to protected class is "not usually disputed").

harassment doctrine. Indeed, neither the *Fox* nor the *Flowers* court paused to consider the theory underlying the ADA or to indicate whether or how the analysis of a hostile environment claim under the ADA might differ from that of a corresponding claim under Title VII. This Article takes that pause.

It argues that because the two statutes prohibit discrimination in such fundamentally different ways, courts must resist the temptation to copy and paste Title VII doctrine into ADA hostile environment opinions. The standard elements of a Title VII hostile environment harassment claim raise new and complex issues when analyzed in the context of the ADA. While a quick glance at similar Title VII language allowed the Fourth and Fifth Circuits correctly to determine that the ADA also prohibits workplace harassment, the quick glances must end there. Title VII doctrine and its underlying notions of equality and discrimination simply cannot effectively answer many of the difficult questions likely to arise in future ADA harassment cases. This Article identifies these questions after reviewing the differing theories of equality that inform Title VII and the ADA. It then suggests an analysis of ADA hostile environment harassment claims that is consistent with the specific combination of theories underlying that statute.

Part II of this Article analyzes the theoretical development of hostile environment harassment claims under Title VII as a mechanism to promote workplace equality. Because the great majority of Title VII harassment cases allege sex discrimination, this Part focuses upon sex as a protected characteristic. Next, Part III examines the modern notions of disability and equality underlying the ADA and analyzes how the statute's provisions—particularly the reasonable accommodation and protected class provisions—coincide with these notions. Part IV of this article then dissects the traditional elements of a Title VII hostile environment harassment claim and notes how the theory and framework of the ADA raise unique issues regarding these elements. Part IV also proposes how these new issues could be addressed in a manner that recognizes the specific theories of equality upon which ADA rests. Finally, Part V offers some concluding thoughts.

I. FORMAL EQUALITY AND THE EVOLUTION OF THE HOSTILE ENVIRONMENT HARASSMENT CLAIM UNDER TITLE VII

Title VII secures civil rights in the workplace by requiring employers to treat similarly situated employees the same, despite differences that

may exist among them in terms of race, sex, national origin, and religion.[35] The statute prohibits differential treatment based upon these classifications because they do not normally affect an employee's ability to perform at the workplace. This theory of equality, which also underlies other legislation such as Title VI of the Civil Rights Act of 1964[36] and Title IX of the Education Amendments of 1972,[37] is often referred to as "formal equality."[38]

Title VII strays only occasionally from a strict formal equality model. For example, the statute's bona fide occupational qualification (BFOQ) exception allows an employer to factor sex, national origin, and religion (but not race) into hiring decisions if the employer can prove that those characteristics are necessary to enable an employee to perform a particular job.[39] For example, it may be a BFOQ for an actor to be male if his job is to portray a specific male character in a film.[40] However, because the great majority of jobs do not require employees to have a particular sex, national origin, or religion, the BFOQ exception does not result in frequent departures from the formal equality model.[41]

An arguably even narrower exception to the formal equality mandate of Title VII appears in the statute's religious accommodation requirement.[42] Because the First Amendment ordinarily prohibits compulsory accommodation of any religious practice, the U.S. Supreme Court has interpreted this statutory provision very narrowly, holding that

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35. 42 U.S.C. § 2000e-2(a). "The core of the Civil Rights Act [of 1964] is the 'race neutral' principle, pursuant to which an individual's race is irrelevant and must be ignored when making employment decisions affecting that individual . . . ." Tucker, *supra* note 26, at 362–63.

36. 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race and national origin in programs and activities receiving federal financial assistance).

37. 20 U.S.C. §§ 1681–88 (1994).

38. *See, e.g.*, Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 747–8 (2001) (noting that anti-discrimination law expressly bans policies setting forth different standards for disfavored groups, but that "[a]side from this insistence on formal or facial equality, . . . the protection of the law is thin"); Mayerson & Yee, *supra* note 26, at 538 (explaining that "[u]nder formal equality, the law treats similarly situated persons the same" and that underlying this model is the notion "that goods should be distributed according to merit and all individuals are able to compete equally if treated equally"); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 705 (1997) (stating that the "dominant guiding principle in antidiscrimination jurisprudence is that of formal equality").

39. 42 U.S.C. § 2000e-2(e).

40. *See* 29 C.F.R. § 1604.2(a)(2).

41. *See* ROTHSTEIN, *supra* note 27, at 208–13 (reviewing case law and emphasizing the narrowness of the circumstances in which the BFOQ defense is available).

42. 42 U.S.C. § 2000e(j) (1994).

employers have no duty to provide accommodations that would involve more than a de minimis cost.[43] Thus, the few instances in which Title VII allows differential treatment on the basis of protected characteristics are tightly circumscribed. Overall, the driving theory of Title VII is one of formal equality, and it is within the context of this theory that the hostile environment harassment claim originated and developed.

A. *Origins of the Hostile Environment Claim*

One way in which Title VII jurisprudence seeks to implement formal equality at the workplace is by prohibiting employers from creating abusive workplace conditions that target a particular race, sex, national origin, or religion. Such conduct is "hostile environment" harassment, and, through a series of federal appellate decisions, it has been recognized as a form of employment discrimination prohibited by Title VII.[44] The Fifth Circuit, in *Rogers v. EEOC*,[45] was the first federal appellate court to hold that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."[46] In *Rogers*, Ms. Josephine Chavez, a woman of Hispanic origin who had worked in an optometrist's office, filed a discrimination complaint with the EEOC, charging in part that her employer segregated its Hispanic patients.[47] She did not allege, however, that her employer required her to attend only to the Hispanic patients,[48] and the trial court therefore held that Ms. Chavez could not state a discrimination claim under Title VII.[49]

The Fifth Circuit disagreed, noting that Title VII specifically proscribes discrimination "against any individual with respect to his

43. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977). For an insightful comparison of Title VII's religious accommodation provision with the reasonable accommodation provision of the ADA, see Malloy, *supra* note 26, at 627–40.

44. "The hostile environment theory itself was not one that Congress anticipated or provided for in the express terms of Title VII, but instead is one that scholars, the E.E.O.C., and judges have fashioned in acknowledgment of a very real and invidious form of sex discrimination in the workplace." DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 439–40 (7th Cir. 2000) (Rovner, J., dissenting in part).

45. 454 F.2d 234 (5th Cir. 1971).

46. *Id.* at 237–38.

47. *Id.* at 236–37.

48. *Id.* at 237.

49. Rogers v. EEOC, 316 F. Supp. 422, 425 (E.D. Tex. 1970).

compensation, terms, conditions, or privileges of employment,"[50] and that such language evinces "a Congressional intent to define discrimination in the broadest possible terms."[51] The court therefore held that Title VII protects "employees' psychological as well as economic fringes" from employer abuse, and that the statute's reference to "'terms, conditions, or privileges of employment' . . . sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[52] In addition, the Fifth Circuit noted that the employer's possible violation of Title VII with respect to Ms. Chavez did not depend upon whether it intended to discriminate against her personally in segregating its patients.[53] However, the court also recognized the possibility that "an employer's patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees."[54]

In sum, *Rogers* established that an employer whose conduct creates a work environment characterized by discrimination against any race, sex, national origin, or religion is in fact discriminating against any employees who belong to the targeted group. This proposition is consistent with the formal equality model explained above because employees in the targeted group experience the hostility of their environment more forcefully and personally than do their colleagues. In this situation, the targeted-group employees receive different—and thus discriminatory—treatment at the workplace because of their protected characteristic.[55]

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50. *Rogers*, 454 F.2d at 238 (quoting 42 U.S.C. § 2000e-2(a)(1)).

51. *Id.*

52. *Id.* The court went on to hold that "the *possibility* that petitioner's segregation of its patients could encompass an unlawful employment practice justifies an EEOC investigation." *Id.* at 240.

53. *Id.* at 239.

54. *Id.*

55. After the *Rogers* decision, courts applied the Title VII hostile environment theory to cases alleging unequal treatment because of race, *e.g.*, Firefighters Inst. for Racial Equal. v. St. Louis, 549 F.2d 506, 514–15 (8th Cir. 1977); Gray v. Greyhound Lines, E., 545 F.2d 169, 176 (D.C. Cir. 1976); sex, *e.g.*, Bundy v. Jackson, 641 F.2d 934, 944–45 (D.C. Cir. 1981); national origin, *e.g.*, Cariddi v. Kan. City Chiefs Football Club, 568 F.2d 87, 88 (8th Cir. 1977); and religion, *e.g.*, Compston v. Borden, Inc., 424 F. Supp. 157, 160–61 (S.D. Ohio 1976).

B. *Further Development of the Hostile Environment Claim in the Context of Sex Discrimination Cases*

In the years following *Rogers*, hostile environment doctrine under Title VII became more nuanced as plaintiffs raised the theory in sex discrimination cases. Sex-based harassment,[56] unlike harassment based on other characteristics, can occur in many forms and can sometimes echo—or mock—expressions of interest or desire that would be socially acceptable if welcomed by the recipient. The first form of sex-based harassment to be tested in the courts concerned employers' requests for sexual favors from employees in exchange for work-related benefits. Originally, numerous courts adamantly refused to recognize these propositions as an actionable form of sex discrimination, seeing them merely as personal interactions involving sexual attractiveness rather than gender.[57] Eventually, however, the federal judiciary became persuaded that this "quid pro quo" sexual harassment,[58] at least, constituted sex discrimination under the formal equality model of Title VII.

In one of the earliest successful quid pro quo cases, *Barnes v. Costle*,[59] the D.C. Circuit reasoned that "[b]ut for" the plaintiff's gender, "her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she

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56. Throughout this article, I will use the term "sex-based harassment" to refer both to harassing conduct with *sexual* dimensions and to harassing conduct that is directed at a particular sex but not necessarily sexual in nature. I will use the term "sexual harassment" to describe only conduct that is sexual in nature.

57. *See, e.g.*, Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated on procedural grounds*, 562 F.2d 55 (9th Cir. 1977) (holding that sexual harassment stems merely from a "personal proclivity, peculiarity or mannerism of the supervisor"); Miller v. Bank of Am., 418 F. Supp. 233, 234 (N.D. Cal. 1976), *rev'd*, 600 F.2d 1211 (9th Cir. 1979) (holding that sexual harassment is "essentially the isolated and unauthorized sex misconduct of one employee to another"); Barnes v. Train, No. 1828-73, 1974 WL 10628, at *2 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (denying sexual harassment claim because "substance of plaintiff's complaint is that she was discriminated against not because she was a woman, but because she refused to engage in a sexual affair with her supervisor"). For an early critique of cases refusing to hold sexual harassment actionable for these and other reasons, see Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1010–11 (1978). For a brief history of the judicial acceptance of sexual harassment as actionable under Title VII, see BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 7–40 (1992).

58. For a general discussion of quid pro quo harassment, see LINDEMANN & KADUE, *supra* note 57, at 129–56.

59. 561 F.2d 983 (D.C. Cir. 1977).

declined the invitation is to ignore . . . that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel."[60] Thus, under the formal equality model, the employer in *Barnes* had singled out the plaintiff for different treatment because of her gender, and this different treatment amounted to discrimination.[61]

Hostile environment harassment is distinguishable from the quid pro quo harassment at issue in *Barnes* because it does not involve the promise or withholding of economic benefits.[62] Although these two forms of harassment may occur simultaneously,[63] and the distinction between them may not be as meaningful as it once appeared to be,[64] the two labels continue to be useful in allowing courts to describe and analyze various harassment scenarios.[65]

The Supreme Court first recognized a sex-based hostile environment as actionable discrimination in *Meritor Savings Bank v. Vinson*,[66] a case involving egregious sexual conduct. In *Meritor*, the plaintiff, Mechelle Vinson, testified that her supervisor at Meritor Savings Bank had harassed her sexually over a period of years.[67] Vinson's testimony asserted that her supervisor had repeatedly requested sexual favors of her, some of which, out of intimidation, she granted.[68] She also testified that her supervisor had fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, and forcibly

60. *Id.* at 990 (footnotes omitted).

61. Three years after *Barnes*, in its 1980 Guidelines on Discrimination Because of Sex, the EEOC included quid pro quo scenarios in its description of actionable sexual harassment. *See* 45 Fed. Reg. 74,677 (1980) (now appearing at 29 C.F.R. § 1604.11 (a)(1)-(2) (2001)).

62. *See* LINDEMANN & KADUE, *supra* note 57, at 8–9.

63. For example, a supervisor may deny a female employee a promotion because of her refusal to grant requested sexual favors and at the same time maintain a hostile environment by making comments and creating policies that denigrate women.

64. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) (holding that quid pro quo/hostile environment distinction has no bearing on issue of vicarious employer liability for sex-based harassment).

65. *Ellerth*, 524 U.S. at 753 ("We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. . . . [T]he terms are relevant when there is a threshold question whether a plaintiff can prove discrimination . . . .").

66. 477 U.S. 57 (1986). Seven years before *Meritor*, Professor Catharine MacKinnon had first theorized that quid pro quo and hostile environment (which she called "condition of work") harassment were distinct but equally actionable forms of sex discrimination. CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 32 (1979).

67. 477 U.S. at 60.

68. *Id.*

raped her on several occasions.[69] In addition, Vinson asserted that her supervisor touched and fondled other female employees of the bank.[70] Vinson's suit sought compensatory damages—among other forms of relief—for injuries allegedly caused by the harassment.[71]

The Bank argued that when Congress referred to the "compensation, terms, conditions, or privileges" of employment in Title VII, it contemplated only economic losses rather than psychological injuries.[72] Drawing largely upon *Rogers v. EEOC*,[73] the Court rejected this argument, holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment," even if the plaintiff has not suffered financially from the discrimination.[74] This holding flowed logically from the Court's initial assertion that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[75]

After *Meritor*, many sex-based hostile environment harassment cases focused upon the level of abusiveness required to make the environment actionably "hostile." The Supreme Court in *Meritor* had already specifically declared that, to be actionable, sex-based harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[76] Seven years later, in *Harris v. Forklift Systems*,[77] the Court clarified that a working environment need not lead an employee to suffer serious psychological harm in order to be actionably abusive.[78] However, the Court specified that the environment must be one that "a reasonable person would find hostile or abusive" in order to violate Title VII.[79] This standard, the Court noted, followed the formal equality principle of the statute: "[T]he very fact that the discriminatory conduct was so severe or pervasive that it

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 64.

73. 454 F.2d 234 (5th Cir. 1971).

74. 477 U.S. at 66.

75. *Id.* at 64.

76. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (brackets added in *Meritor*).

77. 510 U.S. 17 (1993).

78. *Id.* at 21.

79. *Id.*

created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."[80] Justice Scalia, in a concurrence, nevertheless noted the generality of the majority's standard as a potential problem:

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. . . .
>
> Be that as it may, ... I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.[81]

Before *Harris*, in an attempt to focus the standard and to sensitize courts to the possibly differing male and female reactions to sexual words and acts, some advocates had proposed a "reasonable woman" standard,[82] and some circuits had adopted it.[83] After *Harris*, however, several courts interpreted that case to require a "reasonable person" test and therefore explicitly rejected or abandoned the reasonable woman standard.[84] In 1998, the Supreme Court announced in *Oncale v.*

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80. *Id.* at 22.

81. *Id.* at 24 (Scalia, J., concurring). Justice Ginsburg, also concurring, suggested a gloss on the majority's test that would make it both broader and more workable: "It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it 'more difficult to do the job.'" *Id.* at 25 (Ginsuburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

82. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1210 (1989); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769; Deborah S. Brenneman, *From Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281 (1992); Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825 (1992); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984).

83. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987).

84. *See* Bunch v. Shalala, No. 94-2269, 1995 WL 564385, at *8 (4th Cir. Sept. 25, 1995) (table decision at 67 F.3d 293) (rejecting reasonable woman standard as contrary to *Harris*); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454–55 (7th Cir. 1994) (same); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) (same). This reading of *Harris* may not be entirely accurate. The majority opinion in *Harris* specifically noted that it "need not answer today all the potential questions [that the objective standard] raises, nor specifically address the Equal Employment Opportunity Commission's new regulations on this subject." 510 U.S. at 22–23. Those

Sundowner Offshore Services[85] that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[86] Implicitly holding that a plaintiff's "position" and "circumstances" may include her gender, the Ninth Circuit has specifically reaffirmed its use of a reasonable woman standard in sex-based harassment cases involving female plaintiffs.[87]

Whatever the post-*Oncale* status of the reasonable woman standard may be, the test rests upon the premise that conduct that is acceptable when directed at males may become unacceptable when directed at females. This notion runs afoul of the formal equality principle in that it allows for different treatment based upon sex. Some recent scholarship has also criticized the reasonable woman standard on the ground that its inherent essentialism presupposes a uniform manner in which women should react to sexual situations.[88] Indeed, one critic has noted that the standard "resolves some of the sex-based bias in the law at the price of potentially normalizing and enforcing certain gender stereotypes or commonly accepted social norms."[89]

Although *Oncale* did not resolve the reasonable woman issue, it did alleviate some judicial confusion surrounding the "based on sex" element. Before *Oncale*, many courts had held that harassment was based

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proposed regulations, later withdrawn, specified that under the "reasonable person" standard, "consideration is to be given to the perspective of individuals of the claimant's . . . gender." EEOC PROPOSED GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE, OR DISABILITY, 58 FED. REG. 51,266, at 51,267 (proposed Oct. 1, 1993).

85. 523 U.S. 75 (1998).

86. *Id.* at 81 (quoting Harris v. Forklift Sys., 510 U.S. 17, 23 (1993)).

87. Brooks v. City of San Mateo, 229 F.3d 917, 924 (9th Cir. 2000) (relying on a "reasonable victim" perspective and citing with approval "reasonable woman" standard from Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)). *See also* Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (holding that a plaintiff must prove that allegedly hostile environment would detrimentally affect a "reasonable person of the same sex in that position"); DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 438 (7th Cir. 2000) (Rovner, J., dissenting in part) (stating that when "an employer fails to correct a work condition that it knows or should know has a disparate impact on its female employees—that reasonable women would find intolerable—it is arguably fostering a work environment that is hostile to women").

88. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 471–77 (1997). Bernstein advocates the use of a "respectful person" standard, which she argues would strike at the denial of human dignity inherent in sexual harassment. *Id.* at 450. *See also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1214–25 (1990) (criticizing the reasonable woman standard as being unable to overcome the inter-gender conflict that it purports to resolve).

89. Franke, *supra* note 38, at 750.

on sex only if it stemmed from the harasser's sexual desire for the target.[90] This line of thinking led to the "disaggregation" of evidence in plaintiffs' cases,[91] in that courts would consider only sexual conduct with respect to a harassment claim, leaving nonsexual but sex-based conduct to be considered separately, in the context of a garden-variety disparate treatment claim.[92] A court employing this analysis essentially divided and conquered a plaintiff's harassment claim by allowing the plaintiff to present only part of the real harassment evidence.[93] *Oncale* put an end to this problem in 1998 by explicitly holding that sex-based harassment need not be sexual in nature.[94]

In sum, formal equality principles, informed by an increasing understanding of the nature of sex discrimination, have guided the Court in its articulation of the components of a Title VII hostile environment harassment action. While debate continues as to the finer details,[95] one may glean the following core elements of such actions through a synthesis of the Supreme Court's opinions in *Meritor*,[96] *Harris*,[97] *Oncale*,[98] and *Burlington Industries v. Ellerth*:[99]

> the employee must have suffered harassment so severe and pervasive as to create a hostile or abusive working environment;[100]
>
> the employee must have reasonably perceived the environment resulting from the harassment as hostile or abusive;[101]

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90. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710 (1998) (explaining that "[t]o a large extent, the courts have restricted the conception of hostile work environment harassment to male-female sexual advances and other explicitly sexualized actions perceived to be driven by sexual designs").

91. *See id.* at 1713–14 (explaining concept of "disaggregation").

92. *See id.* at 1716–20 (reviewing decisions that "disaggregated" nonsexual from sexual evidence when analyzing sex-based harassment claims).

93. *See id.* at 1720–21.

94. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

95. For example, some circuits require plaintiffs to prove that the conduct complained of was "unwelcome." *See, e.g.*, Cain v. Blackwell, 246 F.3d 758, 760 (5th Cir. 2001); Wanchik v. Great Lakes Health Plan, Inc., No. 99-2333, 2001 WL 223742, *7 (6th Cir. March 2, 2001) (table decision at 248 F.3d 1154). However, the "unwelcomeness" requirement appears to be superfluous, given that the test already requires plaintiffs to prove their subjective belief that the conduct in question created an abusive or hostile environment. *See* Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

96. 477 U.S. 57.

97. 510 U.S. 17.

98. 523 U.S. 75.

99. 524 U.S. 742 (1998).

100. *Meritor*, 477 U.S. at 67 (citing Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

the harassment must have been based on a protected characteristic of the employee;[102] and

the employer must have been responsible, at least vicariously, for the harassment.[103]

C. *The Formal Equality Model in Scholarly Debate Surrounding Sex-Based Hostile Environment Cases*

Recent scholarship regarding these elements has also invoked formal equality principles in attempting to locate the true harm inherent in sex-based hostile environment harassment.[104] In doing so, it has shed new light on the relation between the formal equality model and the nature of Title VII hostile environment claims. Professor Katherine Franke, for example, has examined the nature of harassment that takes a specifically *sexual* form in light of formal equality notions.[105] She has argued that because the formal equality theory conceptualizes different treatment of similarly situated individuals as the gravamen of discrimination, courts applying this theory to sexual harassment cases have mistakenly analyzed causation by determining merely whether the employee would not have received the different and abusive treatment but for her or his sex.[106] This test actually views the harassment from the abuser's perspective, as if its inherent wrong stemmed from the abuser's desire for

101. Courts must evaluate the hostility or abusiveness of the environment from both the plaintiff's subjective perspective and from an objectively "reasonable" perspective. *Harris*, 510 U.S. at 21–22.

102. *Meritor*, 477 U.S. at 66 (reviewing with approval lower court decisions analyzing harassment based on race, religion, and national origin, and holding sex-based harassment similarly actionable); *Oncale*, 523 U.S. at 81 (explaining operation of sex as a protected characteristic).

103. *See generally Ellerth*, 524 U.S. 742 (determining controlling agency law principles with respect to employer liability for workplace harassment). An employer is vicariously liable for a hostile environment created by a supervisor with immediate or successively higher authority over the harassed employee. *Id.* at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). However, an employer may raise in defense that it took reasonable care to prevent and promptly correct the harassment and that the employee unreasonably failed to take advantage of opportunities to prevent or correct the harassment. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. An employer is liable for harassment by a plaintiff's co-workers if it knew or should have known about the harassment but negligently failed to take prompt remedial action. *See, e.g.*, Baskerville v. Culligan Int'l, 50 F.3d 428, 431–32 (7th Cir. 1995). *See also* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 18 (Supp. 1999) (describing liability standard in co-worker harassment cases).

104. *See generally* Franke, *supra* note 38; Schultz, *supra* note 90.

105. *See generally* Franke, *supra* note 38.

106. Franke, *supra* note 38, at 704 n.52.

someone of a particular sex, a desire expressed in an inappropriate place, and, perhaps, in an inappropriate way.[107] Sexual harassment, however, is primarily about "power, privilege, or dominance," rather than desire.[108] Indeed, Franke describes sexual harassment as "a technology of gender discrimination"[109] that "inscribes, enforces, and polices a particular view of who women and men should be."[110] Therefore, according to Franke, to strike at the real inequity of sexual harassment, courts should analyze the "based on sex" element by asking whether the harassment enforced stereotypical views of the target's gender or punished the target for not complying with the stereotype.[111]

While Franke declares that the formal equality model yields an inadequate framework within which to analyze sexual harassment cases,[112] her own theory in fact depends heavily upon that model. Fundamentally, Franke argues that employers should accord similar treatment to employees who happen to comply with traditional gender stereotypes and those who do not, provided that the employees are otherwise similarly situated. This similar treatment is nothing more than formal equality in action. Thus, in her review of hostile environment jurisprudence, Franke is criticizing not the formal equality model itself but rather the manner in which courts have applied it. According to Franke, courts should not ask whether a defendant treated people he found sexually attractive differently from those he did not. Instead, they should ask whether the defendant treated those who failed to conform to gender stereotypes differently from those who did.

Other theories regarding the inherent wrong in sex-based harassment rely more explicitly on the formal equality model. Professor Vicki Schultz, for example, argues that the true invidiousness of this type of harassment lies in its ability to maintain some workplaces as male preserves by undercutting the perceived and actual competence of female employees who dare to enter them.[113] She notes numerous strategies that

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107. *Id.* at 745.

108. *Id.*

109. *Id.* at 771.

110. *Id.*

111. *Id.* at 772. The Supreme Court, in *Oncale*, has since clarified that sex-based harassment need not stem from sexual desire and that it may therefore be perpetrated by heterosexuals against their own sex. 523 U.S. at 79–81. The Court did not, however, address Franke's notion that "because of sex" could mean "because of deviation from sex-based stereotypes."

112. Franke, *supra* note 38, at 693.

113. *See generally* Schultz, *supra* note 90.

employers have used to undermine and intimidate women at work, such as failing to provide them with adequate training or simply assigning them tasks that are impossible to accomplish.[114] These strategies are not sexual in nature and do not involve express references to the targeted employees' gender, yet they are aimed exclusively at women in an attempt to drive them from the workplace.

While courts including the Seventh Circuit have held that evidence of sex-based hostile environments—such as abusive language and conduct—must expressly implicate the complainant's gender,[115] Schultz joins other theorists and commentators who argue that express references to sexuality or gender may facilitate proof of the "based on sex" element but are not prerequisites to a finding of discriminatory harassment.[116] In Schultz's view, the discriminatory aspect of sex-based harassment turns

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114. *Id.* at 1764–66.

115. Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167–68 (1996). In *Galloway* the Seventh Circuit held that a plaintiff failed to state a claim where her allegations of harassment referred to epithets and a gesture that, according to the court, were not "sex- or gender-related." *Id.* at 1167. Oddly, given that holding, one of the epithets at issue was "sick bitch," and the gesture, while not described explicitly, was "obscene" and was directed at the plaintiff along with the words "suck this, bitch." *Id.* at 1165.

116. *See* Schultz, *supra* note 90, at 1800 (noting that "even an apparently gender-neutral act of hazing" could constitute sex-based harassment in a workplace characterized by longstanding gender inequality). *See also* Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J. L. & FEMINISM 195, 224 (1995) ("It is as pernicious to call a woman 'stupid' as it is to call her 'sexy.' Both comments should be illegal when based on gender stereotypes."); LINDEMANN & KADUE, *supra* note 57, at 30:

> Hostile environment cases . . . . present situations that, like quid pro quo cases, involve disparate treatment based on an employee's gender. In one common situation, women employees, often in occupations or workplaces traditionally dominated by men, are subjected to hazing behaviors: scorn, ridicule, and verbal abuse from males who resent their presence. The behavior consists of gestures, words, or conduct that may or may not be sexual in content. The sexual content of the conduct may suffice, but it is never necessary, to prove that the conduct is based on sex.

The "Sexual Harassment" section of the EEOC's 1980 Guidelines, 29 C.F.R. §1604.11, focused only on sexual conduct when discussing hostile environment theory, *see id.* §1604.11(a), but a later Policy Guidance issued to EEOC field officers clarified that "sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion)." EEOC POLICY GUIDANCE ON CURRENT SEXUAL HARASSMENT ISSUES (March 19, 1990), *reprinted in* LINDEMANN & KADUE, *supra*, note 57, at 661, 672. This Policy Guidance implies that comments not explicitly referring to the victim's gender can create a hostile environment, but it does not address the issue squarely.

on gender-related stereotypes regarding workplace competence.[117] She argues that a sex-based hostile environment exists when harassment pressures employees "to conform to the harassers' image of suitable manly competence" regarding a particular job.[118] In the end, Schultz's argument is also one for similar treatment of similarly situated employees. Her competence-based paradigm is designed to prohibit an employer from confronting female and "overly feminine" male[119] employees with gratuitous hurdles that their co-workers would never encounter. In this sense, her proposal is a call for a more broadly based application of formal equality principles.

Thus, Title VII hostile environment jurisprudence, like most anti-discrimination law in this country,[120] has evolved and continues to be debated in relation to the formal equality model. Moreover, given the unfortunate recent tendency of many courts and much of the public to misinterpret anti-discrimination provisions as granting "special rights" and preferential treatment,[121] Title VII jurisprudence, including hostile environment doctrine, is likely to hew very closely to the formal equality model for the foreseeable future.

II. EQUAL OPPORTUNITY AS A SUPPLEMENT TO FORMAL EQUALITY IN THE ADA

The Americans with Disabilities Act of 1990, a "second-generation" civil rights statute,[122] has brought a new model of equality to employment discrimination law. Certainly, Title I of the ADA, which governs employment, incorporates formal equality principles by prohibiting discrimination on the basis of disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and

117. Schultz, *supra* note 90, at 1800.

118. *Id.* at 1774.

119. While Schultz focuses her argument on the need to prohibit conduct aimed at excluding women from male-dominated workplaces, she also demonstrates that the same argument applies to conduct aimed at effeminate men. *Id.* at 1774–89.

120. "Antidiscrimination law, of course, is animated by the very idea of equal treatment." Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 566 (1998).

121. *See generally id.*

122. Burgdorf, *supra* note 26, at 415.

privileges of employment."[123] Thus, as long as disabled employees are qualified,[124] their employers may not disadvantage them with respect to similarly situated co-workers by according them differential treatment because of their disabilities. But the ADA then goes a step further and implements a different model of equality; it also imposes upon employers a duty to make "reasonable accommodations to the known physical or mental limitations" of a disabled employee or job applicant, provided that such accommodations do not cause "undue hardship."[125] A reasonable accommodation might take the form of installing a ramp at the entrance of a building to allow access to employees using wheelchairs,[126] purchasing a telephone amplifier for use by an employee with a hearing impairment,[127] or allowing a diabetic employee to work one shift permanently, rather than rotating shifts, so that she can maintain a strict meal schedule.[128]

In requiring employers to take these types of affirmative steps, the ADA supplements the formal equality model with an "equal opportunity" model of its own.[129] Instead of requiring employers to treat all employees similarly, the statute's reasonable accommodation provision actually requires employers to accord facially *different* treatment to disabled employees so that they and their nondisabled peers may have equal opportunities to demonstrate their capabilities in the

123. 42 U.S.C. § 12112(a) (1994).

124. *See id.* § 12111(8) (defining a "qualified individual with a disability" as one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that [he or she] holds or desires").

125. *Id.* § 12112(b)(5)(A).

126. *See* EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § I-3.10(1) (1992), *reprinted in* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE 41, 64 (1995).

127. *Id.* at § I-3.10(6), *reprinted in* COLKER & TUCKER, *supra* note 126, at 67–68.

128. *Id.* at § I-3.10(3), *reprinted in* COLKER & TUCKER, *supra* note 126, at 66.

129. Arlene Mayerson, one of the ADA's drafters, has explained that she and the other drafters "conceptualized equal protection as equal opportunity." Mayerson & Yee, *supra* note 26, at 537. Robert L. Burgdorf, Jr., another ADA drafter, has referred to the equal opportunity model as one of "real, not merely formal, equality." DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 274 (1995). Whatever label one might apply to its underlying model, "[t]he reasonable accommodation requirement . . . is based upon a more complex and richer conception of equality than a simple requirement that the disabled and nondisabled be treated the same." Diller, *supra* note 26, at 40.

workplace.[130] The ADA also differs from earlier formal equality-based civil rights legislation in that it provides its protections, including the right to reasonable accommodation, only to members of a specifically defined group.[131] The following sections will analyze the ADA's equal opportunity model by tracing its sources and examining its implementation through the statute's reasonable accommodation and protected class provisions.

A. Theories of Disability and the Equal Opportunity Model

The ADA's equal opportunity model emerged from a rethinking of the entire notion of disability. Before the disability rights movement came together in the late 1960s and early 1970s,[132] the commonly accepted paradigm of disability was based upon a medical model.[133] Under the medical model, disability was viewed as a measurable biological fact and thus "an inherent individual defect."[134] Therefore, the primary duty of people with disabilities was to seek cures or rehabilitation through modern science so that they could rid themselves of their defects and join the nondisabled community.[135] Impairments were to be eradicated, rather than accommodated. Thus, the medical model often obliged people with disabilities to make heroic physical efforts to look and act like

130. *See* BURGDORF, *supra* note 129, at 274 (noting "where people's disabilities *do* situate them differently regarding employment opportunities, identical treatment may be a source of discrimination, and different treatment may be required to eliminate it").

131. Title I prohibits an employer from discriminating only against a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1994). "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activites" or "a record of such an impairment," or the state of "being regarded as having such an impairment." *Id.* at § 12102(2).

132. For detailed accounts of the disability rights movement, see FRED PELKA, THE DISABILITY RIGHTS MOVEMENT (1997) (providing an encyclopedic treatment of significant events, persons, and organizations in the movement); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993) (providing a comprehensive history of the movement).

133. For an excellent critical discussion of the medical model of disability, see Anita Silvers, *Formal Justice,* in ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 59–74 (1998).

134. Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL. REV. 1, 7 (1999) (discussing shortcomings of the medical model of disability).

135. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 650 (1999) (noting that under the medical model, the best way to help individuals with disabilities is through medicine and rehabilitative therapy).

nondisabled people.[136] This mandate to become "normal" turned disabled people into patients who had to undergo therapy so that they could function like the rest of society, even if they had already found their own ways to function effectively.[137] To the extent that a disabled person had problems adjusting to environments designed for people with few or no impairments, the fault lay in the disabled person and not in the environments.[138]

The medical model still drives some of our thinking regarding the nature of disability today.[139] Nevertheless, over the past several decades, it has come under increasing attack by disability theorists.[140] While many therapies promoted by the medical model bring tremendous benefits to people with disabilities, such as alleviating pain and improving function, critics have argued that the model itself has caused and continues to

136. Joseph Shapiro reports that in the 1950s, society rewarded people with polio who rejected wheelchairs and built up their muscles so that they could walk like nondisabled people (albeit with braces and crutches). *See* SHAPIRO, *supra* note 132, at 15–16. Doctors at that time had recommended crutches over wheelchairs not because they had evidence that walking was physically more beneficial, but simply because "sociologically it was expected." *Id.* at 16. Ironically, decades later, those who built the most muscle found that their muscles atrophied the fastest. *Id.* Cynthia Griggins, a rehabilitation specialist, has noted more recent societal attitudes consistent with this anecdote: "Somehow, a quadriplegic who is working and learning to dress himself (even though it may take him half a day) is more palatable than a quadriplegic who is doing nothing. It's bad enough that they can't contribute to society—at least they can look busy!" Cynthia Griggins, *The Disabled Face a Schizophrenic Society, in* DISABLED PEOPLE AS SECOND-CLASS CITIZENS 30, 37 (Myron G. Eisenberg et al. eds., 1982).

137. *See* SILVERS, *supra* note 133, at 62 (noting that medical model, whose therapeutic goal is to allow disabled people to function as nondisabled people do, wrongly compares modes of performance without considering their actual effectiveness); Crossley, *supra* note 135, at 650 (stating that "[t]he individual's own subjective experience of impairment or limitation is irrelevant" under the medical model).

138. *See* SILVERS, *supra* note 133, at 74 ("The medical model treats the built and arranged environment as an invariable to which humans have no choice but to adjust."). Because the medical model views environments that are tailored for nondisabled people as being value-neutral, it resembles the model of "transparent" white racism constructed by Prof. Barbara J. Flagg. *See Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995). Flagg's model posits that white-based thinking is so embedded in U.S. culture that the social environments it creates appear racially neutral to the majority of the population. *Id.* at 2035–36.

139. *See* Crossley, *supra* note 135, at 653 ("[T]he medical model of disability still appears firmly ensconced in our collective societal understanding of disability.").

140. *See, e.g.*, Paul K. Longmore & Lauri Umansky, *Disability History: From the Margins to the Mainstream, in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES (Paul K. Longmore & Lauri Umansky eds., 2001) (criticizing the medical model of disability); SILVERS. *supra* note 133, at 59–64 (same); LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 2–3 (1995) (describing flaws inherent in biological interpretations of disability).

cause significant problems. These critics have noted that the medical model fosters dependency on the part of people with disabilities, who may yield much of their own decisionmaking to physicians and other medical personnel.[141]

In addition, the medical model places people with disabilities in the position of passive recipients of charity by excusing them from working until therapy brings them to the point where they can function productively in a "normal" setting.[142] Further, by creating normative categories of "disabled" and "nondisabled," the model inevitably stigmatizes disabled people as inferior human beings.[143] Therapeutic efforts then respond to this stigma by attempting to make disabled people more closely resemble the nondisabled majority, ineptly "leveling the players rather than the playing field."[144]

Indeed, because such therapies tend to focus more on appearances than actual abilities, they can amount to nothing more than high-cost, low-effect solutions to basic functional problems.[145] Moreover, to the extent that therapy may never enable certain disabled people to blend in with the rest of the population, the medical model tends to segregate them even further by consigning them to long-term care facilities.[146] Lastly, the most significant shortcoming of the medical model of disability is its failure to recognize the relativity of the social context in which people with disabilities are supposed to function:

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141. *See generally* Griggins, *supra* note 136 (arguing health and rehabilitation professionals must respect ability of disabled people to make decisions regarding how to live their lives).

142. *See* Berg, *supra* note 134, at 7.

143. See Crossley, *supra* note 135, at 649–50 (explaining that the medical model views disabled people as "innately, biologically different and inferior"). However, with respect to stigma, the medical model of disability certainly improves upon the historic morality-based model, which it replaced. Under the earlier model, the cause of the disabling impairment was thought to be the sinfulness or moral impurity of the affected individual. Berg, *supra* note 134, at 5–6.

144. *See* SILVERS, *supra* note 133, at 70.

145. As an example of this phenomenon, disability activist Nancy Eiesland recounts the story of Diane DeVries, who wore upper and lower prosthetic devices during her childhood at the urging of doctors, to "normalize" her functioning. After trying twelve pairs of arms, DeVries abandoned them, finding them "'more of a hassle than a help.'" NANCY L. EIESLAND, THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY 37 (1994) (quoting an interview with Diane DeVries). Because DeVries could eat, drink, and play much better without the arms, she "felt more disabled and less independent with the devices than without them." *Id.*

146. Silvers notes that in accordance with policies stemming from the medical model, those who are not cured are "sequestered from society for the purpose of their continued medical treatment." SILVERS, *supra* note 133, at 66.

> The dominant [nondisabled] group's fashions of functioning are not the product of any biological mandate or evolutionary triumph, nor are they naturally endowed to be optimally effective and efficient. Rather, members of this group impose on others a social or communal situation that best suits themselves, regardless of whether it is the most productive option for everyone. . . . [T]he main ingredient of being (perceived as) normal lies in being in social situations that suit one—that is, in a social environment arranged for and accustomed to people like oneself. Thus, . . . programmatic normalization—the equalizing strategy promoted by the medical model of disability—lends itself to oppression because it validates and further imposes the dominant social group's preferences and biases.[147]

This last criticism has given rise to a new paradigm that casts disability as a mere socially-constructed phenomenon rather than a biological fact. The paradigm posits that society's classification of some people as "disabled" and others as "nondisabled" is entirely arbitrary because it is based only upon relative notions of the tasks that human beings should be able to perform and how they should be able to perform them.[148] Instead of fixed categories, "disabled" and "nondisabled" are at most fictional endpoints along a continuum of human abilities.[149] To the extent that society has drawn a line on that continuum to indicate where "disability" begins, the placement of that line is baseless. So too,

147. *Id.* at 73–74.

148. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 90 (1983) ("Concepts of normality and abnormality and of ability and disability have no real meaning unless they are considered in the context of the nature and purpose of a particular task or activity."); Robert L. Burgdorf, Jr., *Who Are "Handicapped" Persons?, in* THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES MATERIALS, AND TEXT, 11 (Robert L. Burgdorf, Jr. ed., 1980) ("[C]ertain traits have been singled out and called handicaps. The fine line between *handicapped* and *normal* has been arbitrarily drawn by the 'normal' majority." (footnote omitted)).

149. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 519–22 (1997) (discussing the spectrum of human abilities). *See also* DAVIS, *supra* note 140, at xv (noting that categories such as "disabled" are "products of a society invested in denying the variability of the body"); MARTHA MINOW, MAKING ALL THE DIFFERENCE 95 (1990) (explaining that disabled people, among others, experience the "dilemma of difference" when the status quo "refuses to make room for a range of human conditions").

therefore, is the idea that people on the "disabled" side of the line are somehow abnormal and inferior.[150]

This "social construct" paradigm shifts the locus of responsibility for the problems faced by people with disabilities from the disabled people to their inhospitable environments. It has thus led to a new understanding of the nature of disability-based discrimination. If disability is an artifice of social construction, then societal discrimination—rather than disabilities themselves—must account for the disadvantaged social and economic status of many disabled people.[151]

Indeed, the dominant nondisabled society has constructed a world tailored to the needs of people without physical and mental impairments, and this world largely ignores the needs of the disabled. This construction of the world was not inevitable, however, and its continuing conscious or unconscious failure to consider the spectrum of human needs and abilities is itself discriminatory.[152] Disabled and nondisabled people are equally entitled to accessible environments in which they can demonstrate their talents and abilities. Therefore, if the dominant nondisabled community must adapt current environments to provide disabled people with equal opportunities to flourish, then it must do so not as a matter of charity but as a matter of civil rights.[153]

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150. Disability historian Henri-Jacques Stiker has rejected normalizing notions of abnormality and disability:

> I simply believe that disability happens to humanity and that there are no grounds for conceiving of it as an aberration. Life and biology have their share of risks, as does life in society. . . . [I]nstead of presenting [disability] as an anomaly or as an abnormality, I conceive of it in the first place as a reality.

A HISTORY OF DISABILITY 12 (William Sayers trans., Univ. of Michigan Press 1999).

151. For a thorough discussion of the social and economic status of disabled people in the years leading up to the passage of the ADA, see Burgdorf, *supra* note 26, at 415–26.

152. *See* Burgdorf, *supra* note 149, at 517–18 (noting that the structuring of "services, facilities, programs and opportunities" to meet the needs of nondisabled people, while ignoring the needs of those with disabilities, constitutes discrimination). *See also* DAVIS, *supra* note 140, at 10 (" [I]n an ableist society, the 'normal' people have constructed the world physically and cognitively to reward those with like abilities and handicap those with unlike abilities."); MINOW, *supra* note 149, at 80 (explaining that "[e]xisting arrangements that make some traits stand out as different are neither natural nor necessary; the relationship between the status quo and the assignment of difference can be renovated").

153. *See* Crossley, *supra* note 135, at 659 (describing "civil rights approach" to increasing participation of people with disabilities in society).

B. *The ADA's Implementation of the Equal Opportunity Model*

The ADA implements the equal opportunity model—and differs structurally from prior civil rights legislation such as Title VII—primarily through its inclusion of two specific provisions: the reasonable accommodation requirement and the protected class definition. The discussions below trace the legislative roots of these two statutory provisions and examine the role that each plays in implementing the ADA's equal opportunity model.

1. *The Reasonable Accommodation Provision*

The legal obligation to adjust environments to accommodate disabled individuals did not originate with the ADA. Since its passage, the Rehabilitation Act of 1973 has barred recipients of federal funds from discriminating in their programs and activities against people with disabilities.[154] Although the Rehabilitation Act does not expressly codify a right to reasonable accommodations, a series of implementing regulations promulgated in the years following the Act's passage specifically create a duty to accommodate people with disabilities.[155] Drawing from these regulations and from Rehabilitation Act case law,[156] the United States Commission on Civil Rights in 1983 synthesized the following definition of reasonable accommodation: "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular

154. Section 504 of the Rehabilitation Act, as currently codified, states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (1994).

155. *See, e.g.*, 41 FED. REG. 16,148 (1976) (codified at 41 C.F.R. § 60-741.6(d) (2000)) (requiring federal contractors to "make reasonable accommodation to the known physical and mental limitations of an otherwise qualified applicant or employee with a disability" unless the accommodation would impose an "undue hardship" on the contractors' business); 42 FED. REG. 22,676 (1977) (codified at 45 C.F.R. § 84.12(a) (2000)) (requiring recipients of federal funds to make reasonable accommodations for their employees with known physical and mental impairments).

156. *See, e.g.*, Sch. Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987) (describing limits of reasonableness with respect to reasonable accommodation requirement); Alexander v. Choate, 469 U.S. 287, 300 (1985) (" [W]hile a grantee need not be required to make fundamental or substantial modifications to accommodate the handicapped, it may be required to make reasonable ones.") (internal quotations omitted).

program or activity."[157] Significantly, the Commission noted that "[i]ndividualizing opportunity is this definition's essence."[158] Thus, although in 1990 Title I of the ADA established the first explicit statutory requirement to provide reasonable accommodations in the workplace,[159] the general idea of achieving equality through accommodation was not entirely new. The ADA's significant contribution in this area has been to reaffirm and broaden the disability accommodation rights implicit in the Rehabilitation Act[160] by defining the accommodation duty in detail[161] and extending that duty to most private employers.[162]

The ADA's detailed definition of the accommodation duty stems from its statement that prohibited discrimination includes

> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . the accommodation would impose an undue hardship[163] on the operation of the business of [the employer]; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make

157. UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983).

158. *Id.*

159. *See* 42 U.S.C. § 12112(b)(5)(A)-(B) (1994).

160. *See id.* § 12201(a) (noting that unless specifically provided, nothing in the ADA "shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title").

161. *See id.* § 12112(b)(5). Robert Burgdorf, one of the Act's drafters, has noted that the specificity of this and other provisions of the ADA reflects an "extreme example" of a trend toward greater specificity in modern civil rights legislation. *See* Burgdorf, *supra* note 26, at 510. By describing prohibited discrimination in great detail, the ADA insulates itself to a certain extent from unduly restrictive regulatory and judicial interpretations. *Id.* at 509–10.

162. *See* 42 U.S.C. § 12111(5)(A). The Rehabilitation Act applies only to federal agencies, private employers with federal contracts, and recipients of federal funds. *See* 29 U.S.C. §§ 791, 793, 794 (1994).

163. The ADA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of factors such as the accommodation's cost, the overall financial resources and size of the employer and of the specific facility at issue, and the type of business operations involved. *See* 42 U.S.C. § 12111(10).

reasonable accommodation to the physical or mental impairments of the employee or applicant.[164]

A non-exhaustive list in Title I's definitions section notes that the provision of "reasonable accommodations" may involve (1) making existing facilities readily accessible to disabled employees; (2) restructuring jobs; (3) modifying work schedules or allowing part-time schedules; (3) reassigning a disabled employee to a vacant position; (4) acquiring or modifying equipment or devices; (5) appropriately modifying examinations, training materials, or policies; (6) providing qualified interpreters or readers; or (7) making other similar accommodations.[165] By describing the accommodation duty in such detail, the statute recognizes that disability is not a monolithic concept and that people with disabilities may need a wide variety of physical and policy-related adjustments in order to function effectively in the workplace. More fundamentally, these provisions recognize that without such adjustments, the workplace is effectively a "hostile environment" for disabled employees.

The ADA not only describes the duty of reasonable accommodation in detail; it also extends that duty to employers not covered under the Rehabilitation Act of 1973. The older statute covers only federal agencies, private employers with federal contracts, and recipients of federal funds.[166] The ADA extends this coverage to private employers with fifteen or more employees.[167] Because this description of covered employers was borrowed from Title VII of the Civil Rights Act,[168] the ADA brings the range of anti-discrimination protection afforded to disabled employees in line with the range afforded to women and minorities. This parity reflects Congress's recognition that disability discrimination—which may sometimes take the form of failure to accommodate—is a significant societal problem comparable to differential treatment based on sex or race.

A few superficial similarities between the ADA's reasonable accommodation provision and Title VII doctrine are also worth noting.

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164. *Id.* at § 12112(b)(5).

165. *See Id.* § 12111(9). For a detailed discussion of each of these types of accommodation, see BURGDORF, *supra* note 129, at 280–308.

166. *See* 29 U.S.C. §§ 791, 793, and 794 (1994).

167. *See* 42 U.S.C. §§ 12111(2), (5) (1994). The ADA's coverage also extends to employment agencies, labor organizations, and joint labor-management committees. *Id.* § 12111(2).

168. *See id.* § 2000e(b) (1994).

First, Title VII's disparate impact rule holds employers liable for implementing facially-neutral policies—such as the use of a particular test to screen job applicants—that disproportionately disadvantage people of a particular race, sex, national origin, or religion.[169] Like reasonable accommodation, this doctrine removes artificial barriers to employment[170] and may penalize employers despite their having treated all employees identically. Second, Title VII's affirmative action remedy[171] resembles reasonable accommodation in that it requires an employer to take affirmative steps to provide a benefit or service to some, but not all, employees.[172] For this reason, one scholar has described reasonable accommodation as "*some* form of affirmative action," even though it might stray in some ways from traditional affirmative action principles.[173]

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169. The Supreme Court first recognized the disparate impact theory of discrimination in *Griggs v. Duke Power*, 401 U.S. 424 (1971). Later, the Civil Rights Act of 1991 explicitly codified this theory with respect to Title VII. *See* 42 U.S.C. § 2000e-2(k) (1994).

170. *See Griggs*, 401 U.S. at 431 (describing Court's newly-formulated disparate impact theory as furthering Title VII's purpose of removing "artificial, arbitrary, and unnecessary barriers to employment"); 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, 1429 (1991) (comparing theories of reasonable accommodation and disparate impact and noting that reasonable accommodation protects disabled people from "unnecessary barriers to employment"). Indeed, in its broadest interpretation, disparate impact theory sounds an awful lot like the reasonable accommodation requirement. In the context of race discrimination, one scholar has argued that the courts have mistakenly viewed disparate impact theory as establishing "the right of a nonwhite employee to play on an existing field," when instead they should view it as mandating "alteration of the playing field itself in order to accommodate equally able players with diverse playing styles." Flagg, *supra* note 138, at 2033.

171. *See* 42 U.S.C. § 2000e-5(g)(1) (1994) (allowing courts in Title VII cases to order "such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees"). For a detailed discussion of affirmative action issues, see LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1033–202, 1741–73 (3d ed. 1996).

172. *See, e.g.*, Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 222 (2000) (explaining that the "positive steps" that affirmative action requires of employers are in some ways "analogous to the positive accommodations needed to make employment . . . truly accessible to Americans with disabilities"); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").

173. *See* Tucker, *supra* note 26, at 345. Prof. Tucker recognizes the reasonable accommodation duty as necessary and appropriate, given the ADA's underlying principle of recognizing "the potential of *all* members of society, disabled or not, even though it may cost money or impose some burdens." *Id.* at 351.

Nevertheless, each of these two comparisons has its limits. First, with respect to the reasonable accommodation-disparate impact comparison, Title VII's disparate impact rule differs from the ADA's reasonable accommodation requirement in that the disparate impact rule never *requires* an employer to accord facially *different* treatment to similarly-situated employees.[174] Instead, under Title VII, an employer can avoid liability by ceasing to implement a facially-neutral policy that disproportionately disadvantages certain groups, and replacing it with a new policy that is both facially and practically neutral.[175] Second, with respect to the reasonable accommodation-affirmative action comparison, reasonable accommodation alleviates current barriers confronting a specific employee, while affirmative action seeks to remedy the damaging effects of past intentional discrimination by granting all current protected-group employees favorable treatment.[176]

In addition, the reasonable accommodation provision allows a disabled employee to benefit from a specific alteration to the workplace that would have no value—or not as much value—to the employee's nondisabled colleagues.[177] Affirmative action, on the other hand, can

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174. *See, e.g.*, Lanning v. S.E. Pa. Transp. Auth., 181 F.3d 478, 490 n.15 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000) (explaining that employer who used physical endurance test that disadvantaged women could legally avoid liability by establishing different cut-off scores for men and women, but that employer also had other options, such as tailoring test so that it measured only physical abilities truly required by the job in question). Prof. Mark Kelman has argued that disparate impact law bestows the right to "market-rational" treatment, meaning a right to be judged on one's potential ability to perform a given job and nothing more. *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 891 n.86 (2001). Reasonable accommodation, in contrast, grants a disabled employee the right to *avoid* market-rational treatment, insofar as providing an accommodation makes it more expensive for the employer to hire a disabled employee than a similarly qualified nondisabled one.

175. 29 C.F.R. § 1607.3B (2000).

176. *See* Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421, 482 (1986) (plurality opinion) (holding that courts "may, in appropriate circumstances, order preferential relief benefitting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII"). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that strict scrutiny standard applies to review of race-based voluntary affirmative action programs). *Adarand* dealt only with voluntary affirmative action rather than the type of court-ordered program at issue in *Sheet Metal Workers*. It currently "remains unclear how *Adarand* will be applied, if at all, to race-based court-ordered affirmative relief." LINDEMANN & GROSSMAN, *supra* note 171, at 979 (Cum. Supp. 2000, Philip J. Pfeiffer ed.).

177. Indeed, many accommodations do not even put a disabled employee on par with nondisabled colleagues. Prof. Bonnie Tucker, who is deaf, has explained that her use of a TDD and relay service to communicate via telephone with others who do not have a TDD is more cumbersome, less effective, and much less private than the use of regular telephone service. *See* Tucker, *supra* note 26, at 346–47.

allow a covered employee to receive a job benefit, such as a promotion,[178] that his or her colleagues would find equally valuable. In the end, whether the ADA's reasonable accommodation provision represents a subcategory of affirmative action legislation or a different animal altogether, it departs starkly from the formal equality model and necessitates an expanded understanding of civil rights and equal opportunity.

2. *The Protected Class Provision*

Another feature of the ADA's codification of the equal opportunity principle is its protected class provision, which defines the type of "disability" one must possess in order to enjoy the rights that the statute affords. Both Title I of the ADA and Section 504 of the Rehabilitation Act protect only an "individual with a disability" from discrimination.[179] Because the ADA borrowed its "disability" definition from the Rehabilitation Act Amendment of 1974,[180] both statutes currently define "disability" in terms of the same three alternative prongs:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [the person in question];
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[181]

Before the 1974 amendment, the Rehabilitation Act defined disability only in terms of a person's employment-limiting impairment and his or her potential to benefit from vocational rehabilitation services, because the Act's primary recognized purpose at that time was to regulate the

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178. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 163, 185–86 (1987) (plurality opinion) (upholding order requiring Alabama Department of Public Safety temporarily to promote one African-American trooper for every white trooper promoted where Department had engaged in long-term pervasive discrimination).

179. 42 U.S.C. § 12102(2) (1994) (ADA); 29 U.S.C. § 706(8)(b) (1994) (Rehabilitation Act).

180. *See* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 127–29 (2000) (discussing the ADA drafters' decision to rely upon the Rehabilitation Act's definition of disability).

181. The precise wording reproduced here is from the ADA. 42 U.S.C. § 12102(2). Because the Rehabilitation Act, as a stylistic matter, defines "an individual with a disability" rather than "disability," it prefaces the three prongs with "a person who" and adds the words "has," "has," and "is" to the beginning of each prong, respectively. *See* 29 U.S.C. § 706(8)(B).

provision of such services.[182] Congress added the thee-pronged definition as a supplement in 1974, after recognizing that the first "disability" definition did not suit the Act's additional purpose of combatting discrimination.[183] With respect to the ADA, the statute's drafters ideally would have created yet a third, more expansive, definition turning solely on actual, recorded, or perceived impairment.[184] However, it was much more politically expedient to rely upon the Rehabilitation Act's familiar three-pronged definition, which by that time had been serving its purpose reasonably well for many years.[185]

The flexibility of the ADA's three-pronged definition, particularly as manifested in its "regarded as" prong, reflects Congressional recognition of disability as a social construct. Indeed, the U.S. Supreme Court has noted that by including the "regarded as" prong in the Rehabilitation Act, "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."[186] This observation is consistent with the explicit Congressional finding in the ADA that discrimination against people with disabilities can result from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[187]

In addition, by limiting coverage to a specific group, the ADA's "disability" definition implements a principle of "anti-subordination,"[188]

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182. *See* Pub. L. No. 93-112, § 7(6), 87 Stat. 361 (1973). This definition remains a part of the Rehabilitation Act and continues to define eligibility criteria for the receipt of vocational rehabilitation services. *See* 29 U.S.C. § 706(8)(A).

183. *See* Feldblum, *supra* note 180, at 103.

184. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1468–77 (1999) (arguing that the "major life activities" and "substantially limits" terminology in the definition has invited courts to interpret "disability" much too narrowly and advocating an amendment substituting a simpler impairment-based definition); Berg, *supra* note 134, at 50 n.254 (noting that a simpler impairment-based definition would "significantly enhance[]"the ADA's capacity to remedy disability-based bias). *See generally* Feldblum, *supra* note 180 (describing wide gap between drafters' and courts' understandings of ADA's disability definition, and advocating amendment to replace current definition with impairment-based definition).

185. "Making radical change is not ordinarily Congress' forte. Indeed, one of the best 'selling points' of the ADA was that Congress would simply be extending to the private sector the requirements of an existing law." Feldblum, *supra* note 180, at 92.

186. Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987).

187. 42 U.S.C. § 12101(a)(7) (1994) (from the ADA's "Findings and purpose" section).

188. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (explaining "anti-subordination" principle, which "seeks to eliminate the

which coincides with the statute's equal opportunity model. The anti-subordination principle focuses not upon whether members of different categories are being treated equally, but instead upon whether members of some specific, historically-subordinated category are being placed at a practical disadvantage. Title VII, on the other hand, implements a principle of "anti-differentiation"[189] because it protects *any* person from receiving different and disadvantageous treatment because of race, sex, national origin, or religion.[190] The anti-differentiation principle, of course, coincides with the formal equality model that informs Title VII and most other anti-discrimination statutes.

A decided shortcoming of the anti-differentiation principle is its tendency to spur discrimination actions by members of historically *favored* groups, causing case law to stray from the original statutory purpose of protecting disadvantaged classes of people.[191] The ADA's protected class provision expressly precludes this kind of mission drift by limiting the act's coverage to disabled people, whom the ADA refers to as "a discrete and insular minority."[192]

Unfortunately, by restricting membership in this protected minority group to those with current, past, or perceived "substantial[] limit[ations]" on "major life activities,"[193] the ADA's "disability" definition has allowed the judiciary to limit the statute's coverage dramatically. Numerous courts have seized upon the opportunity to interpret the definition's key language very narrowly,[194] and while such

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power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities").

189. *See id.* at 1005–06 (describing the anti-differentiation principle). Prof. Colker notes that disparate impact theory has allowed Title VII doctrine to depart occasionally from strict anti-differentiation principles in a way that Equal Protection doctrine thus far has not. *See id.* at 1017–1019. Nevertheless, anti-differentiation has played a very significant role in guiding Title VII's different treatment doctrine, for better or worse. *See supra* notes 35–43 and accompanying text.

190. *See supra* note 32 and accompanying text.

191. *See* Colker, *supra* note 188, at 1012 (arguing that the anti-differentiation principle "does a disservice" to the true history and purpose of the Equal Protection Clause "by asserting that discrimination against whites is as problematic as discrimination against blacks"); Tucker, *supra* note 26, at 363 (discussing historic purpose of Civil Rights Act of 1964).

192. 42 U.S.C. §12101(a)(7) (1994).

193. *See supra* note 181 and accompanying text.

194. *See, e.g.*, Ellison v. Software Spectrum, 85 F.3d 187, 193 (5th Cir. 1996) (holding that plaintiff with breast cancer did not have a disability because she had never been substantially limited in working and had never been regarded as being so limited); Kelly v. Drexel Univ., 94 F.3d 102, 106 (3d Cir. 1996) (holding that plaintiff with degenerative joint disease, which affected his walking, was not disabled because limitation on walking was not substantial).

interpretations have been roundly criticized for years,[195] the Supreme Court has recently narrowed the ADA's disability definition even further.[196] Indeed, several scholars have posited that by severely restricting the scope of the ADA's protected class in this manner, courts are indirectly rejecting the statute's equal opportunity model, which they view as granting "special" entitlements to a preferred group.[197]

Ironically, this view of the ADA's equal opportunity model may stem in part from the very existence of the protected class provision. These types of provisions typically appear in entitlement legislation such as public benefits laws, which define special classes of people for eligibility purposes.[198] The resulting structural resemblance between the ADA and public benefits laws is potentially dangerous insofar as it causes

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195. *See generally* Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071 (1999); Burgdorf, *supra* note 148; Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997). *See also* Diller, *supra* note 26, at 25–30 (criticizing narrow interpretations of "disability" as contrary to Congressional intent and EEOC guidance); Eichhorn, *supra* note 184, at 1434–68 (reviewing and criticizing federal decisions interpreting the "major life activities" and "substantially limits" elements); Ruth Colker, *Hypercapitalism: Affirmative Protection for People with Disabilities, Illness, and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM. 213, 229–33 (1997) (describing courts' restrictive interpretations of "disability" as a strategy used to limit ADA's potential to bring about equality through affirmative conduct).

196. *See, e.g.*, Murphy v. United Parcel Serv., 527 U.S. 516, 521, 525 (1999) (holding that Court of Appeals correctly considered remedial effects of plaintiff's hypertension medication in concluding that plaintiff was not substantially limited and thus not disabled, and that employer who dismissed plaintiff because of hypertension had not regarded him as disabled).

197. *See, e.g.*, Diller, *supra* note 26, at 23 (arguing that narrow interpretations of the ADA reflect the courts' misunderstanding or rejection of the statute as a guarantor of civil rights); Tucker, *supra* note 26, at 353 (stating that narrow interpretations of the ADA's "disability" definition "are probably the result of the courts' reluctance to impose what they view as widespread affirmative action responsibilities on specific entities").

198. *See, e.g.*, 42 U.S.C. § 416(i) (1994) (defining "disability" as eligibility criterion for receipt of certain Social Security benefits). Indeed, the ADA may never have included a protected class definition at all had it not drawn upon the Rehabilitation Act of 1973, whose original disability definition provides criteria that govern entitlement to rehabilitation services. *See supra* notes 182–83 and accompanying text. Congress had to add the second, three-pronged, definition to the Rehabilitation Act only because the original "entitlement" definition did not mesh with the Act's new anti-discrimination provision in Section 504. *See supra* note 183 and accompanying text. When the ADA drafters made the political decision to model the new statute on the Rehabilitation Act, they borrowed the Act's three-pronged definition. *See* Feldblum, *supra* note 180, at 128–29 (discussing decisionmaking in the drafting of the ADA). In hindsight, however, because the ADA (unlike the Rehabilitation Act) does not contain any entitlement provisions, Title I could have simply prohibited discrimination on the basis of disability (or physical or mental impairment), and skipped the protected class provision altogether.

confusion as to whether the ADA is granting "special" benefits rather than civil rights. Indeed, one scholar has gone so far as to argue that the disability definition "returns individuals with disabilities to their traditional role within the biomedical model of establishing entitlement to benefits through the evocation of sympathy and pity."[199] In sum, while the ADA's protected class provision properly focuses the statute exclusively on the historically subordinated group of people with disabilities, it has also had the unfortunate side effect of hindering the recognition of the statute as a civil rights law. Such recognition is critical to the ADA's ability to implement its underlying equal opportunity model.

III. FORMAL EQUALITY MEETS EQUAL OPPORTUNITY: HOSTILE ENVIRONMENT CLAIMS IN THE ADA CONTEXT

Although the Rehabilitation Act has been guaranteeing certain rights against disability discrimination in the workplace for decades, and the ADA recently celebrated its tenth anniversary, the appearance of hostile environment harassment claims under these statutes is a fairly recent phenomenon. In 1985, fourteen years after the Fifth Circuit had first recognized a Title VII hostile environment claim in *Rogers* but a year before the Supreme Court did so in *Meritor*, one Rehabilitation Act plaintiff relied on the common law theory of intentional infliction of emotional distress in seeking compensation for injuries allegedly resulting from disability-based harassment.[200]

Six years after *Meritor*, another plaintiff relied on both hostile environment and constructive discharge theories to support her claim under the Rehabilitation Act.[201] The claim, which reached the Sixth Circuit on appeal after summary judgment, arose from the reactions of the plaintiff's supervisor upon learning that the plaintiff, a teacher, had

199. Berg, *supra* note 134, at 42.

200. *See generally* Graves v. Methodist Youth Servs., 624 F. Supp. 429 (N.D. Ill. 1985). The plaintiff's emotional distress claim in *Graves* stemmed from allegations that, before his termination, his supervisors and co-workers "verbally harassed" him about his mental disability. *Id.* at 429. The United States District Court for the Northern District of Illinois overruled a jurisdictional challenge to the plaintiff's wrongful termination claim under the Rehabilitation Act and, in so doing, held that it had jurisdiction over the common law harassment claim under the theory of pendent jurisdiction. *Id.* at 434.

201. *See* Pendleton v. Jefferson Local Sch. Dist. Bd. of Ed., No. 91-3126, 1992 WL 57421, at *5 (6th Cir. Mar. 25, 1992) (unpublished decision) (table decision at 958 F.2d 372).

multiple sclerosis.[202] The supervisor had called both the plaintiff's doctor and her husband without her permission to inquire about her disease and treatment.[203] He then allegedly told the plaintiff that she had "a psychosis caused by her medicine" and called her daily to inquire about her plans for future teaching.[204] After the plaintiff's doctor recommended that she apply for disability leave, she did so and never returned to her job.[205]

The United States District Court for the Southern District of Ohio granted summary judgment on the Rehabilitation Act claim on the ground that the plaintiff had never been terminated.[206] The Sixth Circuit reversed, holding that Section 504 of the Rehabilitation Act, like Title VII, allows disability discrimination cases to be brought "not only for 'termination' but for 'exclusion from employment.'"[207] Because the plaintiff had never actually been terminated, it determined that hers was "an 'exclusion from employment' case."[208] Failure to recognize an "exclusion from employment" theory, the court reasoned, "would have the restrictive result of making an employer who fires an employee because of a handicap liable, while leaving untouched an employer who harasses . . . a handicapped individual, [causing] further deterioration of a person's physical condition to the point where she can no longer work."[209] A year later, citing *Meritor*, the United States District Court for the Eastern District of Pennsylvania stated in dicta that "it is strongly arguable . . . that disability-based harassment responsible for creating an abusive working environment is itself actionable under the Rehabilitation Act, even if it is not accompanied by termination from the job in question."[210]

The United States District Court for the Southern District of Georgia reached a similar conclusion under the ADA in *Haysman v. Food Lion, Inc.*, holding that even if the plaintiff in that case "failed to prove

202. *Id.* at *1–*2.

203. *Id.* at *1.

204. *Id.* at *2.

205. *Id.*

206. *Id.* at *4.

207. *Id.* at *6. The court noted that "this circuit and several others have applied Title VII theories in deciding [Section 504] cases." *Id.* at *4.

208. *Id.* at *4. The "exclusion" language does not appear in the statute. Instead, the *Pendleton* court borrowed it from an earlier Ninth Circuit Section 504 case. *See id.* at *4 (citing Smith v. Barton, 914 F.2d 1330, 1338–39 (9th Cir. 1990)).

209. *Id.* at *4.

210. Taylor v. Garrett, 820 F. Supp. 933, 939 n.11 (1993).

constructive discharge, he could still possibly recover on [a] hostile environment theory."[211] The court explained that an ADA plaintiff "does not have to show 'tangible' or 'economic' loss if a jury finds that the harassment was so severe as to subject him to disparate treatment with respect to the terms or conditions of employment."[212] The plaintiff in *Haysman* suffered from emotional disorders and a disability that affected his back and knee.[213] He presented evidence indicating that, after learning of his medical restrictions, his supervisors scheduled him for the least desirable shifts, berated him in front of co-workers, told him to continue working despite his doctor's advice, and punched or kicked the injured parts of his body.[214] The court held that from this evidence, "a reasonable jury could find that Haysman was subjected to negative stereotyping, threats, verbal abuse and other conduct which created an intimidating and hostile environment."[215]

At this point, many federal circuit and district courts have assumed in dicta that hostile environment harassment, in and of itself, is actionable under the ADA, based on the similarity of the ADA's "terms, conditions, and privileges" language to the Title VII language that first gave rise to hostile environment actions in *Rogers* and *Meritor*.[216] Indeed, when the Fourth Circuit in 2001expressly recognized such a claim under the ADA, its opinion noted that no court examining the issue had ever held or assumed otherwise.[217] Therefore, it is all but settled nationally that one

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211. 893 F. Supp. 1092, 1110 (1995). *See also* Davis v. York Int'l, Inc., Civ. A. No. HAR 92-3545, 1993 WL 524761, *9 (D. Md. Nov. 22, 1993) (holding that employee who had not left her job could proceed against her employer on a hostile environment theory under the ADA).

212. *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1110 (S.D. Ga. 1995).

213. *Id.* at 1097.

214. *Id.* at 1108.

215. *Id.*

216. *See generally, e.g.*, Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 297 (7th Cir. 1999); Cannice v. Norwest Bank, 189 F.3d 723 (8th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); Walton v. Mental Health Ass'n, 168 F.3d 661, 666–67 (3d Cir. 1999); Rodriguez v. Loctite P.R., Inc., 967 F. Supp. 653, 663 (D.P.R. 1997); Morgan v. City & County of San Francisco, No. C-96-3573-VRW, 1998 WL 30013, *7 (N.D. Cal. Jan. 13, 1998); Hudson v. Loretex Corp., No. 95-CV-844 (RSP/RWS), 1997 WL 159282, *3 (N.D.N.Y. April 2, 1997). Curiously, my research also revealed one case, from the Sixth Circuit, that treated a plaintiff's disability-based hostile environment claim as separate and distinct from his ADA claim. *See* Poe v. Memphis Light, Gas and Water Div., No. 98-5942, 1999 WL 1204694, *3 (6th Cir. Nov. 30, 1999) (table decision at 201 F.3d 441).

217. Fox v. Gen. Motors Corp., 247 F.3d 169, 175 (4th Cir. 2001). *See also* Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 232, 233, 233 n.3 (5th Cir. 2001) (noting that the Sixth Circuit had implicitly recognized a hostile environment claim under the ADA and that all other federal appellate courts addressing the issue had assumed the existence of such a claim).

may sue for disability-based harassment under the ADA, and courts are likely to hear more claims of this type from now on.

As they do so, courts will need to resist a temptation to turn unthinkingly to Title VII doctrine when hostile environment questions arise under the ADA.[218] As Parts II and III of this Article have explained, Title VII and the ADA arise from very different underlying assumptions about discrimination and the nature of equality, even if they share statutory language giving rise to hostile environment claims. Therefore, copying and pasting Title VII doctrine into ADA opinions, absent an in-depth comparison of the structures, purposes, and goals of the two statutes, would very likely deny justice to ADA litigants.

The Subparts below identify new issues arising under the ADA with respect to each of the four elements of a traditional hostile environment claim: severe and pervasive harassment creating hostile or abusive working environment; plaintiff's reasonable perception of hostility or abuse; causal connection between the harassment and a protected characteristic; and employer responsibility for the harassment. However, before Subparts B through E analyze these four traditional elements, Section A examines an additional element, membership in a protected class, that has resurrected itself in the context of disability-based hostile environment harassment. In examining these respective elements, all of the Subparts propose methods of analysis that coincide with the anti-discrimination goal and equal opportunity model underlying the ADA.

218. Some courts have already made sweeping statements about the applicability of Title VII standards to ADA hostile environment claims. *See, e.g.*, Fritz v. Mascotech Automotive Servs., 914 F. Supp. 1481, 1492 n.6 (E.D. Mich. 1996) (noting that "standards developed under Title VII case law govern such claims"); McClain v. S.W. Steel Co., 940 F. Supp. 295, 301 (N.D. Okla. 1996) (stating that "Congress intended for hostile work environment claims under the ADA to be governed by the same standard as that applied to similar claims under Title VII"). The Third Circuit, in describing the relationship between Title VII and the ADA in a disability harassment case, has glossed over the fact that Title VII has no coverage restrictions, while the ADA covers only a specific protected class. *See* Walton v. Mental Health Ass'n, 168 F.3d 661, 666 (3d Cir. 1999) (stating that the ADA and Title VII both prohibit "discrimination in employment against members of certain classes").

A. *Membership in a Protected Class: Is Harassment "Substantially Limiting"?*

To the extent that a few circuits still list "membership in a protected class" among the elements of a Title VII hostile environment claim,[219] that element exists as a requirement in name only, given Title VII's applicability to all races, sexes, national origins, and religions.[220] Under the ADA this element takes on a life of its own and can lead to summary judgment against a plaintiff who fails to produce evidence showing that he or she has a statutorily-defined "disability."[221] This scenario has already played itself out in more than one ADA hostile environment action.[222]

For example in *EEOC v. General Electric Co.*,[223] the United States District Court for the Northern District of Indiana held that plaintiff James Smith had not been regarded as disabled despite the fact that he had experienced workplace harassment amidst office rumors that he was HIV-positive.[224] The rumors began to circulate before Smith, who was gay, returned to work following hospitalization to repair an esophageal tear.[225] Smith was emaciated upon his return, and the rumors became more widespread.[226] According to Smith's allegations, he began to experience escalating incidents of harassment around that time, including

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219. *See, e.g.*, Cain v. Blackwell, 246 F.3d 758, 760 (5th Cir. 2001); Wanchik v. Great Lakes Health Plan, Inc., No. 99-2333, 2001 WL 223724, *7 (6th Cir. Mar. 2, 2001) (table decision at 248 F.3d 1154).

220. *See supra* note 32 and accompanying text.

221. *See, e.g.*, Ellison v. Software Spectrum, 85 F.3d 187 (5th Cir. 1996) (affirming summary judgment for the defendant on the ground that plaintiff's breast cancer was not a disability for purposes of the ADA); Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996) (affirming summary judgment for the defendant on the ground that plaintiff's degenerative joint disease was not a disability for purposes of the ADA).

222. *See, e.g.*, Thurston v. Henderson, Docket No. 99-40-P-H, 2000 WL 761897, at *8 (D. Me. Jan. 5, 2000) (recommending that summary judgment be granted to defendant on hostile environment claim on ground that plaintiff, who was on medication for post-traumatic stress disorder, was not disabled); EEOC v. Gen. Elec. Co., 17 F. Supp. 2d 824 (N.D. Ind. 1998) (granting summary judgment to defendant on hostile environment claim on grounds that plaintiff, who was rumored to be HIV-positive, was neither disabled nor regarded as disabled).

223. 17 F. Supp. 2d 824 (N.D. Ind. 1998).

224. *Id.* at 831.

225. *Id.* at 832.

226. *Id.* at 827, 832.

having a container of enamel dropped on him, which sent him to the hospital for one night.[227]

Smith filed suit against his employer, General Electric, alleging hostile environment harassment under the ADA. Because he was not in fact HIV-positive, he based his protected class argument on the third prong of the ADA's disability definition, which covers individuals who have been "regarded as" disabled.[228] However, despite Smith's evidence of the workplace rumors, the court held as a matter of law that he had never been regarded as having an impairment that "substantially limited" a "major life activity" and thus was outside the ADA's protected class of individuals with disabilities.[229] The court therefore granted summary judgment on the harassment claim to the defendant.[230]

The court reasoned that because the ADA defines disability as an impairment that "substantially limits a major life activity," a plaintiff who asserts that he has been regarded as disabled must produce specific evidence that his employer has viewed him as being substantially limited in some particular major life activity.[231] Smith's supervisors and co-workers believed him to have asymptomatic HIV, so he could produce no such evidence.[232] He therefore lost his opportunity to make any showings regarding the harassment he allegedly experienced and its connection to the rumors of his HIV-positive status.

As *General Electric* demonstrates, the already significant problems inherent in narrow readings of the ADA's "regarded as" prong[233] become even more insidious in the context of hostile environment claims. According to his allegations, Smith's rumored HIV-positive status was sufficient to inspire violent harassment that eventually drove him from his job,[234] yet it was insufficient to invoke the protections of a statute designed in part to end workplace segregation based on real and

227. *Id.* at 827.

228. *Id.* at 828.

229. *Id.* at 831.

230. *Id.*

231. *Id.* at 828.

232. *Id.* at 831.

233. For an excellent detailed discussion of these problems, see Arlene B. Mayerson, *Restoring Regard for the Regarded As Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997).

234. Smith's complaint alleged that he left his job in 1994 as a result of the harassment. *See General Elec.*, 17 F. Supp. 2d at 827.

perceived disabilities.[235] While the U.S. Supreme Court, in its 1998 *Bragdon v. Abbott* decision,[236] may have prevented repetition of the specific outcome in Smith's case by holding that a plaintiff with asymptomatic HIV was substantially limited in reproduction and thus disabled,[237] the Court has done nothing to eliminate the *General Electric* court's overall strategy of applying a narrow, literal reading of the "regarded as" prong to harassment cases. Thus, one can easily envision future plaintiffs suffering harassment due to stigmatized but not-always-limiting impairments, such as epilepsy or disfiguring skin diseases, yet being unable to seek reparations in the courts for the same reason Smith was unable to do so. Indeed, now that the U.S. Supreme Court has held that a person is not disabled if he or she can alleviate the effects of an impairment through mitigating measures such as medication,[238] plaintiffs with controlled but very stigmatizing impairments such as mental illness can suffer the same fate if they turn to the courts to seek redress for disability-based harassment.

This scenario has in fact already played itself out in *Thurston v. Henderson*,[239] a decision of the United States District Court for the District of Maine. The plaintiff in that case, Michael Thurston, had been diagnosed with post-traumatic stress disorder[240] but was controlling many of its effects through medication.[241] His co-workers knew of his mental illness and called him "a 'child' who 'needed help.'"[242] One co-worker said, in the presence of Thurston and others, that Thurston was "on suicide watch."[243] Another co-worker submitted a falsified grievance, purportedly filed by Thurston, making it look as if Thurston was seeking special preferences in work assignments.[244] Yet despite Thurston's

235. One of the first Congressional Findings appearing in the ADA concerns the fact that "society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101 (1994).

236. 524 U.S. 624 (1998).

237. *Id.* at 641.

238. Sutton v. United Air Lines, 527 U.S. 471, 482–83 (1999).

239. Docket No. 99-40-P-H, 2000 WL 761897 (D. Me. Jan. 5, 2000).

240. *Id.* at *1.

241. *Id.* at *4.

242. *Id.* at *5.

243. *Id.* at *6.

244. *Id.* at *5. This act of fraud plays upon disability theorist Lennard Davis's notion that people with disabilities are "regarded as narcissists" who demand "exceptions for themselves that overstep what employers can or should provide." *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 197 (2000).

acknowledged diagnosis and these instances of harassment, a federal magistrate recommended that summary judgment be granted to the defendant because this evidence failed to show that he was "substantially" limited "in a major life activity" at the time the harassment took place.[245] The court did not discuss the "regarded as" prong, presumably because the submitted evidence did not indicate that Thurston's supervisor or co-workers knew of any specific major life activity that his mental illness substantially limited, although they all knew of the illness itself.

The literal interpretations in both *General Electric* and *Thurston* undercut the ADA's purpose of facilitating the integration of people with disabilities into the workplace. To avoid this result, courts analyzing the "disability" definition in ADA hostile environment cases must do so with an understanding of the nature of disability-based harassment. This type of harassment typically stems from stigma associated with an impairment rather than from beliefs regarding the specific limitations that the impairment may impose.[246] Thus, because stigma normally has nothing to do with one's functional limitations, an overly literal reading of the ADA's definition of "disability," which turns on whether one has or is believed to have a "substantially limiting" impairment, misses the point:

> While assessing the effect of an impairment upon whether an individual can perform certain life activities may be appropriate in certain contexts, it sheds no light whatsoever on whether a person possesses—or has been perceived to possess—a physical or mental difference that may have caused him or her to be subjected to social stigma and injustice.[247]

Therefore, if an ADA harassment plaintiff is able to prove an impairment but does not qualify as having an actual disability under the

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245. 2000 WL 761897 at *8.

246. Indeed, Professor Adrienne Asch has reviewed research indicating that because people with disabilities are supposed to play a social role involving dependency and neediness, they are "more disliked by nondisabled others if they are clearly competent than if they are perceived as incompetent at a task." *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 395 (2001) (citing Irwin Katz et al., *Attitudinal Ambivalence and Behavior Toward People with Disabilities*, *in* ATTITUDES TOWARD PERSONS WITH DISABILITIES 47, 53 (Harold E. Yuker ed., 1988)). *See also* S. REP. NO. 116, 101st Cong., 1st Sess. 23–24 (1989) (stating that the "regarded as" prong of the ADA's disability definition "is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity").

247. Berg, *supra* note 134, at 50.

first prong of the statutory definition, the courts should follow the EEOC's regulations by interpreting the "regarded as" prong to include a person who "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others" toward the impairment.[248] Consequently, such a plaintiff would satisfy the prima facie burden of showing a disability: because of the alleged harassment, the plaintiff's impairment substantially limited him in working as a result of the attitudes of others. If the plaintiff is later put to his proof, he should be able to avoid summary judgment on the protected class issue if he comes forward with evidence indicating that impairment-based harassment in fact occurred.[249]

If an ADA harassment plaintiff—like Smith—does not have an impairment but instead is merely regarded as having an impairment, similar tests should apply: the plaintiff can satisfy his prima facie "protected class" burden by alleging harassment based upon the perceived impairment, and the plaintiff can survive a summary judgment motion on this element if he can offer evidence that harassment based on the perceived impairment indeed took place. The fact that the impairment in question was perceived rather than actual should not alter the basic analysis. As the U.S. Supreme Court has observed, by including the "regarded as" prong in the disability definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the limitations that flow from actual impairment."[250]

Finally, even when an ADA plaintiff's impairment and its limitations are actual rather than perceived, the plaintiff will have difficulty proving membership in the protected class if the only major life activity limited by the impairment is working. In a non-harassment case, the United States Supreme Court has held that an ADA plaintiff cannot prove a substantial limitation in working merely by showing that her impairment substantially limits her ability to perform her particular job.[251] Instead, a plaintiff must prove that the impairment forecloses generally the type of

248. 29 C.F.R. § 1630.2(l)(2) (2001).

249. Because harassment short of outright abuse could substantially limit an employee in working, the degree of harassment shown with respect to the "protected class" element might differ from the degree required under the "severe and pervasive" element, which calls for evidence of an "abusive workplace environment." *See supra* notes 78–81 and accompanying text.

250. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (interpreting Rehabilitation Act's disability definition, whose relevant language is identical to that in the ADA's definition).

251. Sutton v. United Air Lines, 527 U.S. 471, 492 (1999).

employment in which she is engaged.[252] To meet this burden, a plaintiff must demonstrate that she would encounter disability-related obstacles across an entire class of jobs or a broad range of jobs.[253] In an ADA hostile environment case, this requirement becomes absurd because the obstacle at issue is the employer's harassing conduct. It would be impossible to produce evidence that similar harassment would occur at other workplaces, as no employer would admit to such a possibility. In addition, such a requirement would wrongly presume that harassment is not a significant barrier to employment unless it is practiced by the great majority of employers in a given field.

B. *Severe and Pervasive Harassment: What Constitutes a Hostile Environment Within an Already-Hostile World?*

The ADA's equal opportunity model assumes that the world is always, already, a hostile environment for people with disabilities because it is fraught with socially-constructed obstacles.[254] In the employment context, a workplace environment that a nondisabled employee experiences as appropriate could be harsh or even abusive to a disabled one. For example, a workplace in which employees are not allowed to eat or drink while at their stations could spell disaster for an employee with hypoglycemia, who may need sugary food or drinks at hand to avoid passing out. For this reason, the element of an ADA hostile environment claim requiring "severe and pervasive" harassment merits particularly careful analysis; in many cases, this element may require courts to identify hostile or abusive environments within a superficially neutral atmosphere. Further, because the hostile environment claim originated in the context of Title VII's formal equality model, while reasonable accommodation requirements flow from the ADA's equal opportunity model, courts might overlook reasonable accommodation

252. *Id. See also* Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (interpreting identical language in the Rehabilitation Act's "disability" definition). The *Forrisi* court held that the plaintiff, who repaired utility systems, did not have an actual disability because his acrophobia did not substantially limit him in working, given that he could perform other jobs that did not require climbing. *Id.* In addition, the court held that the plaintiff's employer had not regarded him as disabled because it had viewed him "as unsuited for one position in one plant—and nothing more." *Id.*

253. *Sutton*, 527 U.S. at 491 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998)).

254. *See supra* notes 147–53 and accompanying text.

issues when assessing the severity and pervasiveness of hostile environment harassment.

Because a single failure to provide reasonable accommodation already violates the ADA, it cannot automatically lead to harassment liability as well. Nevertheless, in an ADA case alleging both harassment and failure to accommodate,[255] the circumstances surrounding the refusal of accommodations—and the refusal itself—should certainly be part of the mix of facts that a court considers when deciding whether the harassment was severe and pervasive so as to create a hostile or abusive environment. For example, if an employee experienced several incidents of disability-based taunting or segregation over a period of eighteen months, those incidents alone may not rise to the level of creating a "hostile" or "abusive" work environment, even if the employer made no attempt to put an end to the offensive conduct. However, if the employee also requested several different reasonable accommodations over the same period, and the employer met each request only after an unreasonable delay, a reasonable person might conclude that the workplace was in fact characterized by hostility toward the employee because of his disability. Were the court to "disaggregate" the evidence[256] and refuse to consider the delays as part of the proof of harassment, it could strike the harassment claim as a matter of law at the outset, depriving the factfinder of the opportunity to evaluate the employer's acts and omissions in full context. This type of analysis would preclude consideration of whether a pattern of hostility existed, though that may well have been the case.

And this preclusion is not without consequence. If the taunting and segregation, viewed in light of the repeated delays regarding accommodations, would convince a factfinder that the workplace was indeed imbued with an anti-disability animus, then the employee could recover not only backpay for time lost due to inadequate accommodation, but also compensatory damages for any physical or

255. Harassment and reasonable accommodation problems often go hand in hand. *See generally* Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999) (analyzing alleged harassment of police officer after his receipt of accommodation in the form of permission to work only days shifts); Hudson v. Loretex, No. 95-CV-844 (RSP/RWS), 1997 WL 159282 (N.D.N.Y. April 2, 1997) (analyzing alleged harassment of machine worker after receipt of similar accommodation); Haysman v. Food Lion, Inc., 893 F. Supp. 1092 (S.D. Ga. 1995) (analyzing alleged harassment of grocery worker following his receipt of some accommodations and request for others).

256. *See* Schultz, *supra* note 90, at 1720–29 (discussing courts' "disaggregation" of evidence in sex-based harassment claims).

emotional injuries resulting from the hostile environment.[257] However, if evidence of taunting and segregation is never considered, the employee may receive backpay for the accommodation delays, but any other injuries would likely go unrecognized; the nature of the defendant's conduct is usually relevant to the availability of compensatory damages,[258] and some occasional delays in accommodation look much less injurious than an eighteen-month-long pattern of hostility.

C. *Reasonable Perception of a Hostile and Abusive Environment: Is Reasonableness, Like Disability, Socially Constructed?*

According to equal opportunity theory, the status quo appears reasonable to nondisabled people because it was created by them to suit their needs. Nevertheless, it may present a disabled person with unreasonable barriers and frustrations. Consequently, the application of a reasonableness standard to assess the hostility or abusiveness of a workplace environment becomes even more complex in ADA cases than it is in Title VII cases. The reasonable woman standard in sex discrimination cases is arguably inappropriate in that it assumes that women and men view the world and its reasonableness in fundamentally different ways, and that all members of each group think alike. Consideration of disability as part of the reasonableness standard, however, does not necessarily raise similar problems.

Underlying the equal opportunity model is the proposition that disabled and nondisabled people *do* view the world and experience its reasonableness in fundamentally different ways because the world is tailored to suit the nondisabled. The inequity of this tailoring usually eludes nondisabled people until disabled people call their attention to it. Even then, nondisabled people may still feel that the status quo is perfectly reasonable and that those who are different must simply adjust or settle for being less than full participants in it.[259] This theory thus

257. *See* LINDEMANN & GROSSMAN, *supra* note 171, at 1775–80 (discussing availability of back pay); *id.* at 1821–22, 1828–33 (discussing availability of compensatory damages).

258. *See id.* at 1829 ("[M]ore specific proof of injury is needed when the actions causing the injury are relatively mild. . . . [W]here the actions are egregious, less specific proof of effects may be adequate."). *See also* United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992) (addressing Fair Housing Act claim) ("The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action.").

259. Professor Adrienne Asch has described the wide perception gap between people with disabilities and the nondisabled multitudes who surround them in the context of her own personal interactions:

appears to necessitate that some aspect of the disability experience be incorporated into the reasonableness standard.

A "reasonable disabled person" standard, however, is very problematic. The defining trait of disability is much more heterogeneous than the defining trait of femaleness in sex-based harassment cases using a reasonable woman standard. Despite the "discrete and insular" minority group model explicitly referred to in the ADA's Findings,[260] many people with different disabilities may have little sense of a common identity or frame of reference.[261] Indeed, the geography of disability is not so much "insular" as archipelagic.

One response to this situation could involve refining the standard even further so that it would refer to the particular disability at issue in a given case.[262] However, any standard that asks a factfinder to put himself or

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> I was asked by an examining physician whether, because I was blind, I needed her assistant to "come in and help you get dressed"; . . . I was pushed to the front of a line of customers at a bank, although blindness does not have any relationship to the ability to stand and wait one's turn in a bank line; I was spoken about rather than spoken to—"put her here" was said to a friend of mine as we walked into a crowded room to join a meeting; a friend was described by others not as my friend, but as my "assistant" and my "guide"; a friend of more than twenty years explained to me that my distress, irritation, and frustration were unreasonable responses to people who were "trying to do the right thing."

Asch, *supra* note 246, at 395–96 n.21.

260. *See supra* note 192 and accompanying text.

261. For example, people who describe themselves as being "Deaf" are members of a community who communicate using American Sign Language and see themselves as belonging to a culture that is separate and distinct from that of the hearing world. FRED PELKA, THE DISABILITY RIGHTS MOVEMENT 88 (1997). People who are Deaf do not view deafness as an impairment, and they worry that scientific developments such as cochlear implants could wipe out their culture. *See* Tucker, *supra* note 26, at 385. A Deaf person who is otherwise healthy would probably find it very hard to think of a hearing person who uses a wheelchair as a fellow member of a common minority group. Even a Deaf person with epilepsy may have difficulty identifying with a hearing person with epilepsy. Certainly, with respect to topics such as cochlear implants or the desire for deaf children, Deaf people would find the views of many hearing people with other disabilities to be unreasonable, and vice versa.

262. This standard in fact appeared in proposed GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE OR DISABILITY ISSUED BY THE EEOC in 1993. *See* Proposed 29 C.F.R. § 1609.1(c) (published at 58 FED. REG. 51,266 (1993)) (providing that the "reasonable person" standard includes consideration of the "perspective of persons of the alleged victim's race . . . or disability"). These Guidelines were never adopted, however, because they received a great deal of criticism regarding violations of employers' First Amendment rights. Colker, *supra* note 116, at 222. *See also* Easley v. West, 1994 WL 702904, *7 (E.D. Pa. Dec. 13, 1994) (describing reasonableness element under Rehabilitation Act as requiring "objective detrimental effect on reasonable person with same impairment").

herself in the place of a person with a different life experience—be it reasonable woman, reasonable person with a disability, reasonable Korean-American, or reasonable Mormon—is on some level a fallacy.[263] Our very ability to name such categories indicates that our culture has constructed them and differentiated them from the generic "person." This differentiation, and all the biases and stereotypes that go with it, will of course affect the way in which someone assigned to a given category negotiates the world and what he or she believes is reasonable. It is rather unrealistic, then, to expect a judge or juror (let alone a conscientious employer) who is not part of that same category to assess the reasonableness of a situation from the "other's" perspective. This problem becomes particularly acute in the ADA context where the plaintiff has a mental disability, such as an anxiety disorder or mental retardation.[264]

Nevertheless, recognition—so far as possible—of an individual's disability experience should have some place in the legal standard, given the "social construct" paradigm of disability. The best method to accord that recognition is simply to ask the factfinder to determine whether the harassment created an objectively hostile or abusive work environment for the plaintiff, given the circumstance of the plaintiff's disability. Such a standard does not ask the factfinder to perform the impossible task of adopting the perspective of a reasonable quadriplegic person or a reasonable mentally retarded person. Instead, it simply asks the factfinder to take account of evidence regarding the plaintiff's disability when assessing the reasonableness of the employer's conduct toward the plaintiff.

The United States District Court for the Southern District of Iowa employed such a standard recently in *Hiller v. Runyon*.[265] In its detailed analysis of whether the harassment alleged in that case was objectively abusive, the court clearly considered the circumstances of plaintiff Jeff Hiller's disability experience, which included surgery for testicular cancer.[266] The court placed weight on the fact that the plaintiff's

263. "Different histories yield different judgments of working conditions." Bernstein, *supra* note 88, at 469. *See also id.* at 474 (explaining why male jurors cannot view events from the perspective of a "reasonable woman").

264. *See, e.g.*, Pirolli v. World Flavors, Inc., 1999 WL 1065214, *6 n.9 (E.D. Pa. 1999) ("If courts were to modify the objective test to account for each particular mental disability suffered by every plaintiff, the objective test could lose its objectivity.").

265. 95 F. Supp. 2d 1016, 1026 (S.D. Iowa 2000).

266. *Id.* at 1018.

supervisor "berated, challenged and intimidated him on a daily basis" immediately upon his return to work after radiation treatments, when the plaintiff was still subject to medical restrictions.[267] More significantly, the court stated that "the language [the supervisor] used to harass Hiller, including that Hiller was 'unproductive' and 'could not perform,' can . . . have a particularly cruel and offensive double-meaning to an employee who is infertile, unable to engage in sexual relations and recovering from testicular cancer."[268] In this way, the court evaluated all of the circumstances—including those of Hiller's disability—from its own sense of reasonableness without trying to invent and assume the perspective of some fictional "reasonable person with testicular cancer."

D. Harassment Based on Disability: If Disability Is a Social Construct, When Does a Harasser Act "Because of" Disability?

The causation element of a hostile environment claim most clearly illustrates the inadequacy of the copy-and-paste function with respect to Title VII and the ADA. The question of whether harassment occurred because of a disability is many times more layered than the Title VII questions of whether harassment occurred because of an individual's race, sex, national origin, or religion. The additional layers in the ADA analysis stem from a number of factors regarding both the statute and the nature of disability itself. First, the ADA, unlike Title VII, defines a protected class, and the notion of disability in that definition is both flexible and contingent. Second, disability—especially mental disability—is much more likely than race, sex, national origin, or religion to manifest itself in behavior that may strike co-workers and supervisors as inappropriate or difficult. Third, the percentage of people with disabilities in the workforce is quite low,[269] and the number of disabled employees in any given workplace is therefore likely to be very small. Finally, popular confusion regarding reasonable accommodation

267. *Id.*

268. *Id.* Some evidence indicated that this choice of words was intentional; Hiller's supervisor used these same expressions almost daily over the course of a year, even after Hiller had specifically asked the supervisor to stop harassing him about his testicular cancer. *Id.* at 1019. In addition, the supervisor at another time stated that there were "too many cripples in our post office" and referred to another employee who had undergone back surgery as a "cripple." *Id.* at 1024.

269. *See* Susan Schwochau & Peter David Blanck, *Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled,* 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000) (describing a 1998 survey, which revealed that only 26.6% of disabled individuals were employed, compared to 78.4% of nondisabled individuals).

rights may cause animosities resulting in harassment that appears, superficially, to be unrelated to disability. These factors combine and recombine to give rise to a number of new questions with respect to causation, as explained below.

1. What degree of awareness must a harasser have with respect to the disability of the harassed employee?

One of the earliest cases to discuss hostile environment actions under the ADA stated that in order for harassment to be based on a disability, the employer must first "have knowledge of the disability."[270] However, given that the ADA defines "disability" flexibly and contingently in terms of actual or past or even perceived substantially limiting impairments, "knowledge of the disability" can mean many things: knowledge of an employee's condition and its satisfaction of the ADA's disability definition, knowledge of the employee's specific diagnosis, knowledge only of the presence of an impairment, which happens to fulfill the definition, or—given the "regarded as" prong of the "disability" definition—mere mistaken beliefs as to any of the above.

The Seventh Circuit, in *Casper v. Gunite Corp.*,[271] in an unpublished opinion, offered some clarification of the knowledge element in stating that "'some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability.'"[272] The plaintiff in that case, Ricky Casper, had an I.Q. of sixty-six and had been diagnosed as "mildly mentally handicapped."[273] Although he had mentioned to Gunite's personnel director during his job interview that he was "slow" and had been in special education programs, neither Casper nor the personnel director communicated this information to anyone else at Gunite.[274] Once Casper began working, his supervisors began peppering him with offensive comments, including epithets such as "Ricky Retardo" and "dumb

270. Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1109 n.3 (S.D. Ga. 1995) (citing Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995)).

271. No. 99 3215, 2000 WL 975168 (7th Cir. July 11, 2000).

272. *Id.* at *3 (quoting Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 934 (7th Cir. 1995)).

273. *Id.* at *1.

274. *Id.* at *3. Even if this information had been communicated to others, the Seventh Circuit held that it was "not sufficient to put Gunite on notice that [the plaintiff] was disabled." *Id.*

ass."[275] Another supervisor allegedly told him that his children would "grow up acting like [Casper], like slow and stuff."[276]

The Seventh Circuit, in analyzing the causation element of Casper's ADA harassment claim, held that the case presented "a genuine issue of material fact over whether Casper's actions and outward appearance reasonably put Gunite on notice that he was mentally disabled."[277] In so holding, the court emphasized "the fact that some of the comments made by Gunite employees suggest that they viewed Casper as having a learning disability."[278]

The Seventh Circuit's opinion suggests, reasonably, that the harasser—in this case Gunite through its supervisors—need not be aware of the details of a disabled employee's specific diagnosis.[279] However, it does suggest that the harasser must have notice that the employee in question has a disability. The opinion is unclear as to whether the court refers to disability in the general sense of impairment or in the ADA's legal sense of an impairment that "substantially limits" a major life activity.[280]

Given the rather Talmudic complexity of ADA's disability definition,[281] it seems extremely arbitrary to focus the causation inquiry

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275. *Id.* at *2.

276. *Id.* at *2 n.2.

277. *Id.* at *3.

278. *Id.*

279. Given principles of confidentiality in the medical profession and the confidentiality provisions of the ADA itself, *see* 42 U.S.C. § 12112(d) (1994), the details of an employee's diagnosis would not likely reach many potential harassers at the employee's workplace, if it reached any of them at all. Another issue related to diagnoses concerns whether an employee's impairment must in fact have been diagnosed in relation to some particular disease before it can become the type of disability upon which actionable harassment can be based. Two district courts have indicated that such may be the case. *See* Presta v. S.E. Pa. Transp. Auth., No. CIV.A. 97CIV.2338, 1998 WL 310735, *13 n.9 (E.D. Pa. June 11, 1998) ("Presta cannot argue that the harassment was 'based upon' his adjustment and anxiety disorders, as he was harassed for two to three years before he was even diagnosed with these disorders."); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1081 (S.D. Ga. 1995) (holding that plaintiff could not show "that any discrimination or harassment was causally connected to her disability" where "her agoraphobia and dythmia had not yet been diagnosed" when she left her job). Given that an impairment—even one technically qualifying as a disability under the ADA—must exist before it is diagnosed, and given that supervisors and co-workers will not ordinarily learn whether and how an employee's impairment has been diagnosed, these holdings are problematic.

280. *See* 42 U.S.C. § 12102(2)(a) (1994).

281. The EEOC, for example, in its INTERPRETIVE GUIDANCE TO TITLE I OF THE ADA, spends 30 paragraphs attempting to elucidate the statutory "disability" definition and its component parts. *See* 29 C.F.R. app. § 1630.2(g)-(l) (2000). The last two cases presenting definitional issues presented to

on whether the harasser understood the employee's impairment in terms of that definition and all of its legalistic detail. After all, the definition's "substantially limits" terminology alone may call for consideration of factors such as "the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment," "[t]he geographical area to which the individual has reasonable access," and "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment."[282] It is hard to imagine a defendant-harasser saying anything other than "I never gave those kinds of things any thought" when asked about these factors, even if he or she genuinely believed that the harassed employee had some kind of impairment, and even if a court might later classify that impairment as a disability under the ADA.

In the end, the analysis of causation becomes much more appropriately focused if framed in terms of whether the actor harassed the employee either because the employee had an impairment or because the actor believed that the employee had an impairment. This framework still requires the employee to carry the burden of persuasion in establishing a causal connection between the real or perceived impairment and the harassment, yet it avoids tangential questions that have little or nothing to do with the nature of disability-based discrimination.

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the Supreme Court resulted in nine separate opinions, *see* Sutton v. United Air Lines, 527 U.S. 471, 474 (1999) (O'Connor, J.); *id.* at 494 (Ginsburg, J., concurring); *id.* at 495 (Stevens, J., dissenting); *id.* at 513 (Breyer, J., dissenting); Bragdon v. Abbott, 524 U.S. 624 (1998) (Kennedy, J.); *id.* at 655 (Stevens, J., concurring); *id.* at 656 (Ginsburg, J. concurring); *id.* at 657 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part), a few of which had the justices philosophizing about the significance of reproduction as a human activity, *see id.* at 639 (Kennedy, J.) ("[R]eproduction could not be regarded as any less important than working or learning."); *id.* at 664–65 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("[T]he act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as . . . caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.") (internal quotes omitted).

282. *See* 29 C.F.R. app. § 1630.2(j).

2. *When does a harasser act because of an employee's disability rather than because of the employee's conduct?*

Even in cases where the harasser is aware of an employee's disability, the harassed employee must still prove that the harassment stemmed from his or her disability and not from some other cause. Because disability can sometimes manifest itself through conduct, courts may find it necessary to determine whether harassment based on an employee's disability-related conduct was in fact based on the employee's disability. Employers have sometimes defended against disability-based hostile environment actions by arguing that the alleged harassment arose from conduct on the part of both the disabled employee and the harasser that led to a personality conflict between them.

For example, in *Hendler v. Intelecom USA*,[283] the defendant asserted that even if Stephen Hendler's supervisor and co-workers harassed him, their harassment stemmed from Hendler's status as a non-smoker and his requests that they not smoke in the office, rather than from Hendler's asthma.[284] This defense tactic is reminiscent of one used by employers in early sexual harassment cases; defendants would argue—and courts would sometimes hold—that the harasser's conduct occurred not because of the victim's gender but instead because the victim was sexually attractive to the harasser.[285] Such an argument portrays harassment as a personal issue between two particular individuals rather than as an instance of socially harmful discrimination. In the ADA context, this personalization of harassment coincides with the medical model of disability, which posits that disability is a personal issue rather than a societal one.[286] Under this model, unlawful discrimination can appear to be nothing more than a non-actionable personality conflict.[287] Indeed, the persistence of the medical model in contemporary thought probably

283. 963 F. Supp. 200 (E.D.N.Y. 1997).

284. *Id.* at 209.

285. *See supra* note 57 and accompanying text.

286. *See supra* notes 133-38 and accompanying text.

287. *See, e.g.*, Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 667 (3d Cir. 1999) ("Although it is clear that the relationship between [the plaintiff] and [her supervisor] was poor, [the plaintiff] has not asserted facts that would allow a reasonable jury to find that [the supervisor] harassed her because of her disability."). The *Walton* court cited an ADA case outside of the harassment context for the proposition that "[a] personality conflict doesn't ripen into an ADA claim simply because one of the parties has a disability." *Id.* (citing Uhl v. Zalk Josephs Fabricators, Inc., 121 F.3d 1133, 1137 (7th Cir. 1997)).

accounts for the fact that "many judges are not strongly imbued with the notion that basic civil rights are at stake in ADA cases."[288]

Fortunately, a number of lower courts have begun to recognize the connection between disability and the types of conflicts that can lead to harassment. The *Hendler* court, for example, held that the taunting in that case could have arisen not from Hendler's persistent requests that his colleagues and supervisor refrain from smoking, but instead from

> the fact that [Hendler] had difficulty breathing. For example, an employee confined to a wheelchair who is chided about not being able to climb the stairs is being harassed on the basis of his disability regardless of the fact that the comments are directed at the environment or his ability to function under the working atmosphere.[289]

Such careful consideration of the causation element is even more critical in ADA cases than in Title VII cases. The very small number of people with disabilities employed at a given workplace[290] tends to focus attention on the harassed employee as an individual with unique quirks and proclivities rather than as a member of a larger protected class. Proof of causation is rather easy in cases such as *Fox v. General Motors Corp.*,[291] recently decided by the Fourth Circuit, where the harassers use abusive language that specifically refers to an employee's disability.[292]

However, in cases not involving such blatant references, proving causation normally involves comparing the defendant's treatment of the disabled plaintiff to its treatment of other disabled employees.[293] This

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288. *See* Diller, *supra* note 26, at 46.

289. 963 F. Supp. at 209.

290. *See supra* note 269 and accompanying text.

291. 247 F.3d 169 (4th Cir. 2001).

292. The harassers in *Fox* called the plaintiff and other disabled workers "handicapped MFs," among other epithets. *Id.* at 174.

293. Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 338–39 (2000). Differences in treatment received by a disabled employee and by his or her nondisabled colleagues may aid in a showing of causation, but are far from probative. *See* Bryant v. Compass Bank, No. CV-95-N-2458-S, 1996 WL 529214, *6 (N.D. Ala. May 31, 1996) (explaining that if "other workers openly violated the dress code and [the defendant] singled out only the plaintiff, one could reasonably infer that some type of discrimination *might* be a factor") (emphasis added). Of course, if the defendant can show that nondisabled employees received the very treatment of which the plaintiff complains, a court will hold that the treatment was not based upon disability. *See, e.g.*, Mannell v. Am. Tobacco Co., 871 F. Supp. 854, 860 n.5 (E.D. Va. 1994)

avenue of proof is not as available to ADA plaintiffs as it is to Title VII plaintiffs because a workplace is less likely to include many individuals with disabilities, although it may include many employees of different races and sexes. Even when an ADA plaintiff has several disabled co-workers, the possible variety of their disabilities may weaken the probative value of comparisons. Without helpful comparative evidence, a court or jury is likely to focus on the plaintiff's own personality and conduct, rather than his or her disability, as the root of the harassment problem.[294]

Other "conduct versus disability" issues arise when a disability leads to behavior that might render an employee unable to perform his or her particular job, as in cases where an employee's disability causes absenteeism or lateness. While an employer may certainly rely on "consequences or symptoms of a disability" to conclude that an individual is not qualified for a given job, those consequences or symptoms "are no justification for harassment."[295] Therefore, an employer may enforce an attendance policy, but it cannot do so in a manner that singles out disabled employees and places harassing burdens upon them.

For example, in *Fritz v. Mascotech Automotive Services*,[296] plaintiff Jeffrey Fritz alleged that his frequent lateness to work was attributable to his diabetes because his fluctuating work schedule altered his insulin requirements and caused him to awaken frequently with hypoglycemia and occasionally with insulin shock.[297] On such days, Fritz alleged, he could not drive to work until the condition had passed.[298]

When Fritz's supervisor told him that his lateness and absences were becoming a problem, Fritz explained their cause[299] and suggested that he be allowed to work late on the days when he arrived late, to make up for lost time.[300] The supervisor did not implement this suggestion, although

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(explaining in dicta that allegedly harassing conduct could not have been based on disability because nondisabled employees were subject to identical conduct).

294. *See* Freshman, *supra* note 293, at 326 ("In an organization with [ ] very few people like the plaintiff, it would be easy to assume that the plaintiff's peculiarities, rather than impermissible discrimination, really explain her misfortune.").

295. Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1109 (S.D. Ga. 1995).

296. 914 F. Supp. 1481 (E.D. Mich. 1996).

297. *Id.* at 1484.

298. *Id.*

299. *Id.*

300. *Id.* at 1490.

he did indicate that he would excuse diabetes-related absences and lateness under an individualized probationary policy that he imposed upon Fritz.[301] The policy included a number of requirements that did not apply to other workers. For example, it required Fritz to punch a time clock, to document all incidents of absence and lateness with doctor's notes, and to perform work that was considered "less demanding" and "boring."[302]

After Fritz filed an ADA hostile environment claim, his employer moved for summary judgment, arguing that the requirements of the probationary policy were imposed upon Fritz because of his conduct and not because of his disability.[303] Nevertheless, the United States District Court for the Eastern District of Michigan denied summary judgment to the employer, noting that Fritz's supervisor, in requiring the doctor's notes, had used nothing but "personal judgment" in assuming that the attendance problems were "more likely attributable to delinquency than disability."[304] The court explained that a jury could have inferred from the evidence that the supervisor "took an especially dim view" of Fritz's attendance problems because of a "suspicion that [Fritz] was 'misusing' his disability as an excuse."[305]

As a result, the court identified a genuine issue of material fact as to whether the supervisor's response to Fritz's problems "was improperly influenced to some degree by consideration of the disability."[306] The court also noted, however, that to prevail at trial, Fritz would have to show that his latenesses were in fact caused by his diabetes and also that, if his employer were to provide specific reasonable accommodations, his diabetes and his consequent late arrivals would not render him

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301. *Id.*

302. *Id.* at 1485. The requirement of a doctor's note for each incident aggravated Fritz's lateness problem because Fritz would have to spend additional time visiting his doctor's office before arriving at work. *Id.* In addition, Fritz protested that the requirement was nonsensical because by the time he was able to drive to see his doctor, his hypoglycemia and shock would already have passed. *Id.*

303. *Id.* at 1495.

304. *Id.* at 1494.

299. *Id.* at 1495.

306. *Id. Cf.* Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1367 (S.D. Fla. 1999) (holding that employee who received harsh criticism of her work after returning from breast cancer surgery had produced no evidence to show criticism was based on disability rather than on work product, and noting that decisions "based on reasons independent of an employee's disability, while they may correlate with a disability, are not actionable under the ADA").

unqualified for the job.[307] Such requirements make perfect sense, because if reasonable accommodations could render an employee qualified to perform a given job, then the employer "must attempt to accommodate the individual's disability, not harass him because of it."[308]

In requiring Fritz to punch a time clock and to provide doctor's notes, Fritz's supervisor appears to have acted on a stereotypical assumption that disabled people are lazy and will lie to avoid having to work. This scenario is not unusual, and a few courts have correctly focused on stereotypes in assessing the causation of hostile environment harassment. In one case where an employer claimed that an employee had received harsh treatment because he "constantly complained, rarely worked his scheduled hours, overstated his physical complaints, and wanted to avoid work," the United States District Court for the Southern District of Georgia held that a jury could infer from the employee's medical evidence that his complaints were not overstated and that "his absences were the legitimate result of severe pain."[309] Because a jury could further infer that the defendant "engaged in negative stereotyping of the disabled as people who overstate complaints, do not want to work, and 'milk' or 'snowball' their employers for benefits," the court correctly held that a summary judgment for the defendant was inappropriate on the issue of whether the harsh treatment had been based on a disability.[310]

As the above cases illustrate, disability and conduct are often intertwined. While a harassing employer may appear superficially to be reacting to an employee's conduct, the employer may in fact be reacting to the employee's disability. The relation between an employee's disability and his conduct is complex and individualized, but a factfinder cannot determine whether harassment was based on disability without some understanding of this relation. For this reason, courts should avoid summary disposals of the causation issue in ADA harassment cases when the conduct of which the employer complains may have stemmed from the employee's disability.

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307. *Fritz*, 914 F. Supp. at 1495.

308. Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1109 (S.D. Ga. 1995).

309. *Id.* at 1108–09.

310. *Id.* at 1109. *See also* Simonetti v. Runyon, No. Civ.A. 98-2128, 2000 WL 1133066, *8 (D.N.J. Aug. 7, 2000) (holding that, under Rehabilitation Act, epithets including "disability chaser" and "faker" contributed to creation of fact issue as to whether defendant's harassment was based upon employee's disability).

3. *How does reasonable accommodation relate to disability as a basis of harassment?*

An employer's failure to provide reasonable accommodation to a disabled employee, when combined with other harassing conduct, may create a hostile or abusive working environment.[311] However, an employer's appropriate provision of such accommodation may inspire co-worker backlash, which can also create a hostile or abusive environment for the employee with a disability. This backlash stems from common misunderstandings of the ADA's equal opportunity model as one that accords special rights rather than equal rights.[312] A "biased prototype"[313] of people with disabilities as selfish and willing to do anything to gain the special benefits to which they believe themselves entitled may also contribute to co-worker resentment and harassment.[314]

For example, in *Hudson v. Loretex Corp.*,[315] plaintiff Robert Hudson experienced an epileptic seizure while at home, and his physician attributed the episode to the fact that Hudson had been working night shifts.[316] On the recommendation of the physician, Loretex accommodated Hudson by moving him to the day shift.[317] Once Hudson received this accommodation, his supervisor informed him, in front of co-workers, that he should be "more grateful," given that the company had changed his shift because he was "supposedly sick," and that the change had "affected many people."[318] Hudson's co-workers later accused him of receiving preferential treatment because of a "phoney illness,"[319] and his supervisor, in later reprimanding Hudson regarding an unrelated incident, implied again that Hudson was lying about his epilepsy.[320] The United States District Court for the Northern District of New York correctly denied Loretex's motion to dismiss Hudson's hostile

311. *See supra* notes 255-56 and accompanying text.

312. *See supra* note 121 and accompanying text.

313. Professor Martha Chamallas uses this term to describe "stock images, mental portraits, schemas, or cultural scripts . . . that operate to limit the law's protection of marginal social groups." *See* Chamallas, *supra* note 38, at 778.

314. *See* Davis, *supra* note 244 *at* 197–98.

315. No. 95-CV-844 (RSP/RWS), 1997 WL 159282, *1 (N.D.N.Y. April 2, 1997).

316. *Id.* at *1.

317. *Id.*

318. *Id.*

319. *Id.* at *3.

320. *Id.* at *1.

environment action, holding that Hudson's allegations described a "pattern of harassment" based on disability that could support such a claim.[321]

A few courts have stated more expressly that harassment based on a request for accommodation is equivalent to harassment based on disability, for purposes of hostile environment actions under the ADA.[322] This interpretation makes eminent sense in light of the ADA's equal opportunity model. Without necessary reasonable accommodations, many people with disabilities would be deprived at the outset of opportunities to perform at the workplace. Therefore, one who harasses a disabled employee for requesting accommodation is essentially harassing that employee for being disabled and daring to work.

Harassment that goes so far as to interfere with an employee's request for or use of an accommodation implicates the ADA's coercion provision.[323] This provision, in part, makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter."[324] Requesting reasonable accommodations and using such accommodations are both rights "granted or protected" by the ADA.[325] Therefore, under the coercion provision, any interference with these actions is unlawful. No corresponding provision appears in Title VII, whose formal equality model does not grant or protect affirmative rights such as the right to accommodation.

The coercion provision differs from the ADA's retaliation provision, which, like Title VII's retaliation provision,[326] prohibits employers from discriminating against people who participate in investigations or hearings regarding discriminatory employment practices or who

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321. *Id.* at *3.

322. *See, e.g.*, Walton v. Mental Health Assoc., 168 F.3d 661, 667 (3d Cir. 1999) (stating that an ADA hostile environment plaintiff must prove, among other things, that "the harassment was based on her disability or a request for an accommodation"); Simonetti v Runyon, No. Civ.A. 98-2128, 2000 WL 1133066, *7 (D.N.J. Aug. 7, 2000) (same).

323. 42 U.S.C. § 12203(b) (1994).

324. *Id.*

325. *See supra* notes 154-78 and accompanying text (discussing reasonable accommodation provision). *See also* Wray v. Nat'l R.R. Passenger Corp., 10 F. Supp. 2d 1036, 1040 (E.D. Wis. 1998) (implying that the use of a reasonable accommodation is a right protected by 42 U.S.C. § 12203(b)).

326. *See* 42 U.S.C. § 2000e-3(a) (1994).

otherwise oppose those practices.[327] To state a claim under the ADA's retaliation provision, a plaintiff must prove that the defendant has "discriminate[d]" in response to the plaintiff's protected activities.[328] Therefore, retaliation in the form of harassment will not be actionable unless it rises to the level of discrimination by being severe and pervasive.[329] In contrast, under the ADA's coercion provision, harassment is actionable even if it falls short of being severe and pervasive, provided it takes the form of coercion, intimidation, threat, or interference, and provided it is based upon a disabled employee's requests for or enjoyment of accommodations.[330]

Most litigants and courts thus far have looked only to the ADA's narrower retaliation provision when asserting and analyzing claims based on interference with accommodations.[331] This phenomenon most likely results from habits developed with respect to Title VII, which lacks a coercion provision, as explained above. Further, even when courts have looked to the coercion provision, they have failed to appreciate the difference between it and the retaliation provision.[332] As a result, valid coercion claims have been dismissed for failure to meet the higher retaliation standard.

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327. *Id.* § 12203(a).

328. *Id.*

329. Hostile environment harassment is actionable under the ADA only because it represents discrimination regarding "terms, conditions, and privileges of employment," which is prohibited by 42 U.S.C. § 12112(a).

330. The coercion provision specifically prohibits coercion, intimidation, threats, and interference directed at disabled employees pursuing or enjoying their ADA rights. 42 U.S.C. § 12203. This provision is separate and distinct from the ADA's prohibition of discrimination with respect to "terms, conditions, and privileges of employment," which gives rise to hostile environment actions, *see id.* § 12112(a). Therefore, the ADA does not support the imposition of hostile environment standards on the analysis of a coercion claim.

331. *See* Wray v. Nat'l R.R. Passenger Corp., 10 F. Supp. 2d 1036, 1040 (E.D. Wis. 1998) (stating that "[m]ost of the cases interpreting § 12203 are 'retaliation' cases arising in an employment context").

332. *See, e.g.*, Barnett v. U.S. Air, 228 F.3d 1105, 1121 (9th Cir. 2000), and cases cited therein. In *Barnett*, the Ninth Circuit, after citing the ADA's coercion provision (and not its retaliation provision), noted that "it is necessary to establish a framework for analyzing retaliation claims under the ADA. Most other circuits have adopted the Title VII framework for analyzing ADA retaliation claims." *Id.* The court then explained that "[a]dopting the Title VII framework incorporates a comprehensive body of law analyzing workplace retaliation. This seems useful." *Id.* Unfortunately, Title VII's "comprehensive body of law" says absolutely nothing about the coercion claim that the court was analyzing because Title VII has no coercion provision. Thus, while Title VII retaliation doctrine may have seemed "useful" to a court oblivious to the difference between ADA retaliation and coercion claims, that doctrine was in fact inapposite.

For example, in *Silk v. City of Chicago*,[333] a case alleging harassment based on the plaintiff's receipt of an accommodation, the Seventh Circuit expressly cited both the coercion provision and the retaliation provision of the ADA.[334] However, after summarizing these two provisions, the court referred to the claim as one for "retaliation" and went on to analyze the harassment only in terms of the retaliation provision and its "discrimination" standard.[335] This standard of course led the court to the "severe and pervasive" requirement for discriminatory harassment,[336] and in turn led to an affirmation of summary judgment for the defendant on the retaliation claim.[337] Thus, the Seventh Circuit assigned absolutely no independent significance to the ADA's coercion provision. Most likely, the court's failure to understand this provision—and perhaps the entire equal opportunity model—is traceable to the Title VII "prototype" that the court admitted to following.[338]

In sum, Title VII and the ADA differ starkly with respect to the scope of employees they cover and remedial mechanisms they provide. The ADA's attempt to define a specific protected class in terms of disability, its provision of a right to reasonable accommodation, and its inclusion of mechanisms to protect that right raise new questions regarding the causal relation between protected characteristics and harassment. The three questions discussed above are unique to the context of disability discrimination, and courts therefore cannot look to Title VII jurisprudence expecting to find answers to them. Instead, courts must approach the causation questions with an appreciation for the unique theoretical underpinnings of the ADA, as explained above.

E. Employer Responsibility for Hostile Environment Harassment: Given the Complex Definition of Disability, How Can an Employer Prohibit Disability Discrimination and Recognize It When It Occurs?

Even when a hostile environment plaintiff can prove that he or she experienced severe and pervasive harassment because of a protected

333. 194 F.3d 788 (7th Cir. 1999).

334. *Id.* at 799.

335. *Id.*

336. *Id.* at 807.

337. *Id.* at 808.

338. *Id.*

characteristic, the plaintiff must still show that the employer was, at least vicariously, responsible for the harassment.[339] With respect to harassment by a co-worker, an employer is liable if it knew or should have known about the harassment but negligently failed to take prompt remedial action.[340] With respect to harassment by a supervisor, the Supreme Court in *Burlington Industries. v. Ellerth*,[341] a Title VII sex discrimination case, recently clarified the standard for employer responsibility.

Under *Ellerth*, an employer is vicariously liable for a hostile environment created by a supervisor with immediate or successively higher authority over the harassed employee.[342] However, an employer may raise in its defense that it took reasonable care to prevent and promptly correct the harassment and that the employee unreasonably failed to take advantage of opportunities to prevent or correct the harassment.[343] With respect to the first part of this defense, a small employer may show that it reasonably resorted to informal means to prevent and correct harassment, but a larger employer will normally need to show that it communicated to all of its employees a formal anti-harassment policy, including a complaint procedure that allowed a complainant to bypass harassing supervisors.[344] Once a policy is in place, a showing that an employee unreasonably failed to use such a complaint procedure will normally satisfy the second part of the defense.[345]

Although they evolved in the context of Title VII, the above rules regarding employer responsibility for co-worker and supervisor harassment apply to ADA hostile environment cases.[346] While these rules

339. *See supra* note 103 and accompanying text.

340. *See, e.g.*, Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431–32 (7th Cir. 1995). *See also* LINDEMANN & KADUE, *supra* note 103, at 18 (describing liability standard in co-worker harassment cases).

341. 524 U.S. 742 (1998).

342. *Id.* at 765. *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (decided on same day as *Ellerth* and articulating same standard for employer liability).

343. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

344. *Farragher*, 524 U.S. at 807–09. *See also* LINDEMANN & GROSSMAN, *supra* note 171, at 522 (3d ed. Cum. Supp. 2000) (explaining that an employer will normally be held to have taken reasonable care to prevent harassment when it has put all employees on notice of a policy governing the reporting and investigation of harassing conduct).

345. *Ellerth*, 524 U.S. at 765; *Farragher*, 524 U.S. at 807–08.

346. *See, e.g.*, Silk v. City of Chicago, 194 F.3d 788, 807 n.18 (7th Cir. 1999) (reciting standards for supervisor and co-worker harassment); Davis-Durnil v. Vill. of Carpentersville, 128 F. Supp. 2d 575, 585 (N.D Ill. 2001) (same); Simonetti v. Runyon, Civ. A. 98-2128, 2000 WL 1133066, *7 (D.N.J. Aug. 7, 2000) (reciting standard for co-worker harassment); Hiller v. Runyon, 95 F. Supp. 2d 1016, 1023–24 (S.D. Iowa 2000) (reciting standard for supervisor harassment).

are fairly straightforward in the Title VII context, they become more complex when applied to disability harassment under the ADA because of that statute's complex definition of "disability."[347] For example, an employer's typical anti-harassment policy that is consistent with Title VII will prohibit discrimination based on race, sex, national origin, and religion, and most employees will have some notion of whether they are acting in response to such characteristics when they interact with co-workers and subordinates. In contrast, under the ADA, it is easy for an employer to establish a policy prohibiting employees from harassing any disabled subordinates or co-workers because of their disabilities, but it is extremely difficult for the policy to explain—and for employees to understand—how to determine if a worker is in fact disabled under the statute's complex, three-pronged test.[348]

A related problem inheres in the employer's duty under the ADA to take prompt action to correct co-worker harassment. An employer can be liable for failing to act if it knows or should know that such harassment is taking place,[349] but the law is unclear as to whether the employer should know that the harassment involves a statutorily-defined disability before the duty to act will arise. No ADA case has specifically addressed this issue, but a Rehabilitation Act[350] case has indicated that an employer must take remedial action when it is "aware" of a co-worker's "discriminatory acts."[351] Presumably, harassment is not discriminatory under the ADA or the Rehabilitation Act unless it is based on a disability, so awareness of discriminatory acts would necessitate awareness of a disability. As a practical matter, however, it makes little sense to condition an employer's duty to remedy harassment upon the employer's familiarity with the complex disability definition. A sounder policy would encourage an employer to investigate and remedy instances of harassment whenever they appear to be based on an employee's physical or mental impairment, whether or not those impairments may meet the technical requirements of a statutorily-defined disability.

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347. *See supra* notes 179–81 and accompanying text.

348. *See* 42 U.S.C. § 12102(2).

349. *See supra* note 340 and accompanying text.

350. Because the ADA is based in large part on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994), cases decided under the Rehabilitation Act are instructive to courts interpreting the ADA. For a discussion of the relationship of these two statutes, see *supra* notes 154–67 and accompanying text.

351. Simonetti v. Runyon, Civ. A. 98-2128, 2000 WL 1133066, *9 (D.N.J. Aug. 7, 2000).

Fortunately, with respect to employer responsibility, erring on the side of caution is consistent with sound management practices. A employment policy that prohibits employees from harassing each other because of physical or mental impairments has the virtue of being fairly easy to understand; in addition, it can both assist an employer in avoiding potential ADA liability and in fostering a work environment in which people focus on productivity rather than intra-office conflicts. Further, if a possibly disabled employee reports an incident of harassment that sounds more than trivial, an employer would be wise to investigate it and take any necessary action. Even if the conduct is based on something short of a disability, it is still likely to be interfering with productivity by distracting workers and hindering teamwork.

IV. CONCLUSION

Lawyers and judges are trained to think in terms of analogies, and it is tempting to draw extensive analogies between hostile environment claims arising from almost identical language in Title VII and the ADA. Indeed, as the Ninth Circuit has noted, it seems useful to import existing Title VII doctrine into ADA hostile environment opinions; the copy and paste icons loom large in such cases. Nevertheless, what seems useful is not always what serves justice under the ADA, a statute that supplements Title VII's theory of formal equality with an equal opportunity theory of its own. Lawyers and judges therefore must understand the ADA's own notions of equality and discrimination, and incorporate these notions into their thinking as they begin to analyze the many ADA hostile environment issues that are likely to arise in the near future.