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THE AMERICANS WITH DISABILITIES ACT
INTERPRETING THE TITLE I REGULATIONS:
THE HARD CASES

Bonnie P. Tucker†

INTRODUCTION

Title I of the Americans with Disabilities Act (the ADA or the Act) addresses and makes illegal certain discrimination in the workplace based on real or perceived disabilities. The Equal Employment Opportunity Commission (the EEOC), in compliance with the ADA's mandate to implement Title I, has issued regulations and interpretive guidance with respect to the employment provisions of the Act. The EEOC's regulations are, for the most part, thoughtful and comprehensive. The regulations are largely premised on regulations and case law developed over more than a decade under the Rehabilitation Act of 1973, particularly sections 504 and 501. The EEOC is to be

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commended for its substantial efforts in attempting to address the significant employment issues that may arise under the ADA. Given the gargantuan nature of that task, however, it is not surprising that the regulations contain grey areas, and that unresolved questions remain.

This article will present six hypothetical case scenarios designed to (1) illustrate pitfalls that might arise under the ADA regulations, and (2) address potential interpretive dilemmas. In a few instances the author will venture an educated guess as to the manner in which the courts are likely to resolve issues raised, but the author assumes no responsibility for what happens in real life!

I. DRIVING ACROSS THE SUBSTANTIALLY LIMITED THRESHOLD

Joe Smith applies for a job driving a garbage truck in the city in which he resides. He is conditionally hired for the job, pending the results of a post-offer, pre-employment medical exam. During the medical exam, Joe acknowledges that he has experienced occasional mild seizures during his lifetime. Joe explains that he has tested negatively for epilepsy and other seizure disorders, and that doctors have attributed his seizures to hyperventilation during periods of extreme stress or fear. Joe also states that he has not had any seizures in over five years. He is again given an electroencephalogram (EEG) which confirms that he does not have epilepsy. The city nonetheless refuses to hire Joe in accord with its policy which prohibits hiring to drive city vehicles an individual with any record of seizures. The policy reflects the city's fear that an individual will have a seizure while driving. Joe files an action under Title I of the ADA claiming discrimination on the basis of either an actual or perceived disability.

The threshold issue is whether Joe is protected under the ADA. Is he disabled within the meaning of Title I? It is not enough that Joe's history of mild seizures constitutes or is regarded as a physical impairment. Under the ADA, Joe is only covered if he has a physical or mental impairment — actual or perceived — that substantially limits one or more of his major life activities. "Major life activities" under the Act include functions such as "caring for oneself, performing manual tasks,  

6. 42 U.S.C. § 12102(2) (Supp. II 1991); 29 C.F.R. § 1630.2(g).
walking, seeing, hearing, speaking, breathing, learning, and working." Assuming Joe's infrequent mild seizures do not interfere with any of his other everyday activities, the only way Joe falls within the protection of the ADA is if he is substantially limited in his ability to work. Joe's status must be determined before his action under the ADA can proceed.

The Title I regulations provide that, with respect to the major life activity of working, the term "substantially limits" means:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.9

The regulations suggest that three factors be considered when evaluating whether Joe's major life activity of working is substantially limited:

(A) The geographical area to which [Joe] has reasonable access;
(B) The job from which [Joe] 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 [Joe] is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which [Joe] has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from

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7 29 C.F.R. § 1630.2(i).
8 See 29 C.F.R. app. §1630.2(j), which provides that "[i]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered."
9 29 C.F.R. § 1630.2(j)(3).
which [Joe] is also disqualified because of the impairment (broad range of jobs in various classes).\textsuperscript{10}

Under this regulation, the fewer alternative job opportunities Joe has, the more likely his major life activity of working will be substantially limited.

Before Joe can get to the merits of his claim, therefore, he will have to spend time and money identifying similar and dissimilar jobs within a reasonably accessible geographical area from which he would be disqualified.\textsuperscript{11} Although the interpretive guidelines to the regulations provide that an "onerous evidentiary showing" is not required,\textsuperscript{12} Joe will be required to present "evidence of general employment demographics and/or of recognized occupational classifications that indicate the appropriate number of jobs" from which Joe would be excluded due to his seizure history.\textsuperscript{13} Even that "non-onerous" evidentiary showing may involve costly and time-consuming investigation and analysis.

Moreover, the regulations are ambiguous with respect to what other employers and jobs are to be considered in this analysis. Should Joe assume that other employers who hire drivers, such as neighboring cities that hire garbage truck drivers, would also refuse to hire Joe? Or, are such employers to be viewed as employers from whom Joe might obtain employment despite his seizure history?

The EEOC's initial proposed regulations contained a proviso stating that, when determining whether an individual is regarded as substantially limited in the ability to work, "it should be assumed that all similar employers would apply the same exclusionary standard that the employer charged with discrimination has used."\textsuperscript{14}

That proviso was deleted from the final regulations.\textsuperscript{15}

\textsuperscript{10} Id.

\textsuperscript{11} This determination, preliminary to determining whether an individual is "disabled" due to a substantial limitation in the ability to work, is purely a creation of the EEOC; it is not supported in the ADA itself or the legislative history to the Act.

\textsuperscript{12} 29 C.F.R. app. § 1630.2(j).

\textsuperscript{13} Id.


\textsuperscript{15} See 56 Fed. Reg. 35,728 (1991) (section-by-section analysis of comments
Under the final version, the "regarded as" prong of the definition of "disability" is satisfied if the plaintiff can show that the employer made a decision "because of a perception of disability based on 'myth, fear or stereotype.'" The effect of this change is unclear.

A good argument can be made that Joe is "disabled" if the city's refusal to hire him is based on a myth or stereotype about his seizures, regardless of the extent to which Joe is precluded from obtaining other jobs. The city has either misclassified Joe as having a disability or regards Joe as having a disability based on stereotypes when he is not, in fact, disabled. This argument is in accord with the legislative history of the ADA, which indicates that Congress intended that a rejection from one particular job based on the fact that the employer regarded an individual as disabled would constitute discriminatory conduct under Title I. The House Judiciary Report notes that:

a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as"] test, whether or not the employer's perception is shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

That report further states:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test ....

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and revisions to the proposed regulations).

16 Id.


The EEOC's regulations, however, do not resolve the issue in this manner. Rather, the regulations focus on the effect of the classification, the *substantial limitation* of the ability to work, looking to the number of jobs from which Joe is precluded due to the employer's attitude. Under the EEOC's regulations, therefore, an analysis of other job opportunities will probably be required. Another question thus arises: when making that analysis, do we count employers having the same types of jobs in our examination of jobs from which Joe would be excluded? This question remains unanswered in the EEOC's regulations.

It is clear, however, that in the likely event that an evidentiary showing *is* necessary, whether Joe can pursue his action under the ADA will depend upon where he lives. If he lives in a major city, for example, he may not be covered under Title I, because there are a variety of other jobs, besides driving a garbage truck for the city, that he could obtain with his education and credentials despite his seizure history. If, however, he lives in a small town, he may be covered under the ADA because of the smaller number of other jobs available in that area. Under the Title I regulations, where two people have identical physical characteristics but live in different locations, one may be held "disabled" and thus covered under the ADA and the other may not. Aside from leading to incongruous results, this provision allows employers in metropolitan areas to engage in conduct that may be held discriminatory when engaged in by employers in less populated areas.

II. CHECKING SEVERAL ISSUES

John Brown is a professional hockey player with the New York Swingers. He is injured in a car accident and loses a kidney. Otherwise, he recovers completely. After the accident, the owner of the Swingers, Kathy Baldwin, tells John that she is releasing him from the team for his own safety. Hockey is a rough game, and the likelihood that John could be hit in the kidney area by a puck, hockey stick, or another player is great. The possibility that John could injure his sole remaining kidney — and die as a result — worries her. Kathy offers, however, to hire John as one of the team's four assistant coaches.

John refuses to leave the team. He explains that he fully understands the risk to his safety if he continues to play hockey. Playing hockey is the most important thing in his life and, having weighed the pros and cons, worth whatever risk he might face. John has no interest in coaching; he likes to *play,*
not devise strategy. Moreover, the salary of an assistant coach is considerably less than the salary of a good hockey player. Kathy refuses to back down and releases him from the team. John files suit under the ADA.

This hypothetical case raises several questions: Is John disabled within the meaning of the Act? What is the scope of the safety defense? And, how broad is the employer's obligation to reassign an employee with a disability?

A. DISABLED UNDER THE ADA?

As with the previous case, the threshold determination is whether John is disabled within the meaning of Title I and thus covered by the Act. Since John's loss of a kidney has not substantially limited any of his daily life activities, John is only covered if he is substantially limited in his ability to work. Is John "disabled" within the meaning of the ADA because Kathy prohibits him from playing hockey?

Two examples from the interpretive guidelines to the Title I regulations suggest not. The first example involves a pilot who is refused employment as a commercial airline pilot because he has a minor vision problem, but who could be employed as a commercial airline co-pilot or as a pilot for a courier service. The second involves a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball. According to the guidelines, neither individual is "substantially limited in the major life activity of working," because both "are only unable to perform either a particular specialized job or a narrow range of jobs." Under this interpretation, John would not be covered under Title I because he is only precluded from performing a particular specialized job — playing hockey.

Since John has no disability that would actually impair his ability to play hockey, but rather his employer merely considers him as having an impairment, his situation should be analyzed under the "regarded as" prong of the definition of a disabled person. The EEOC's narrow interpretation of "major life activity" appears to eviscerate this prong. Under the EEOC's

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19 29 C.F.R. app. § 1630.2(j).
20 Id.
21 Id.
22 29 C.F.R. § 1630.2(g)(3).
regulatory interpretation, employers may be free to discriminate at will when the result would be to preclude individuals from working in only a specialized or narrow class of jobs.

Suppose, for example, that John was not a hockey player, but a litigation attorney whose law firm fired John "for his own good" based on the purely mythical belief that a person with one kidney should not stand on his feet in the courtroom for long periods of time or engage in frequent stressful travel. Because John has been precluded from working only as a litigation attorney — a specialized job under the EEOC's interpretation of the regulations — the law firm may discriminate against John with impunity. A more logical interpretation would be that John falls within the statutory definition of a disabled person because his employer regards him as being substantially limited in his ability to work at his chosen career, for which he has trained for many years, when in fact he is not so limited. In the EEOC's view, however, this interpretation is incorrect.

B. SAFETY DEFENSE

Assuming, arguendo, that John meets the definition of a disabled person, a more significant question arises. Does Kathy violate Title I by firing John for his own safety? Title I of the ADA provides employers with a "safety defense." While an employer cannot discriminate against qualified disabled individuals, an individual with a disability is not qualified for a job if that individual poses a direct threat to the health or safety of others in the workplace and such threat cannot be eliminated by reasonable accommodations. Is John a qualified person with a disability, thereby protected under the ADA? Here it is not contended that John poses a threat to others, but that he poses a threat to himself.

The EEOC's Title I regulations have expanded the Title I safety defense by providing that a individual with a disability is not qualified for a job if that individual poses a direct threat to

23 Presumably, if John were precluded from working as a lawyer in any capacity (as opposed to being precluded from working as a litigation attorney), the class of job(s) from which John was excluded would be sufficiently broad to render John substantially limited in his ability to work.

24 Telephone conversations between the author and EEOC attorneys.


26 42 U.S.C. § 12113(a)-(b).
the individual's own safety, as well as to the safety of others.27 Since this regulation exceeds the express language of the Act, an early challenge as to the validity of this regulation is virtually certain.

From a policy perspective, the regulation should be invalid. A basic premise of the ADA is to eliminate "overprotective rules and policies" that have the effect of discriminating against persons with disabilities.28 The legislative history of the Act is replete with statements evidencing congressional intent to prohibit paternalistic attitudes and actions that serve to remove people with disabilities from the mainstream of society.29 Allowing employers to refuse to hire an individual with a disability because his disability would cause a threat to the individual's health or safety could encourage the very type of paternalistic attitudes that the ADA is intended to eradicate. Shouldn't John be able to decide for himself whether he wishes to continue to play hockey?

Doctrinally, the EEOC's paternalistic safety regulations arguably contravene legal principles recently expressed by the Supreme Court examining provisions of Title VII of the Civil Rights Act.30 These provisions are the basis for the enforcement section of Title I of the ADA.31 In United Automobile Workers of America v. Johnson Controls, Inc.,32 the Supreme Court considered Johnson's policy barring all fertile women from jobs involving actual or potential lead exposure that exceeded standards set by the Occupational Safety and Health Administration. The Court found that sex-specific fetal protection policies violated Title VII's prohibition against discrimination on the basis of sex or race.

27 29 C.F.R. § 1630.15(b)(2).
29 See H.R. REP. No. 485, pt. 2, supra note 5, at 41 ("The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of 'good intentions'.") (quoting testimony of Arlene Mayerson before House Subcommittees on Select Education and Employment Opportunities), reprinted in 1990 U.S.C.C.A.N. 303, 323; H.R. REP. No. 485, pt. 2, supra note 5, at 56 ("The determination that an individual with a disability will pose a safety threat to others... must not be based on... patronizing attitudes... ."), reprinted in 1990 U.S.C.C.A.N. 303, 338.
Title VII permits an employer to discriminate on the basis of sex in "those certain instances" where sex "is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of [the employer's] particular business or enterprise." Johnson claimed that its fetal protection policy fell within a judicially recognized "safety exception" to the BFOQ test. The Court disagreed. The Court held that the safety exception "is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." For similar reasons, the Court held that Johnson's policy did not meet the criteria of the BFOQ test. Under that test an employer may only make distinctions based on gender when such distinctions "relate to ability to perform the job."

The enforcement powers of Title I of the ADA are premised on, and patterned after, Title VII of the Civil Rights Act of 1964. Title I provides that the powers, remedies, and procedures set forth in Title VII are available under Title I. If the BFOQ and safety defenses under Title VII apply only to instances in which an employee's sex actually interferes with the employee's ability to perform the job, the safety defense under Title I of the ADA (except as otherwise provided in the ADA itself) should similarly be held to apply only to those instances in which an employee's disability actually interferes with the employee's ability to perform the job.

In Johnson Controls, the Court also addressed the concern that Johnson Controls might be exposed to greater tort liability for potential injury to a fetus. The majority noted that if the law precludes policies that discriminate on the basis of a protected category, the employer fully informs employees of any risk, and the employer acts in a non-negligent fashion, a court would have a remote basis for finding tort liability. The same should be true under Title I of the ADA. If an employer abides by Title I's nondiscrimination mandate, complies with all safety regulations applicable to the employer's business, informs disabled employees of potential risks to their safety, and acts in a non-negligent fashion, a court should not hold the employer liable in tort if a disabled employee is injured on the job.

34 111 S.Ct at 1205.
35 Id. at 1206.
36 Id.
Congress intended that the ADA "provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women," incorporating by reference rights and remedies afforded women and minorities under Title VII of the Civil Rights Act of 1964. For this reason, Congress rejected an amendment to the ADA offered by Congressman Sensenbrenner that would have denied disabled people the protections given to minority groups under revisions to Title VII proposed in the Civil Rights Act of 1990 — protections such as the right to damages for employment discrimination.

Under Title VII, an employer may not refuse to hire a female applicant based on the belief that a job poses a risk to the safety of the woman, unless the woman is unable to perform the job. It should be equally impermissible for an employer to refuse to hire a disabled applicant based on the belief that a job poses a risk to the safety of a person with a disability, unless that individual was unable to perform the job. Such paternalistic attitudes are implicitly prohibited by the ADA.

Assuming, arguendo, that the EEOC's safety defense regulation is upheld, the question becomes whether Kathy's decision to fire John falls within that defense. The regulations define a "direct threat" to the health or safety of the disabled individual or others as "a significant risk of substantial harm... that cannot be eliminated or reduced by reasonable accommodation." A significant risk is defined as one that causes a "high probability of substantial harm." An employer determining whether a particular individual's disability would cause a high probability of substantial harm to the individual or others must consider such factors as:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;

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40 See 136 CONG. REC. H2611-23 (daily ed. May 22, 1990) (Senate discussion of, vote on, and rejection of the Sensenbrenner Amendment to the ADA).
41 29 C.F.R. § 1630.2(r).
42 29 C.F.R. app. § 1630.2(r).
(3) The likelihood that the potential harm will occur; and
(4) The imminence of the potential harm.\(^\text{43}\)

This assessment must be "strictly based" on objective evidence, including valid medical analyses and individualized factual data.\(^\text{44}\) A "safety risk" determination must be based on evidence of a specific risk to John. The ADA rejects the broad notion that a particular disability may pose a statistically significant risk of harm is sufficient ground to hold the safety defense satisfied.\(^\text{45}\)

Arguably, the safety defense is satisfied in this situation. The risk of injury to John’s remaining kidney occurs immediately upon his playing hockey and will last for as long as he continues to play. The severity of the potential harm is great — it could lead to John’s death. And, a specific risk of harm is at issue. John’s strongest argument is that the potential harm is not "likely" to occur and thus the risk is not "significant." This is a factual determination to be left to the courts. The medical probabilities are too uncertain to predict a court’s conclusion. If the court were to uphold the employer’s decision, however, the result would be to deny John the right to make fundamental choices about his own life that non-disabled people, such as fertile or pregnant women, have the unequivocal right to make for themselves.

C. EMPLOYER’S OBLIGATION TO PROVIDE ALTERNATIVE EMPLOYMENT

The last issue raised by this hypothetical is the obligation of the employer to provide another position. Assuming that John is held to be disabled, and that his employer’s decision to terminate his employment as a hockey player is upheld as a non-discriminatory exercise of the safety defense, what is the employer’s obligation to place John in another job? Is any such

\(^{43}\) 29 C.F.R. § 1630.2(r). This regulation simply codifies the standard set forth by the Supreme Court for dealing with the safety defense under § 504 of the Rehabilitation Act. See School Board of Nassau County v. Arline, 480 U.S. 273, 287-88 (1987).

\(^{44}\) 29 C.F.R. app. § 1630.2(r).

obligation satisfied by Kathy's offer to hire John as an assistant coach?

The EEOC's Title I regulations list "reassignment to a vacant position" as a possible accommodation that might be made for an employee who is unable to perform the employee's current position due to a disability. Such reassignment should be to an "equivalent position," in terms of pay and status, if such a position is vacant or will become vacant "within a reasonable amount of time." An employer need not create a job, nor bump another employee from a job, to accommodate an employee with a disability. When an equivalent position is not available, the employer may reassign an employee to a lower graded position at a lower salary. According to the regulations, an employer is not required to promote an individual with a disability as an accommodation.

Under the regulations, Kathy probably complied with the ADA by offering to "reassign" John to the position of assistant coach. Presumably, no "equivalent jobs" were available for which John was qualified. Even if the position of head coach were available, it is unlikely that John would be qualified given his lack of prior coaching experience.

III. CONNECTING REASONABLE ACCOMMODATIONS TO PERSONAL NEEDS

Susan Jones is a quadriplegic, paralyzed below the shoulder level. A large Wall Street law firm, Katsiff, Goldman & Troisi, hired her as a telephone operator. As a reasonable accommodation the firm purchased voice activated computer equipment that will allow Susan to perform the duties of her position. Due to her disability, Susan requires assistance during the work day with toileting and eating. As a further accommodation Susan requests that the law firm provide an employee to assist Susan with those tasks. The law firm refuses to do so. Susan files suit under the ADA.

The ADA mandates that employers provide "reasonable accommodations" that make it possible for an employee with a

46 29 C.F.R. § 1630.2(o)(2)(ii).
47 29 C.F.R. app. § 1630.2(o).
48 Id.
49 Id.
disability to perform the employee's job. This hypothetical raises the question of the scope of reasonable accommodations required under Title I. To what length must employers go to assist employees with disabilities? Is Katsiff, Goldman & Troisi required to provide Susan with someone who can assist with her personal needs during the work day?

What constitutes a "reasonable accommodation" in any given case will not always be clear. The ADA and the EEOC regulations anticipate common situations and list suggested accommodations. That list is intended to provide guidance as to what is meant by a reasonable accommodation. Susan's request is not among the accommodations listed. The regulations, however, make clear that the list is not all-inclusive and that "[t]here are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in [the] listing."

The interpretive guidelines to the regulations only briefly address the issue of personal assistants. The guidelines note that in addition to the regulatory list of suggested reasonable accommodations, "[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation." The explanatory section to the regulations notes that the interpretive guidelines "make clear that it may be a reasonable accommodation to provide personal assistants to help with specified duties related to the job." Yet, toileting and eating are not specified duties related to the job, so the regulations do not specifically address Susan's needs.

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51 The regulations suggest that, in appropriate situations, the following accommodations might be reasonable: (1) making existing facilities readily accessible to and usable by people with disabilities; (2) job restructuring (by reallocating or redistributing non-essential job functions); (3) development of part-time or modified work schedules; (4) reassignment to a vacant position (when accommodation within an employee's current job cannot satisfactorily be made); (5) acquisition or modification of equipment or devices; (6) modification or adjustment of examinations, training materials or policies; and (7) provision of qualified readers or interpreters for blind or deaf employees. 29 C.F.R. § 1630.2(o)(2); See also 42 U.S.C. § 12111(9)(A)-(B) (Supp. II 1991).

52 29 C.F.R. app. § 1630.2(o).

53 Id.

Arguably, because the EEOC specified assistance with *job-related* duties, providing personal attendants for non-job-related duties would exceed the reasonable accommodation requirement. The more logical conclusion, however, is that this question must be decided on a case-by-case basis, in accord with the statutory and regulatory factors for determining whether a requested accommodation constitutes an undue hardship to the employer. The ADA focuses on an individualized inquiry to determine whether a requested accommodation is reasonable.

Resolution of Susan's case should hinge on whether it would constitute an undue hardship for Katsiff, Goldman & Troisi to provide her with the personal assistance she requires. If the firm has to hire another full-time employee just to assist Susan, that might well constitute undue hardship. But, perhaps the firm could accommodate Susan by having another employee (e.g., another telephone operator, a secretary, or a clerk) perform those tasks for a relatively small increase in salary. If that alternative is unsuitable and if it is determined that hiring a full-time personal assistant constitutes an undue hardship to the firm, the firm and Susan might agree to share the cost of an attendant. The firm is required to pay that portion of the attendant's salary that would not constitute an undue hardship; Susan could choose to pay the remainder. An employer is only excused from providing that portion of an accommodation that would constitute an undue hardship.

IV. CONSTRUCTING THE UNDUE HARDSHIP DEFENSE

Ginny Johnson, who uses a wheelchair, works for a construction company. She applies for a transfer to serve as a site manager for a three block project the company is building and requests that the construction site be made wheelchair accessible. The construction company refuses to do so claiming that such an accommodation would constitute an undue hardship. The company argues that since the terrain and structure of the site will be constantly changing as construction progresses, structures to permit wheelchair access would have to be continually rebuilt. Ginny sues under the ADA.

55 See 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (Supp. II 1991); 29 C.F.R. app. § 1630.15(d); See also discussion infra part V.
56 29 C.F.R. app. § 1630.2(p).
The issue involves the scope of the "undue hardship" defense under Title I.\textsuperscript{57} Ginny contends that the company can afford the cost of making the construction site accessible; therefore, the undue hardship test is not satisfied. The company argues that requiring continuing alterations to ensure that the site is wheelchair accessible would constitute a fundamental alteration in the nature of a temporary construction site.

The ADA sets forth four criteria to determine whether an accommodation constitutes an undue hardship:

(i) the nature and cost of the accommodation needed . . . ;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.\textsuperscript{58}

The ADA does not specifically provide a separate "fundamental alteration" defense to the provision of reasonable accommodations. However, the Supreme Court found that this type of defense was incorporated under similar language in Section 504 of the Rehabilitation Act.\textsuperscript{59} Under that defense, an accommodation is not reasonable if it would require an employer to fundamentally alter its business or program. Arguably, the statutory instruction to consider "the impact otherwise of such

accommodation upon the operation of the facility"\textsuperscript{60} reflects the same principle. Moreover, the EEOC's Title I regulations add a fifth factor to be considered when deciding whether an accommodation would constitute an undue hardship to the employer: "[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."\textsuperscript{61}

The EEOC interprets these five factors as creating a "fundamental alteration" defense.\textsuperscript{62} Thus, the interpretive guidelines to the regulations provide that "the concept of undue hardship is not limited to financial difficulty . . . [but] refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."\textsuperscript{63}

This interpretation is consistent with the legislative history of the Act.\textsuperscript{64} In accord with this principle, the undue hardship test should be satisfied in our hypothetical, since maintaining wheelchair access would fundamentally alter the nature of a temporary construction site. This is a temporary site, to which permanent alterations cannot be made.\textsuperscript{65}


\textsuperscript{61} 29 C.F.R. § 1630.2(p)(2)(v). The regulations make clear, however, that, with respect to the impact on other employees, an employer could not demonstrate undue hardship by showing that the provision of the accommodation would have a negative impact on the \textit{morale} of other employees; rather, the impact must be on the ability of other employees to perform their job duties. 29 C.F.R. app. § 1630.15(d).

\textsuperscript{62} 29 C.F.R. app. § 1630.2(p).

\textsuperscript{63} Id.


V. INVESTIGATING "OTHERWISE QUALIFIED"

Tom Rogers is a rehabilitated drug abuser. He has not used drugs for five years. During his period of drug use, he was convicted on two charges of illegal narcotics possession. Tom applies for a job as a campus police officer at Utopia University and is rejected because a University policy precludes hiring as police officers people who have been convicted of a crime. Tom files suit under the ADA. Tom contends that as a rehabilitated drug abuser he is covered by the Act and that the University's policy impermissibly discriminates against him.

Tom clearly meets the threshold test and is considered a disabled individual under the ADA. The Act expressly provides that rehabilitated drug abusers are protected from employment discrimination on the basis of that disability. However, Title I only protects "otherwise qualified" individuals with disabilities. Thus, the question: Is Tom otherwise qualified to be a campus police officer?

An individual with a disability is not otherwise qualified for a job unless he or she satisfies the personal and professional attributes of the job. These attributes include the requisite "skill, experience, education, physical, medical, safety and other requirements ...." As a prerequisite for a job as a Utopia University police officer, an applicant must have no criminal convictions. While this policy has a discriminatory effect on rehabilitated drug addicts, it does not violate the ADA if, and only if, the selection criteria is "job-related" and "consistent with business necessity." The requirement that police officers, who are hired to enforce the law, must themselves have refrained from criminal activity (so that, for example, their own credibility is not suspect or subject to impeachment) is likely to be held job-related and consistent with business necessity. Tom should not be found otherwise qualified for the job and, therefore, should lose his suit.

A more troubling scenario is a University policy that simply prohibits former drug abusers from serving as police officers

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66 42 U.S.C. § 12114(b)(1),(2) (Supp. II 1991); See also 29 C.F.R. § 1630.3(b)(1),(2).
68 29 C.F.R. § 1630.2(q).
69 29 C.F.R. § 1630.10.
regardless of whether they have been convicted of a crime. Since former drug addiction is a protected status under the ADA, the University may have violated the ADA by discriminating solely on that status.

Imagine another applicant, Joyce Burns, who is also a rehabilitated drug abuser. She became addicted to prescription drugs taken for an injury. Joyce never abused illegal drugs, yet she was a drug abuser. Under this version of the University's policy, Joyce could not obtain a job as a police officer. Assuming that Joyce is otherwise qualified for the job, the University's refusal to waive its policy appears to violate Title I of the ADA. Just as Title I precludes the University from refusing to hire recovered alcoholics as police officers,70 it should preclude Utopia from refusing to hire persons who were formerly addicted to legal drugs while under medical supervision.

If, however, the University's policy precluded hiring police officers who were formerly addicted to illegal drugs, or who were formerly addicted to legal drugs listed as "controlled substances" — taken illegally without prescription and absent supervision of medical care personnel71 — the situation is more akin to our initial hypothetical where Tom was denied employment based on prior criminal convictions. Although refusal to hire is not premised on conviction of a crime in this instance, it is premised on past illegal activity, an ethical issue that bears directly upon the integrity of the University's police department. The EEOC's Technical Assistance Manual For The Americans With Disabilities Act notes that a law enforcement agency might be able to show that prohibiting persons with a history of illegal drug abuse from serving as police officers satisfies the business necessity test because, "such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case."72 However, as the EEOC points out, the

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70 Interestingly, Title I prohibits an employer from refusing to hire an alcoholic who currently uses alcohol, if the employee is able to perform the essential functions of the job despite his or her alcoholism. See MANUAL, supra note 65, § 3.9.

71 Illegal drug abusers under the ADA are those who use, possess or distribute drugs that are unlawful under the Controlled Substances Act, 21 U.S.C. § 812 (1988). 42 U.S.C. § 12210(d) (Supp. II 1991). The Controlled Substances Act makes it unlawful to use illegal drugs or to illegally use prescription drugs that are "controlled substances" by virtue of their potential for abuse.

72 MANUAL, supra note 65, § 8.7.
business necessity test might not be satisfied if an applicant with a history of illegal drug abuse "could demonstrate an extensive period of successful performance as a police officer since the time of drug use."\(^7^3\)

VI. ESSENTIALLY FUNCTIONING AT HOME

Ann Thomas has been a computer programmer with Ursa Corporation for three years. The company has two thousand employees at the facility where Ann works, including twenty-five programmers. Two years ago Ann was diagnosed as having multiple sclerosis. Her illness has progressed and she can no longer commute to work without endangering her health. After providing Ursa Corporation with medical documentation of her need to work at home, Ann requests that the company install a computer in her house and allow her to work at home. The company refuses. Ann files suit under the ADA.

Ursa's policy requires that all employees work in the office. The company wants its workers in one place, where they can engage in face-to-face contact with supervisors and co-workers, where they may be easily reached for spontaneous communication, and where they are part of the "work community."

Ann contends that the company objectives do not require an inflexible worksite policy. At home, she could easily be reached by telephone and via notes sent by a messenger who would transport Ann's work to and from her home. Her communication with supervisors has been minimal and has primarily involved the delivery of work assignments and the receipt of completed work. She has had little communication with co-workers to date. Finally, her workload can be monitored just as easily if she works at home. The evidence supports Ann's contentions.

At issue is whether Ann is still qualified for her job now that she can no longer come to the office. Does the ADA require employers to accommodate employees to this extent? If Ann were a prospective employee who was applying for a job with Ursa Corporation would she be found "otherwise qualified" for the job if she could not satisfy the attendance requirements of the position? Presumably, the employer would have the same obligations with respect to this issue whether Ann were a new or old employee.

\(^7^3\) Id.
Under Title I, Ann is only otherwise qualified for the job if she is able to perform the job's "essential functions."74 Whether Ann is otherwise qualified, therefore, depends on whether attendance at the office is an essential function of her job. The term "essential functions" is defined in the EEOC's Title I regulations as "job tasks that are fundamental and not marginal."75 The legislative history of the ADA explains that the term "essential functions" refers only to tasks to be performed and not to the manner in which they are performed. The House Judiciary Report explains that in a job requiring the use of computers, "the essential function is the ability to access, input, and retrieve information from the computer."76 Thus, it is not essential that people be able to visually read the screen or use their hands to type on the keyboard if adaptive equipment is available to allow people with impaired vision or no arms to control the computer and access information.77 In accord with this reasoning, it is arguable that Ann can perform the essential functions of her job as a computer programmer regardless of whether she works at home or at the office. Is this a satisfactory resolution of the matter?

At least two courts have considered Rehabilitation Act claims dealing with employee requests to be allowed to work at home. In Koffler v. Hahnemann University,78 a medical school professor, whose job also entailed administrative responsibilities, was precluded by his disability from being present on campus on a regular basis. Dr. Koffler, however, could be present on campus to teach and supervise research. He requested that the university accommodate him by eliminating the alleged ten percent of his job duties that he would be unable to perform due to his absence from campus. Since Dr. Koffler was not able to satisfy the administrative portion of the job requirement due to his absence, the court held that he could not perform the essential tasks of his job if he was not present on campus.79

75 29 C.F.R. § 1630.2(r).
77 Id.
79 Id.
In Langon v. U.S. Department of Health and Human Services, a computer program analyst became, like Ann, unable to commute to her job and requested that her employer allow her to work at home. The district court held that the plaintiff had not provided adequate medical documentation of the need to work at home and, therefore, had not established the need for the requested accommodation. On appeal, the District of Columbia Circuit held that the district court erroneously granted summary judgment in favor of the employer. The court remanded the case holding that factual disputes existed as to: (1) whether the plaintiff had provided her employer with sufficient information about her disability to invoke her employer's existing work-at-home policy; (2) whether the plaintiff could perform her job at home; and (3) whether allowing the plaintiff to work at home would impose an undue hardship on the employer.

Neither of these cases helps our analysis. In our hypothetical situation, Ann is able to perform all of her current job tasks at home, she has established the medical necessity to work at home, and her employer has no existing work-at-home policy. And, nothing in the EEOC regulations dealing with "essential functions" reveals whether attendance at the office is, in and of itself, an essential function of the job.

An alternative analysis of the issue may be to investigate whether it would constitute an undue burden on the company to allow Ann to work at home. Assuming minimal expense and administrative effort in providing the accommodation, so that no undue hardship results, would it constitute a fundamental alteration of the company's program to allow Ann to work at home? In the context of one employee, a credible argument can be made that it would not.

Neither the "undue hardship" nor "essential function" defenses of the ADA appear to be directly on point in this situation. While solid arguments can be mustered for the proposition that neither defense would apply in Ann's case, whether the ADA should be interpreted to compel an employer to eliminate the requirement that employees be present at the workplace is questionable. It seems likely that courts would

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80 749 F. Supp. 1 (D.D.C. 1990), aff'd in part and rev'd in part, 959 F.2d 1053 (D.C. Cir. March 31, 1992) (affirming judgment that claim that Department's failure to accommodate which led to denial of promotion request and ultimate termination did not constitute a separate violation of Rehabilitation Act).

81 Langon, 959 F.2d 1053.
stretch the regulatory language and hold either that attendance at the workplace was an essential function of the job or that it would constitute a fundamental alteration of the company's business to require it to allow Ann to work at home.

CONCLUSION

The six hypotheticals presented in this article illustrate some of the "hard cases" that are likely to arise under Title I of the ADA. Cases will frequently involve important policy questions, as well as factual questions, that cannot necessarily be resolved by looking to the EEOC's regulations. It will be interesting to watch as the courts wander through the Title I regulatory maze and try to interpret the regulations in accord with the spirit and purpose of the ADA.