Redefining the Air Force's Interactive Process and Duty to Accommodate in Commuting Cases under the Rehabilitation Act after the Americans with Disabilities Act Amendments Act

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Disclaimer

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Abstract

Redefining the Air Force's Interactive Process and Duty to Accommodate in Commuting Cases under the Rehabilitation Act after the Americans with Disabilities Act Amendments Act

The Americans with Disabilities Act Amendments Act (ADAAA) went into effect in 2009. Under the ADAAA, the definition of what constituted a disability was substantially broadened and therefore, disability discrimination protection was enlarged. The changes brought by the ADAAA apply to disability discrimination lawsuits under both the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. The key issues in contention during a disability discrimination lawsuit have switched from whether a plaintiff is disabled under the law, to the interactive process under the employer's reasonable accommodation duty. The shift has encouraged employers to review and retool their reasonable accommodation procedures in order to be in compliance with the law and to provide a solid defense in any future lawsuit.

This thesis reviews and critiques the United States Air Force Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures. In addition, it is recommended that the Air Force update its procedures and model them after the "committee centered" United States Postal Service (USPS) reasonable accommodation procedures. The advantages and disadvantages of applying the USPS model to the Air Force are explored in relationship to defending the Air Force in an employment discrimination lawsuit. Once an employer properly responds and shifts the way it defends disability

discrimination lawsuits, an employer must then realize the new battleground of expanding an employer's duty to accommodate.

The ADAAA reinstated a broad view of disability and the expanded coverage of protection under the law only enlarged an employer's duty to accommodate. A movement to further enlarge an employer's duty to accommodate to areas outside the workplace must be recognized by attorneys for the defendant employer. These areas include parking spaces, transportation reimbursement, shift changes, modified work schedules and work-at-home programs. Generally speaking, an employer's duty to accommodate should only be extended to areas and programs within the workplace where the employer has control. Even if the employer has control within the workplace, all workplace accommodations must still undergo an examination as to their reasonableness and the creation of an undue hardship before an employer has a duty to accommodate.

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I. INTRODUCTION

Depending on where you live, commuting can be a hassle or even worse, a nightmare. United States census data from 2009 ranks "driving an automobile alone" as the number one way to commute.[1] Other methods of carpooling, public transportation, walking and taxi round out the top five ways people in the United States of America commute to work each day.[2] Salt Lake City, Buffalo, Rochester, Milwaukee and Albany, in order of ranking, were at the top of Forbes Magazine's best and worst cities for commuters.[3] Coming in at the bottom of Forbes' list, with dismal ratings, were Detroit at number fifty-nine followed by number sixty, Tampa/St Petersburg/Clearwater Florida area.[4]

If you ask people about their daily commute, you are sure to get the typical gripes about traffic, weather, cost of gas and other people's driving techniques. However, you will also hear a steady chorus indicating how lucky a person feels to even have a job in today's economy. With an unemployment rate over nine percent in January 2011, people will still exchange bad driver jokes around the water cooler and/or tolerate the hour long commute in order to live in the suburbs for the sake of their family.[5] At the moment,

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[1] U.S. CENSUS BUREAU, http://factfinder.census.gov/ (follow "Data Sets" to "American Community Survey"; select "2009 American Community Survey 1-Year Estimates" and click on Selected Population Profiles" followed by "show Results" hyperlink).

[2] *Id.*

[3] Francesca Levy, *Best And Worst Cities For Commuters*, DAILY GRIND (Feb. 16, 2010, 06:00 AM EST), http://www.forbes.com/2010/02/12/best-worst-commutes-lifestyle-mass-transit_chart.html.

[4] *Id.*

[5] *March 2011 Economic News Release of Employment Status of the Civilian Population by Sex, Age, and Disability Status*, UNITED STATES DEPARTMENT OF LABOR (Apr. 01, 2011), http://www.bls.gov/news.release/empsit.t06.htm.

people realize how daunting the job market is and that the opportunity of employment naturally brings commuting issues.

For the 54 million Americans with disabilities, unemployment and commuting issues are even worse.[6] According to a recent survey, there is still an economic employment gap for Americans with disabilities.[7] The unemployment rate for disabled individuals in January 2011 was 13.6%.[8] While there are programs for disabled individuals, such as social security, which discourage people from entering the workforce, there is also real world employment discrimination that occurs against disabled individuals.[9] This employment discrimination creates barriers for disabled individuals from entering and working in the workplace.[10]

Even before a disabled individual potentially collides into a workplace barrier, he or she will face transportation barriers in his or her daily commute. Imagine if you were disabled and had to commute by relying on public transportation or finding an available handicapped parking spot near your workplace. The best case scenario for a disabled individual is to live in a larger city with a well developed public transportation system. But even larger cities equipped with the infrastructure still have transportations issues.

For example, if you live in the Washington D.C. area and use Metrorail, chances are you will see at least one out of service escalator on your daily commute. In addition,

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[6] Suzanne Robitaille, *Americans with Disabilities Act turns 20*, HEALTHDAY (July 26, 2010, 7:39 PM), http://www.usatoday.com/news/health/2010-07-26-disabilities-act_N.htm.
[7] *Id.*
[8] *March 2011 Economic News Release of Employment Status of the Civilian Population by Sex, Age, and Disability Status*, *supra* note 5.
[9] Robitaille, *supra* note 6.
[10] *Id.*

once inside a station, you will hear reoccurring announcements over the public address system about all the stations in the rail system that have out of service elevators. Elevator and escalator outages are an inconvenience to most commuters but could be a genuine barrier for a disabled person. The Metrorail system has a total of 588 escalators.[11] A current study on outages, ordered by Metro's chief executive, reported on average that each escalator breaks down every seven to eight days.[12] Commuters on April 28, 2011 using Metrorail faced 93 out of 588 escalators out of service as well as 9 out of 237 elevators out of service.[13]

How exactly is a disabled person confined to a wheelchair in the Washington D.C. area supposed to commute to work? If an individual goes on the Washington Metropolitan Area Transit Authority's website, he or she can peruse a whole tab labeled "Accessibility" that will help educate a customer with disabilities about using the Metrorail system.[14] Under the "Accessibility" tab, MetroAccess is described as a program that delivers door-to-door paratransit service for people who cannot use public transportation due to a disability.[15] The tab also has a link where an individual can sign

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[11] Ann Scott Tyson, *Metro escalator problem growing, report finds*, THE WASHINGTON POST (Feb. 8, 2011, 9:57 PM),http://www.washingtonpost.com/wpdyn/content/article/2011/02/08/AR 2011020803148.html.

[12] *Id.*

[13] METRORAIL ELEVATOR & ESCALATOR SERVICE STATUS, http://www.wmata.com/rider_tools/ metro_serv ice_status/elevator_escalator.cfm? (last visited Apr. 28, 2011).

[14] METRORAIL ACCESSIBILITY, http://www.wmata.com/accessibility/ (last visited Mar. 6, 2011).

[15] METRORAIL ACCESSIBILITY - METROACCESS, http://www.wmata.com/accessibility/metroacess_service/ (last visited Mar. 6, 2011).

up to receive elevator outage alerts.[16] Armed with the elevator outage information, a person then must navigate around out of service elevators on his or her daily commute.

The Metrorail website explains that when a customer's destination station has an elevator outage, he or she can request a shuttle service.[17] A customer who relies on elevators can also take advantage of Metrorail's center-platform stations to circumvent out-of-service elevators.[18] The website encourages customers to use the center-platform method, if available, over the shuttle service due to time saved.[19] By using the shuttle service, the customer either must ride past the desired station or get off the train one stop before the desired station and then request shuttle service to the desired station.[20]

"It all boils down to extra time if you are handicapped and using either Metrorail, a bus or MetroAccess" according to disabled customer Frank Rawlings.[21] Mr. Rawlings is a wheelchair bound customer who has used all three services and says he always allows an additional 45 minutes to one hour in case there are delays with MetroAccess or elevator problem.[22] In 2006, the MetroAccess program had 1,445,620 passenger trips.[23] The biggest complaint of MetroAccess customers in 2006 was late pickups or even no-

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[16] METRORAIL ACCESSIBILITY, *supra* note 14.
[17] METRORAIL CENTER PLATFORM STATIONS, http://www.wmata.com/rail/elevators_escalators/center_pl atform_stations.cfm (last visited Mar. 6, 2011).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Interview with Frank Rawlings, Disabled Metro Rider, in Arlington, Va. (Oct. 6, 2010).
[22] *Id.*
[23] PLANNERS COLLABORATIVE, INC, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ADA COMPLEMENTARY PARATRANSIT SERVICE COMPLIANCE REVIEW 8 (Federal Transit Administration, December 4-6, 2006).

show pickups.[24] On top of delays, customers commented on the difficulty in getting through to an operator to request a MetroAccess ride.[25] Hold times of 15 minutes or longer were not unusual according to the 2006 Federal Transit Administration report.[26]

The discussion of Mr. Rawlings' experience assumes an individual is successful in arriving at a metro station in order to catch a Metrorail train. Such an assumption is not safe if the disabled person catches a train out of the Branch Ave Metrorail Station. At the Branch Ave Metrorail Station, there is the added problem of finding an available handicapped parking space.[27] On the morning of 20 September 2010, the last handicapped parking space was filled at 4:46a.m.[28]

That same day, 20 September 2010, at least two people admitted to a Fox 5 News reporter in the parking lot that they were using someone else's handicapped placard.[29] One of the confessors was a Navy enlisted member in his Class A uniform. The Navy member stated he was using his wife's handicap placard.[30] Other people confronted by the reporter who would not disclose their disability, stated they had no problem with

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[24] *Id.* at 11.
[25] *Id.* at 31.
[26] *See id.* at 31. Customers of MetroAccess commented on how it was difficult to get through to call-takers at certain times of the day. Late afternoon was recorded as the worst time to call. However, the average number of call-takers on duty decreases after 2p.m. The longer hold time was attributed to the fact that the peak times for incoming calls did not match peak staffing levels for MetroAccess. The transit report recommended that WMATA increase its call-taker staff coverage during the late afternoon hours and stagger the lunch breaks of the call-takers to meet peak call times. *Id.* at 35.
[27] Tisha Thompson, *Fox 5 Investigates: Metro Handicap Parking*, FOX 5 DC (Sept. 21, 2010, 12:20 AM), http://www2.myfoxdc.com/dpp/news/investigative/fox-5-investigates-metro-handicap-parking-092010.
[28] *Id.*
[29] *Id.*
[30] *Id.*

people parking in handicapped spaces when the person did not need them or was not disabled.[31] One other person moved her car out of a handicapped spot once she was confronted by the television reporter recording for FOX 5 News.[32] While at least one police officer has voiced his frustration with the problem at Branch Ave involving the handicapped parking spaces, the police department in the jurisdiction does not conduct sting investigations on handicapped parking like other jurisdictions.[33]

Some frustrated civilians realized that "there aren't enough police officers to issue tickets" so they launched HandicappedFraud.org.[34] The website is a community based reporting system of handicapped placard abuse and fraud.[35] The website's founder hopes to change people's bad habits of parking in handicapped spots and bring awareness to the problem.[36] The website now enlists the help of people across the country to record

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[31] *Id.*

[32] *Id.* Following the report that aired on the newscast, the FOX 5 News Network posted the report in both a video and transcript format on its website. Numerous people posted comments on how they believed it was inappropriate for the reporter to question individuals about whether or not they were disabled. One viewer thought the questions from Tisha Thompson were equally as offensive as people abusing the parking spaces. Another viewer commented on the fact that some disabilities are hidden or flare up for only a couple of days, a week or a month. In addition, there were several comments about the Navy Seaman who used his wife's handicapped placard. One retired military person wrote in scolding the Seaman for his stupidity and called for the Seaman's commander to demote the individual.

[33] *Id.*

[34] HANDICAPPEDFRAUD.ORG, http://www.handicappedfraud.org/index.php?mod=about (last visited Feb. 21, 2011).

[35] *Id.*

[36] *Id.* The founder of the website details his personal experience of being a caregiver to his severely handicapped brother and his handicapped grandfather. The founder notes how it became a reoccurring situation for him to have to drive endlessly in circles looking for an open handicapped parking space and then observe able body people enter or exit from the car in a spot. One day he recounts seeing a woman in a red corvette digging around in her glove box who pulled out a placard and then looked around as she jumped out of the car in a hospital parking lot.

potential violations.[37] Every month the website creates a state specific report for each Department of Motor Vehicles (DMV).[38] The hope of the website is that each DMV will be able to track trends involving any placard numbers with the information the website collects and reports and then be able to investigate the holders of the placards.[39]

Another entity is shedding light on disability issues and setting goals to decrease barriers that disabled individuals face.[40] The Federal Government was the first entity to consciously open up the job market to disabled individuals through the passage of the 1973 Rehabilitation Act.[41] The Act's passage also brought the issue of accessibility of public transportation to the forefront.[42] The Department of Defense (DoD) demographics for December 2010 show that 6.71% of appropriated funded civilian employees reported themselves as "disabled".[43] That is over 53,000 individuals in DoD.[44] The DoD employees with disabilities who are employed by the Department of the Air Force face a number of commuting issues depending on where they live and work.

Air Force disabled employees must concern themselves with questions such as: where is the base or unit of employment located? Is the base or unit in a large city with a well defined public transportation system or in a little town? Does public transportation service the base or are there any nearby bus or rail stops? What is the current base policy

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Proclamation No. 13548, 75 Fed. Reg. 45,039 (July 30, 2010).
[41] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).
[42] *See id.* § 502.
[43] DEPARTMENT OF DEFENSE, CIVILIAN PERSONNEL MANAGEMENT SERVICES, DOD DEMOGRAPHICS AS OF DEC. 31, 2010 REPORT (2010) (on file with author).
[44] *Id.*

on whether or not taxis are allowed on base? Finally, does the base or unit location have enough handicapped parking spots?

The reality is all Air Force civilian employees have to commute to work whether they are disabled or not. For some, the commute is short because they live on base or right down the street from a unit's office building in a large city. For others the commute is much longer and the commute only becomes more difficult when the employee is disabled. In addition to the commuting difficulties, some catalysts have occurred that will increase the number and significance of applicants and employees the Air Force will employ who have a disability. These catalysts include the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which restores the broad intent and protections of the Americans with Disabilities Act of 1990 (ADA) and Executive Order 13548 of July 26, 2010, which supports and encourages the employment of people with disabilities in the Federal Government.[45]

Due to the increased number of disabled applicants and employees and the increased spotlight on employment of individuals with disabilities, there will naturally be an increase of employment discrimination charges. The number of ADA charges pre-ADAAA (2008) through the Equal Employment Opportunity Commission (EEOC) was 19,453.[46] In 2010, after the ADAAA was in effect, there were 25,165 ADA charges received by the EEOC.[47] One question this thesis raises is whether or not the Air Force's

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[45] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) *and* Proclamation No. 13548, 75 Fed. Reg. 45,039 (July 30, 2010).

[46] *ADA Charge Data by Impairments/Bases – Receipts FY 1997 – FY 2010*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last visited Feb. 26, 2011), http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm.

[47] *Id.*

current interactive process under the ADA and Rehabilitation Act is hindering the branch's success of compliance and limited liability in the new battlefield of disability law. Additionally, should an employer's duty to accommodate extend to commuting assistance such as parking spaces, transportation reimbursement, shift changes, modified work schedules and work-at-home policies in light of the ADAAA, which broadened the definition of a disability, thus focusing an employer's defense on job qualifications, reasonable accommodation and undue hardship?

Part II of this thesis reviews the foundation and evolution of disability law in the United States, starting with the Rehabilitation Act of 1973, which only applied to the Federal Government and certain federal contractors.[48] It then moves onto the ADA and the melding of the ADA with the Rehabilitation Act. There is discussion of the significant Supreme Court decisions that narrowed the ADA and finally the evolutionary discussion ends with the passage of the ADAAA, which took effect in 2009.[49]

Part III examines the Department of the Air Force's current process for handling disability accommodation requests from applicants and employees in light of the ADAAA. The Air Force's process is compared to the current state of the law and to another federal agency's process, which has been lauded as a benchmark employer by the EEOC in the area of disability law, the United States Postal Service (USPS).[50] This thesis suggests the Air Force adopt the "committee centered" model for the interactive accommodation process and provides general guidance on how to blend the USPS model

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[48] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).
[49] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).
[50] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE (FY 2009).

into the Air Force's framework. After setting forth a model interactive process that will enable the Air Force to meet its duty of accommodation under the Rehabilitation Act, the ADA and the ADAAA, Part III then considers whether an employer's duty to accommodate should extend to commuting assistance such as parking spaces, transportation reimbursement, shift changes, modified work schedules and work-at-home policies.

In Part IV, the thesis concludes that the Air Force must further tailor, implement and monitor its interactive process for the benefit of both the disabled applicant or employee and the Department of the Air Force. Furthermore, the thesis concludes by exploring the issues of reasonableness and undue hardship and by using a theory that an employer's duty to accommodate is confined to only the workplace, that the Air Force's duty to accommodate should only be limitedly extended to shift changes and modified work schedules.

II. BACKGROUND

A. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 was the first major piece of legislation to address the employment of disabled applicants and employees.[51] At the time, Congress recognized that "individuals with disabilities constitute one of the most disadvantaged groups in society".[52] In addition, Congress believed that "disability is a natural part of the human experience and in no way diminishes the right of individuals to … pursue meaningful careers".[53] The goals of the Rehabilitation Act included providing individuals with disabilities the tools necessary to make informed choices and decisions and "[to] achieve equality of opportunity, full inclusion and integration into society, employment, independent living, and economic and social self-sufficiency".[54] The goals of the Act were to be attained through individual empowerment and Federal Government leadership in promoting the employment of individuals with disabilities.[55]

The Rehabilitation Act prohibits discrimination on the basis of disability in programs and employment.[56] The protection extends to programs conducted by the Federal Government, programs receiving federal financial assistance, actual federal employment and employment through federal contractors.[57] The Act prohibits virtually

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[51] *Americans with Disabilities Act Questions and Answers,* U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION (last updated Nov. 14, 2008), http://www.ada.gov/q%26aeng02.htm.
[52] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat.355 (1973).
[53] *See id.* § 701.
[54] *Id.*
[55] *Id.*
[56] *A Guide to Disability Rights Laws,* U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION (Sept. 2005), http://www.ada.gov/cguide.htm#anchor65610.
[57] *Id.*

all employment discrimination by Federal Government contractors and subcontractors by setting a low dollar amount threshold. All federal contracts for $10,000 or more fall under the purview of the Rehabilitation Act of 1973.[58]

Each federal agency is required, under the Act, to establish and maintain a plan consisting of regulations that promote the employment of disable individuals.[59] Such plans require an agency to take affirmative actions in the employment of disabled individuals.[60] Topics of regulations normally include reasonable accommodation, program accessibility, communication with individuals who have hearing or vision disabilities and accessibility of new construction and alterations to existing facilities.[61] Each agency must review and update its affirmative action plan annually.[62]

Under the Rehabilitation Act, all federal agencies and applicable federal contractors have a duty to accommodate disabled individuals.[63] This duty is only extinguished by the production of an undue hardship after the plaintiff presents a request which is deemed reasonable.[64] A hardship can be created if there is no reasonable accommodation or if an accommodation imposes undue financial and administrative burdens.[65] A plaintiff's prima facie case of discrimination consists of proving that he or she is 1) disabled or perceived to be disabled 2) a qualified individual and 3) was

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58 Rehabilitation Act of 1973, 29 U.S.C. § 793 (2010).
59 *See id.* § 794 (2002).
60 *See id.* § 791 (2010).
61 *A Guide to Disability Rights Laws, supra* note 56.
62 Rehabilitation Act of 1973, 29 U.S.C. § 791 (2010).
63 *Id.*
64 *See id.* § 794 (2002).
65 *Id.*

discriminated against on the basis of his or her disability.[66] While the Act's purposes and subsequent judicial framework are broad, the Act does not prevent an employer from making decisions "based on the job-related attributes of a person's handicaps".[67] In other words, "an employer is not required to accommodate a disabled employee by eliminating one of the essential functions of a job" under the Rehabilitation Act.[68]

The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in the Americans with Disabilities Act.[69] The Rehabilitation Act and the subsequent Americans with Disabilities Act (ADA) are generally uniform in administration and judicial precedent.[70] The ADA was extensively modeled after the Rehabilitation Act and the ADA even mandates that an individual construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act. [71]

B. Americans with Disabilities Act of 1990

The enactment of the Americans with Disabilities Act (ADA) came seventeen long years after the Rehabilitation Act.[72] In 1990, the ADA officially closed the gap and provided disability discrimination protection against private employers, state and local governments, employment agencies and labor unions.[73] The ADA and the 2008 ADA

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66 Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005).
67 Misek-Falkoff v. Int'l Bus. Machines Corp., 854 F. Supp. 215, 225 (S.D.N.Y. 1994) *aff'd sub nom.* Misek-Falkoff v. IBM, 60 F.3d 811 (2d Cir. 1995).
68 Hall v. United States Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988).
69 *A Guide to Disability Rights Laws*, *supra* note 56.
70 Bragdon v. Abbott, 524 U.S. 624, 645 (1998).
71 Americans with Disabilities Act of 1990, 42 U.S.C. § 12201 (2009).
72 Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 349, 370 (2010).
73 *Americans with Disabilities Act Questions and Answers*, *supra* note 51.

Amendments Act were adopted by Congress in a substantially bipartisan manner.[74] The vote for the ADA in the House of Representative was 377 to 28 and in the Senate, 91 to 6.[75] Congress stated in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities … [which] continues to be a serious and pervasive social problem."[76] Congress found that discrimination based on disability costs the United States billions of dollars in dependency and non-productivity expenses.[77]

The ADA was intended to compliment the Rehabilitation Act.[78] The ADA was even modeled after Section 504 of the Rehabilitation Act and its case law.[79] Courts routinely rely on Rehabilitation Act case law as persuasive precedence for ADA lawsuits.[80] For example, the Supreme Court noted one similarity of the two Acts in *Bragdon v. Abbott* when it said "the ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973."[81] It was the intention of lawmakers for the ADA to pick up where the Rehabilitation Act left off and to expand disability protection by continuing the tough task of cutting the unemployment rate of some 54,000,000 disabled Americans.[82]

The ADA's central mission was to break down barriers in the fields of employment, transportation, public accommodation, public services and telecommunications in the hope of having society benefit from the many skills and talents

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[74] Wexler et al., *supra* note 72.
[75] *Id.*
[76] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2009).
[77] *Id.*
[78] 42 AM. JUR. Proof of Facts 3d 1 § 1 (2011).
[79] Wexler et al., *supra* note 72, at 371.
[80] 42 AM. JUR. Proof of Facts 3d 1 § 6 (2011).
[81] Bragdon v. Abbott, 524 U.S. 624, 631 (1998).
[82] Wexler et al., *supra* note 72, at 371.

of disabled individuals.[83] The law extended civil rights protections to individuals with disabilities just as Title VII provided protections on the basis of race, color, sex, national origin and religion.[84] The past thirty plus years of disability discrimination law under both the Rehabilitation Act and the ADA can best be described as a pendulum swinging back and forth from no coverage, to coverage, to restrictive coverage and then back to broad coverage under the ADA Amendments Act of 2008.[85]

C. ADA Amendments Act of 2008

On January 1, 2009 the ADA Amendments Act of 2008 (ADAAA) became effective.[86] The ADAAA provisions apply to not only the ADA but also the Rehabilitation Act.[87] "Disability" under the ADA and Section 504 of the Rehabilitation Act is now defined as a physical or mental impairment that substantially limits a major life activity; a record of a physical or mental impairment that substantially limited a major life activity; or when an employer takes an action prohibited by the ADA based on an actual or perceived impairment.[88] The coverage of the ADAAA applies to only

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[83] *Americans with Disabilities Act Questions and Answers*, *supra* note 51.
[84] *Id.*
[85] Wexler et al., *supra* note 72, at 370.
[86] ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008).
[87] *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last updated Sept. 23, 2009), http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html. *See also*, *Americans with Disabilities Act Amendments Act of 2008 (ADAAA)*, WRIGHTSLAW (Apr. 9, 2009), http://www.wrightslaw.com/info/sec504.adaaa.htm.
[88] Frank Morris, Adjunct Professor of Law at George Washington University Law School, Current Developments in Employment Law: The Obama Years – Selected ADA Developments (Nov. 15, 2010).

discriminatory acts that occurred on or after 1 January 2009.[89] The purpose of the ADAAA is "to reinstate a broad scope of protection" by expanding the definition of the term "disability".[90]

By enacting the ADAAA, Congress expressly rejected the narrow interpretation of the term "disability" the Supreme Court had created in three cases. The Supreme Court in *Sutton v. United Air Lines*, *Murphy v. UPS* and *Albertson's Inc. v. Kirkingburg* ruled that an individual does not have a disability if a mitigating measure was used to correct or suppress a disability.[91] The mitigating measure in *Sutton* was a pair of eye glasses for a pilot.[92] *Murphy* involved a UPS driver who was taking medication for high blood pressure.[93] In *Kirkingburg,* the truck driver's brain had subconsciously compensated over time to correct or eliminate his monocular vision disability.[94] The Supreme Court rejected the EEOC guidelines that directed an individual's condition should be considered in his or her uncorrected state in all three holdings.[95]

The Supreme Court continued reshaping the scope of protection afforded under the ADA even after the three 1999 cases. In 2002 the Supreme Court again "narrowed the broad scope of protection" found in the ADA by defining what constituted a "major life activity" and the term "substantially limits" in *Toyota Motor Manufacturing,*

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89 *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008,* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last updated Sept. 23, 2009), http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.
90 *Id.*
91 Wexler et al., *supra* note 72, at 370.
92 Sutton v. United Air Lines, Inc., 527 U.S. 471, 475, (1999).
93 Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 519, (1999).
94 Wexler et al., *supra* note 72, at 373.
95 *Id.* at 372.

Kentucky, Inc v. Williams.[96] In *Toyota Motor* the Court defined "major" to mean important and "major life activities" to refer to those activities that are of central importance to daily life.[97] Moreover, the Court found that to be "substantially limited" in performing manual tasks under the ADA, an individual must have an impairment that prevented or severely restricted the individual from doing activities that were of central importance to most people's daily lives and not just the individual's work life.[98] The enactment of the ADAAA rejected/erased the three 1999 cases dealing with mitigating measures precedence, the definitions found in *Toyota Motor* and other precedence created by the Supreme Court under the ADA, thereby restoring the broad protection under the ADA of 1990.[99] Congress believed that due to the Supreme Court's rulings, lower courts were incorrectly finding that people with a range of substantially limiting impairments were not people with disabilities.[100]

In effect, the ADAAA redefines disability by reducing the burden under whether an impairment "substantially limits" a major life activity.[101] "Major life activities" are expanded to include eating, sleeping, standing, reading, thinking, concentrating or communicating. Moreover, the ADAAA adds the "operation of a major bodily function" such as digestive or respiratory functions to be major life activities.[102] The ADAAA coverage now also includes any impairments that are episodic or in remission.[103] And

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[96] *Id.* at 373.
[97] Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 US 184, 197 (2002).
[98] *Id.*
[99] ADA Amendments Act, Pub. L. No. 110-325, §2, 122 Stat. 3553 (2008).
[100] *Id.*
[101] Morris, *supr*a note 88.
[102] *Id.*
[103] *Id.*

finally, the last major effect of the ADAAA is to eliminate the consideration of mitigating measures other than eyeglasses or contact lenses.[104] Due to the expansion of definitions and the resulting broad inclusion of protection under the ADAAA, the emphasis under disability law is no longer what is and is not a disability.[105] What has not changed under the ADAAA is the employer's duty of reasonable accommodation, the employer's defense of undue hardship and the use of the employer/employee interactive process to work through accommodation requests.[106]

D. Prongs of protection under the Rehabilitation Act, ADA and ADAAA

Employers with fifteen or more employees fall under the ADA and their employees and applicants benefit from the Act's protection.[107] The Rehabilitation Act has no employee quota since the Federal Government employs thousands of individuals.[108] Both the Rehabilitation Act and the ADA, including the 2008 Amendments, prohibit discrimination in all employment practices ranging from hiring, training, advancement, leave, layoffs and firing.[109] There are four prongs of protection under the employment field of disability law.[110] Each prong of protection corresponds to a specific subdivision of discrimination an employee or applicant may face in the employment arena.[111]

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[104] *Id.*
[105] *Id.*
[106] Joyce Walker-Jones, Senior Attorney Advisor with the Equal Employment Opportunity Commission, Overview of the Amendments Act of 2008 (May 12, 2009).
[107] *A Guide to Disability Rights Laws*, *supra* note 56.
[108] *Id.*
[109] *Americans with Disabilities Act Questions and Answers*, *supra* note 51.
[110] Morris, *supra* note 88.
[111] *Id.*

The biggest prong, actual impairment or disability, covers those individuals who have the disability. Under the actual impairment or disability prong, a court normally focuses on whether or not an employee is qualified to perform the essential functions of the job.[112] The second prong, "regarded as", covers those employees and applicants whom the employer thinks are disabled and thus treats them accordingly.[113] An individual who is regarded as having a disability is not entitled to a reasonable accommodation under the ADAAA.[114] Instead, a court will examine whether an employer disqualified the employee from a broad range of jobs in the workplace based on the employer's misperception.[115] The "record of" or the third prong considers the employees who have a disability that has both active and non-active stages, such as Crohn's disease, hepatitis or cancer.[116] The "record of" prong was created to deal with employers who would discriminate against employees based on the worry that the employee's cancer could come back during his or her time of employment.[117]

The last prong of protection is the associational protection prong, which covers those employees or applicants who have a familial association with an individual who has an actual disability.[118] Such an employee or applicant could face workplace discrimination because the employer is afraid the individual will be absent from the workplace excessively in order to care for the disabled family member or is fearful of the

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] HEALTH BLURBS, http://www.healthblurbs.com/flare-up-and-remission-of-disease/ (Feb. 12, 2011).
[117] Morris, *supra* note 88.
[118] *Id.*

cost of providing health insurance to the employee's dependants.[119] The employer has no duty to accommodate under the associational protection prong and must simply not discriminate against a person based on the fact he or she is associated with another who is disabled.[120]

E. Plaintiff's prima facie case

Under the ADA, an employee must first file an administrative complaint with the Equal Employment Opportunity Commission (EEOC) before he or she can file in a state or Federal Court.[121] A complaint under the Rehabilitation Act can be filed with the responsible federal agency.[122] However, Section 504 of the Rehabilitation Act allows enforcement through private lawsuits alone.[123] It is not necessary to file a complaint with a federal agency before going to court.[124] While the administrative complaint process will not be discussed in this thesis, it is important to point out there is a constant stream of fact finding and inquiries that are universal and overlap from the time the employee or applicant requests an accommodation to when a plaintiff presents his or her prima facie court case.

Each different prong of protection will shape an employee's or applicant's prima facie case. The actual impairment or disability prong (prong #1), the prong that this thesis focuses on, follows the same basic framework whether brought under the

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[119] *Id.*
[120] *Id.*
[121] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/howtofile.cfm (last visited Feb. 12, 2011).
[122] *A Guide to Disability Rights Laws*, *supra* note 56.
[123] *Id.*
[124] *Id.*

Rehabilitation Act or the ADA. A plaintiff's prima facie case under the Rehabilitation Act consists of four elements:

> 1) Plaintiff is a handicapped individual
> 2) Plaintiff is otherwise qualified for the position in question
> 3) Plaintiff has been excluded solely due to his or her handicap
> 4) The agency or program in question is run by the federal government or is a recipient of federal assistance[125]

The Rehabilitation Act defines a handicapped individual as a person who is able to perform the essential tasks of the job with or without a reasonable accommodation.[126] This definition is borrowed by the ADA framers and flows right into the elements a plaintiff must prove under the ADA.[127] A plaintiff's prima facie case under the ADA consists of five elements:

> 1) Employer is a covered entity under the ADA
> 2) Plaintiff has a disability
> 3) Plaintiff was discriminated against due to his or her disability
> 4) Plaintiff is otherwise qualified to perform the essential tasks of the job
> 5) A reasonable accommodation was sought and the Employer failed or refused to make an accommodation[128]

Both of the prima facie cases involve a jurisdiction element of either having the discrimination occur in either a federal agency or program that receives federal money, or discrimination by a "covered entity". Then element one under the Rehabilitation Act matches with element two of the ADA. Element two of the Rehabilitation Act matches

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[125] 42 AM. JUR. Proof of Facts 3d 1 § 2 (2011).
[126] *Id.*
[127] *Id.*
[128] *See Id.* § 6.

with element four of the ADA. Finally, element three of the Rehabilitation Act is synonymous with elements three and five of the ADA. Under both Acts, the employee or the applicant bears the burden of both production and persuasion that an accommodation exists that would allow him or her to perform the essential functions of the job.[129]

F. Employer's duty to accommodate

The Rehabilitation Act and the ADA also mutually create a duty of accommodation for the employer. This reasonable accommodation duty is triggered generally when an employee or applicant makes a request for an accommodation.[130] An accommodation can fall under one of three categories; a modification or adjustment to a job application process, modification or adjustment to the work environment or lastly a modification or adjustment that ensures equal benefits and privileges of employment.[131] Under EEOC guidelines, an employer is not required to make an accommodation primarily for the employee's or applicant's personal benefit. However, it will be evident in the second part of the analysis section of this thesis that it is sometimes difficult to draw the line between work and personal benefit.[132] Lastly, as the Seventh Circuit pointed out, "[t]he ADA and the Rehabilitation Act do not require that an employer provide a disabled employee with a perfect accommodation or an accommodation most preferable to the employee."[133]

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[129] McBride v. BIC Consumer Products Mfg. Co., Inc., 583 F.3d 92, 97 (2d Cir. 2009).
[130] Charles R. Richey, *2 Manual on Employment Discrimination Appendix F11*, at par 1, MANUAL OF EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS (2010).
[131] *Id.* at general principles.
[132] Charles A. Sullivan, *Getting to Work*, Workplace Pro Blog (Aug. 3, 2010), http://lawprofessors.typepad.com/laborprof_blog/disability/.
[133] Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

An accommodation's purpose is to remove workplace barriers for individuals with disabilities.[134] Examples of broad accommodations include, part-time or modified work schedules, acquiring or modifying equipment, making existing facilities accessible and reassignment to a vacant position.[135] More specifically, take for example an employee who has diabetes.[136] A reasonable accommodation for the employee may consist of an employer providing an area for food and medicine storage, providing a private area for the employee to test his or her blood sugar and to administer medication and finally allowing time for meal breaks through the day.[137] Another example of a reasonable accommodation is providing an attorney with lupus who is restricted from long periods of typing with voice recognition software.[138]

The important strategy of how to arrive at a reasonable accommodation is for both the employer and the employee to be creative and flexible. There are many organizations that provide assistance, references and resources in the area of accommodations to both the employer and employee.[139] The Department of Labor operates the Job Accommodation Network (JAN).[140] JAN provides employers, employees, applicants and others guidance on workplace accommodations and disability employment issues.[141]

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[134] Richey, *supra* note 130, at general principles.
[135] *Id.*
[136] Gayla C. Crain, Shareholder of Crain Cubbage Healy & McNamara, The Americans with Disability Act of 2008: Employer Obligation to Provide a "Reasonable Accommodation" (May 12, 2009).
[137] *Id.*
[138] *Id.*
[139] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, PersonNet Reference Guides EEOC 2 (2007).
[140] JOB ACCOMMODATION NETWORK, http://askjan.org/links/about.htm (last visited Feb.19, 2011).
[141] *Id.*

JAN offers free assistance over the internet via a searchable accommodation database or an individual can telephone a JAN consultant.[142] The Air Force cites JAN as a useful tool throughout and even after the recruitment process of employment for commanders, managers and supervisors.[143]

The Department of Defense (DoD) also has another program, CAP, at its disposal for accommodations. Use of the program is mandated by the Department of the Air Force's procedures for reasonable accommodations.[144] The Computer/Electronic Accommodation Program (CAP) was created in 1990 by the Under Secretary of Defense for Personnel and Readiness as a centrally funded reasonable accommodations program for employees with disabilities in the DoD.[145] Through the program assistive technology, devices and support are provided free of charge to DoD agencies.[146] In 2009, CAP filled over 2,300 accommodations for DoD employees with an average cost of $533.[147] The Air Force had the lowest use of CAP in 2009 with only 273 accommodations.[148] The Army had 4,286 accommodation through CAP and the Navy had 1,158.[149]

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[142] *Id.*
[143] AIR FORCE, PLAN FOR EMPLOYMENT AND DEVELOPMENT OF PEOPLE WITH DISABILITIES AND REASONABLE ACCOMMODATION PROCEDURES IN THE DEPARTMENT OF THE AIR FORCE 5 (Jan. 2011) (on file with author).
[144] *Id.* at 11.
[145] COMPUTER/ELECTRONIC ACCOMMODATIONS PROGRAM, http://cap.tricare.mil/About CAP/ AboutCAP.aspx (last visited Feb. 28 2011).
[146] *Id.*
[147] U.S. DEP'T OF DEF., COMPUTER/ELECTRONIC ACCOMMODATIONS PROGRAM ANNUAL STAKEHOLDERS REPORT 4-9 (FY 2009), *available at* http://cap.tricare.mil/Documents/FY 09_AR.pdf.
[148] *Id.* at 8.
[149] *Id.*

Whether such an accommodation is reasonable will depend on the facts and circumstances of each case.[150] When an employer fails to meet its duty of accommodation by not sufficiently engaging in the interactive process, the risk of not discovering a reasonable accommodation increases the chance that an employer will be found to have violated the Rehabilitation Act or the ADA.[151] If on the other hand, the employer puts forth a good faith effort to accommodate the plaintiff, then the plaintiff will not be afforded compensatory damages.[152] If no reasonable accommodation is available, then an employer is not liable for failing to engage in a good faith interactive process.[153] Nevertheless, any accommodation that requires an employer to eliminate an essential function of a job is not considered reasonable.[154]

G. Undue Hardship

An employer can respond to an employee's or applicant's request for accommodation in two ways.[155] The employer can provide the accommodation, thus fulfilling its duty to accommodate or the employer can deny the request based on the fact that the request is not reasonable or creates an undue hardship.[156] The process in which the employer analyzes and determines a final action on the request for accommodation is

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[150] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
[151] McBride v. BIC Consumer Products Mfg. Co., Inc., 583 F.3d 92, 101 (2d Cir. 2009).
[152] Michael Selmi, Professor of Law at George Washington University Law School, The ADA and Related Issues (Mar. 9, 2011).
[153] McBride v. BIC Consumer Products Mfg. Co., Inc., 583 F.3d 92, 100 (2d Cir. 2009).
[154] Richey, *supra* note 130, at general principles.
[155] *Id.*
[156] *Id.*

called the interactive process.[157] An undue hardship is a quantitative, financial, or other consequence that is created if an employer provides an accommodation.[158] In simpler terms, an undue hardship equates to significant difficulty in providing an accommodation.[159] Since the defense of undue hardship is technically only invoked if the employer fails to provide a reasonable accommodation, the employer defendant has the burden of proving an undue hardship.[160] Therefore, if the employer provides an alternate reasonable accommodation from the one the employee requests, the employer has met its duty and there is no need for the employer to show an undue hardship.[161]

The ADA defines undue hardship as an "action requiring significant difficulty or expense".[162] Whether an accommodation translates into an undue hardship is determined on a case-by-case basis.[163] A court will look at different factors during its analysis such as the nature and cost of the accommodation in relationship to the size, resources, nature and structure of the employer's operation.[164] Or the court will look at the impact of the

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[157] Douglas R Andres & Clay D. Creps, *The Interactive ADA Accommodation Process*, EMP'T UPDATE (Bullivant, Houser & Baily,) (Volume 6, Number 1 Winter 2001) *See also* http://www.mediate.com/articles/bullivant.cfm.

[158] Richey, *supra* note 130, at general principles.

[159] *Id.*

[160] RICHARD L. ALFRED ET AL., DISABILITY DISCRIMINATION, ELI MA-CLE 10-1 § 10.2.5 (Massachusetts Continuing Legal Education, Inc., 3rd ed. 2009).

[161] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html#undue.

[162] Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2009).

[163] *Americans with Disabilities Act Questions and Answers*, *supra* note 51.

[164] *Id.*

accommodation on other employees and the organization's ability to conduct business.[165] It is assumed by courts that the larger the employer, the larger the employer's resources and ability are to make an accommodation.[166] In sum, an employment law blog said it best when it described reasonable accommodation and undue hardship as "two sides of the same coin".[167] "If accommodations are not reasonable, they constitute an undue hardship. Likewise, if the employer faces an undue hardship in providing accommodations, they are not reasonable accommodations."[168]

The "foot stomping" point for any large employer, like the Department of the Air Force, is to never assume that an accommodation is an undue hardship.[169] No assumptions can be made and no leaps toward undue hardship should be advised, until an employer does substantial homework about the effects of a requested accommodation and the search for any viable alternative.[170] The worst thing a large employer could do would be to equate undue hardship with cost and negate or shirk its responsibility under the interactive process, the very process used to find a reasonable accommodation.[171]

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[165] Mel Muskovitz, *The Americans with Disability Act – An Employer's Responsibilities*, ABOUT.COM, http://humanresources.about.com/od/legalissues/a/ada_explained_2.htm (last visited Feb. 13, 2011).

[166] *Americans with Disabilities Act Questions and Answers*, *supra* note 51.

[167] Mark C. Weber, *Understanding "Undue Hardship" Under the ADA*, BARRON LAW CORPORATION BLOG (Dec. 15, 2010), http://www.businesslawyerca.com/2010/12/understanding-undue-hardship-under-the-ada.shtml.

[168] *Id.*

[169] Peter J. Petesch, *Are the newest ADA guidelines 'reasonable?' - Americans with Disabilities Act*, HR MAGAZINE, June, 1999, http://findarticles.com/p/articles/mi_m3495/is_6_44/ai_549942 05/pg_3/.

[170] *Id.*

[171] *Id.*

H. Interactive Process

The interactive process consists of an exchange of knowledge between the employee and the employer relating to a request for an accommodation.[172] It is fundamental for an employer to view an accommodation as a process and not a single event.[173] Each party has the duty to facilitate the process, supplement the process and keep the process active under a good faith standard.[174] Courts will judge both party's participation in the process with a fact-intensive study.[175] Any resulting breakdown in the process will lead to the assignment of both bad-faith responsibility and ultimate liability.[176]

The EEOC generally considers it the responsibility of the employee or applicant to first request an accommodation in order to trigger the interactive process.[177] In making the request, the employee or applicant must also suggest a possible reasonable accommodation.[178] The form of the request is not regulated and can be oral or written.[179] The request does not need to include any buzz words like ADA, Rehabilitation Act or reasonable accommodation.[180] The vast majority of the time, an employee or applicant files the request for accommodation.[181] However, if an employee with a known disability

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[172] Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find A Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LAB. LAW. 499, at 500 (1998).
[173] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
[174] Comisky, *supra* note 172, at 500.
[175] *Id.*
[176] *Id.*
[177] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
[178] *Id.*
[179] Richey, *supra* note 130, at par 3.
[180] *Id.* at par 1.
[181] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.

is exhibiting difficulty in his or her job, an employer is allowed to discuss the possibility of a reasonable accommodation with the employee.[182] Some courts have even found it acceptable for a family member, friend or health professional to request a reasonable accommodation.[183]

The legislative history of the ADA discloses the premise that the interactive process is "a problem-solving approach … used to identify possible accommodations."[184] The ADA explains:

> 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 in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[185]

All requests must be processed and acted on in a timely manner.[186] Any delay by the employer will likely constitute bad faith participation in the interactive process.[187] Each request received for an accommodation should be evaluated individually; therefore each interactive process will differ.[188] However, the same basic framework will apply.[189] The employer faced with an accommodation request from a qualified employee should:

> 1. Analyze the particular job to determine its purpose and essential functions.

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[182] *Id.*
[183] Richey, *supra* note 130, at par 2.
[184] Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111 (9th Cir. 2000) *vacated sub nom* 535 U.S. 391 (2002).
[185] 29 C.F.R. § 1630.2 (2011).
[186] Theresa M. Connolly, *The Interactive Process Under the Americans with Disabilities Act*, BNA BOOKS, 2001, at 4, *available at* http://www.bna.com/bnabooks/ababna/rnr/2001/connolly.doc.
[187] *Id.*
[188] *Id.*
[189] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.

> 2. Consult with the employee to find out the precise job-related limitations imposed by the disability and how those limitations can be overcome.
> 3. Identify potential accommodations and assess the effectiveness of each in enabling the employee to perform the essential functions of the job, with the employee's assistance.
> 4. Consider the employee's accommodation preferences and select and implement the accommodation most appropriate for both the employee and employer.[190]

In some situations a reasonable accommodation may be obvious and any in-depth or formal interactive process will not be necessary.[191] For example, if an employee in a wheelchair is unable to access pertinent files in an office, the employer will only need to move some furniture around or lower the files into the bottom drawers of the filing cabinet.[192] Other requests may necessitate a formal multi-meeting interactive process which enlists the expertise of a company doctor, the employee's supervisor, the employee, human resources personnel, safety personnel and management.[193]

No matter if the interactive process is conducted by an individual or in a group setting, the process should always keep its interactive character and never become directive.[194] The employee and the employer should work together to solve the accommodation problem.[195] An employer's primary concern in the interactive process is how the employee's disability affects the employee's job performance and not what the disability actually is.[196] The best way for an employer to ease its concern is to listen to

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[190] *Id.*
[191] *Id.*
[192] Connolly, *supra* note 186, at 4.
[193] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
[194] *Id.*
[195] *Id.*
[196] *Id.*

the employee and not direct the employee.[197] In more complicated cases, the process will happen over time and an employer has the duty to monitor the success of an accommodation.[198] If an initial accommodation is failing, then an employer must reopen the interactive process.[199]

If there is a breakdown of the interactive process, it does matter to the EEOC and courts which party is to blame for the breakdown.[200] The EEOC considers the interactive process a two-way street.[201] The employee will not have the knowledge of the essential functions of a position, how a position may be modified, or whether other positions are available or vacant.[202] On the other hand, an employer will not have sufficient understanding of the employee's disability and whether a particular accommodation will be effective for the employee.[203] For example, if an employee refuses to provide information regarding the nature and extent of the employee's impairment thus making it impossible for the employer to determine the appropriateness and availability of a particular accommodation, then the breakdown in the interactive process is due to the fault of the employee.[204] Subsequently, the employer would not be liable under the Rehabilitation Act or the ADA.[205]

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197 *Id.*
198 *Id.*
199 *Id.*
200 ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
201 *Id.*
202 Connolly, *supra* note 186, at 4.
203 *Id.*
204 ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
205 *Id.*

Due to liability and accountability, an employer must maintain detailed records of the interactive process and its results.[206] The EEOC suggest the documentation should include:

> • what accommodations were considered;
> • who was contacted for suggested accommodations, information concerning effectiveness of accommodations, information concerning the functional limitations of the applicant or employee with a disability, prices and other relevant information;
> • who made the decision that accommodation would or would not be provided and whether that decision was reviewed by top management;
> • what factors were considered in the decision and how those factors affected the decision;
> • how the employee's opinions were obtained, what the employee's opinions were and how those opinions were taken into account in making the decision; and
> • if the decision is that providing any accommodation, or providing a particular accommodation wanted by the employee, would be an undue hardship on the employer, exactly why that decision was made, including both financial and other factors.[207]

Creating and maintaining documentation on a given interactive process forces an employer and its agents to actually work through the process.[208] Most importantly, the documentation will be vital in any court case to prove the employer actually acted in good faith, thus negating any damage award.[209]

The number of ADA charges filed with the EEOC reached an all time high after the enactment of the ADAAA.[210] In 2009 the total number of ADA charges received by

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[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] U.S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMERICANS WITH DISABILITY ACT OF 1990 (ADA) CHARGES FY 1997 – FY 2010, available at http://www.eeoc.gov/eeoc/statistics/ enforcement/ada-charges.cfm.

the EEOC amounted to 21,451.[211] Once notice and knowledge of the ADAAA fully reached the legal community and the public at large in 2010, the number of ADA charges ballooned to 25,165.[212] It has become even more critical now for employers to have a solid disabilities policy, a knowledgeable legal department and an engaged human resources department. The facilitator or agent best equipped and responsible to guide an employer through the implications and ramification of the ADAAA is a lawyer.

III. ANALYSIS

A. Interactive Process

1. Employer's response to the ADAAA

First and foremost, agents of the employer must be knowledgeable of the ADAAA and its drastic impact on the future of Rehabilitation Act and ADA employment litigation.[213] Whether the knowledge base develops from the employer's human resource department, legal department or a front line supervisor, an employer must review and retool its Rehabilitation Act or ADA policies and procedures.[214] The retooling is necessary in order to transform the employer's position from one of reaction to one of offensive action. The assessment and resulting policy changes by the employer will be grounded in key conclusions. These key conclusions will allow the employer to reposition itself in the ever changing landscape of employment law. The key conclusions spotlight the losing battle of arguing whether an employee is disabled or not, the few

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[211] *Id.*
[212] *Id.*
[213] Avis McAllister, *Watch Out! The Floodgates May be Opening!* (AIR FORCE LAB. L. FIELD SUPPORT CENTER NEWSLETTER), Aug. 2009, at 7.
[214] Morris, *supra* note 88.

numbers of summary judgment motions granted for an employer after the implementation of the ADAAA, the increasing importance of the interactive process and finally the need for an old fashion assessment of current job descriptions. [215]

First, the employer's default argument of whether or not an employee was even disabled and covered under the Rehabilitation Act or ADA has been eviscerated by the ADAAA.[216] In the Amendments, Congress has redefined disability, major life activities, and major bodily functions "in favor of broad coverage of individuals" and "to the maximum extent permitted".[217] As a result, an employer is wise to redirect its litigation assets from disproving a covered disability, to the essential job functions and the duty to accommodate under the interactive process.[218] Due to a shift in the employer's deployment of litigation assets and the resulting acquiescence of the employer in Rehabilitation Act or ADA coverage, the number of summary judgment rulings in favor of the defendant employer will likely decrease.[219] The much coveted summary judgment ruling of law will not be impossible for an employer's counsel. However, such rulings will be substantially limited.[220] The number of summary judgments will decrease due to the fact that the core questions under the Amendments are no longer legal questions of what constitutes a disability but are now focused on essential job functions and the duty

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[215] *Id.*
[216] *Id.*
[217] Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2009).
[218] Michael Iwan & Chris Amundsen, *Much ADAAA About Nothing: Recent Amendments to the Americans with Disabilities Act* (Aug. 25, 2009), *available at* http://hennepin.timberlakepublishing.com/article.asp?article=1355&paper=1&cat=147.
[219] *Id.*
[220] *Id.*

to accommodate under the interactive process.[221] These types of questions are best resolved by the fact finder or jury.[222]

Another key conclusion that an employer must ascertain from the Amendments in order to properly frame its response, is the importance of the interactive process and how it relates to an employer's liability under the Rehabilitation Act or the ADA.[223] With the new battleground set around the interactive process, an employer's sincerity, documentation and ingenuity will all be tested. Any deficiencies by the employer in any part of the interactive process will likely result in liability being attributed to the employer.[224] The most important factor for an employer's defense counsel will be documentation.[225] Documentation will force an employer to go through the interactive process and provide the crucial evidence of no liability on the part of the employer during litigation.

The starting point of proper documentation and an important aspect of the interactive process for the employer is the need to retool and update all job descriptions.[226] Updated job descriptions will enable an employer to determine what the essential functions of a given job actually are.[227] The descriptions will also help to determine whether an individual is qualified for the job regardless of a disability. Finally, an updated description will provide the employer with a powerful tool in any litigation.[228]

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[221] Morris, *supra* note 88.
[222] *Id.*
[223] Wexler et al., *supra* note 72, at 375.
[224] Selmi, *supra* note 152.
[225] Crain, *supra* note 136.
[226] Morris, *supra* note 88.
[227] *Id.*
[228] *Id.*

Without updated and accurate job descriptions, the employer's policies, interactive process and future disability litigation will be seriously compromised and weakened.[229] The employer must put forth the effort in the beginning by accepting the key conclusions that flow from the ADAAA and tailor its response accordingly.

2. United States Air Force's response to the ADAAA

The Unites States Air Force has responded to the ADA Amendments Act (ADAAA).[230] From the top, it is evident that the leading players of the Air Force Personnel Center (AFPC), Equal Employment Opportunity (EEO) Office and the Judge Advocate General Corps (JAGC) are well versed in the ADAAA and have implemented policies. The macro level knowledge and policies however mean very little when the interactive process starts on a micro level at each installation. If the policies and procedures are not created and implemented with a single eye towards serving the front lines of an installation, then the Air Force's problem solvers or the JAGC are relegated to fixing the problem once an EEOC complaint has been filed or once there is litigation. This could be months or years later. While the workforce at the Labor Law Field Support Center and the Field Offices are more than up to the challenge, such a back loaded process is unjust to the base level Civilian Personnel Offices, commanders and supervisors dealing with civilian disability issues on a daily basis. This thesis challenges the implementation, effectiveness and base level responsibilities of the Air Force's current response to the Amendments and its model for the interactive process.

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[229] *Id.*

[230] Air Force Instruction 36-2706, Equal Opportunity Program – Military and Civilian (Oct. 5, 2010) *see also* Air Force HR Advisory Number: 2010-10, Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force (Feb. 8, 2010) (on file with author).

It seems that the bulk of the Air Force's response concerns the release of a Human Resource Policy Memorandum, an update to the Department of the Air Force Plan for Employment and Development of People with Disabilities and an update to the controlling Air Force Instruction (AFI).[231] AFPC released a revised Plan for the Employment and Development of People with Disabilities and Reasonable Accommodation Procedures on 8 February 2010 in the form of advisory opinion number HR 2010-10.[232] The release's purpose was to renew and further support the efforts to employ people with disabilities.[233] The Department of the Air Force Plan for Employment and Development of People with Disabilities and Accommodation Procedures, was last updated in January of 2011.[234]

After the release of advisory opinion HR 2010-10, AFI 36-2706 was also updated with the effective date of 5 October 2010 and became the leading regulation on Air Force disability accommodation.[235] For most Air Force personnel, the starting point in researching any issue is always to find the controlling AFI. The AFI generally explains and directs personnel on the proper implementation of the Air Force's duty to accommodate and its interactive process.[236] On page 95, the AFI cites a reader to the

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[231] *Id.*
[232] Air Force HR Advisory Number: 2010-10, Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force (Feb. 8, 2010) (on file with author).
[233] *Id.*
[234] Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force (Jan. 2011) (on file with author).
[235] Air Force Instruction 36-2706, Equal Opportunity Program – Military and Civilian, at 95 (Oct. 5, 2010).
[236] *Id.* at 95-97.

Air Force Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures dated January 2010. However, the hyperlink does not lead a person to any version of the plan.[237] The plan does augment the AFI and it provides more in depth information on the Air Force's interactive process, Air Force timelines and accommodation reporting forms.[238]

The 2010 and current January 2011 plans provide "information and guidance for managers and supervisors regarding the recruitment, retention and accommodation of qualified applicants and employees with disabilities".[239] The Department of the Air Force's reasonable accommodation procedures are built upon timely and expeditious processing of requests and implementing approved reasonable accommodations in a timely manner.[240] The Air Force plan borrows straight from EEOC guidance by explaining how a request for accommodation can be in writing or oral and a request does not have to contain any special words such as "reasonable accommodation", "disability" or "Rehabilitation Act" [which replaced the word "ADA" in the EEOC guidance].[241] In addition, the Air Force plan allows an employee or designee of the employee to make a

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[237] *Id.* at 95.

[238] Air Force HR Advisory Number: 2010-10, Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force (Feb. 8, 2010) (on file with author).

[239] Air Force HR Advisory Number: 2010-10, Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force at 2 (Feb. 8, 2010) (on file with author) *and* Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force, at 3 (Jan. 2011) (on file with author).

[240] Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force, at 12 (Jan. 2011) (on file with author).

[241] *Id.*

request.[242] A request can be made to a supervisor or manager in the employee's chain of command or a human resource specialist, Disabilities Program Manager or Special Emphasis Program Manager from the Civilian Personnel Office.[243]

All requests must be forwarded to the decision-making level, which is normally the employee's supervisor or organization director, no later than five workdays from receipt.[244] The Air Force plan further discusses requests for medical records, denials and a 20 day metric for deciding on and implementing a request.[245] The actual "how to" of working through the interactive process is lacking in the plan. A person is forced to flip back to the AFI, where there are five helpful bullets, which describe a problem solving approach for the interactive process.[246] The bullets point out the most important questions that should be answered during the interactive process but rests the responsibility on the shoulders of one individual, the person who receives the request.[247] There is the language in the Equal Employment Opportunity (EEO) AFI to consult with the installation Disability Program Manager and the Staff Judge Advocate (SJA).[248] Yet, with such a disability accommodation process there is a possibility for requests to fall through the cracks. Will a request be processed? Will a supervisor or commander know to contact the EEO Office regarding a request? Will the Disability Program Manager or the Legal Office ever be consulted? Will anyone involved refer to the plan for guidance

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[242] *Id.*
[243] *Id.* at 14.
[244] *Id.* at 13.
[245] *Id.* at 13, 14.
[246] Air Force Instruction 36-2706, Equal Opportunity Program – Military and Civilian, at 96 (Oct. 5, 2010).
[247] *Id.*
[248] *Id.*

and abide by the 20 day metric or reporting procedures? Will the issue just land on a JAG's desk with little documentation months or years later after a civilian employee or applicant is not pleased with the Air Force's attempt to accommodate?

This thesis believes the effectiveness of the revised plan, AFI and the Air Force's procedures under the interactive process in light of the ADAAA can be improved. It is unclear under the Air Force's current interactive process if a base level agent dealing with a request for accommodation will have the notice, knowledge of the Air Force plan and proper procedures in place to deal effectively with a request. One of the major problems attorneys at the Labor Law Field Support Center (LLFSC) see is the lack of knowledge and lack of following the procedures set forth in the plan and AFI.[249]

The Air Force's process or response is one dimensional at best and leaves the organization susceptible to liability and even worse, the possibility of offending the goals of the Rehabilitation Act and ADA. Certain fundamental questions are raised when viewing the Air Force's interactive process model. Why is the point of contact (POC) the EEO Office? The leading regulation, AFI 36-2706, is an Equal Opportunity Program regulation and places responsibility in the base EEO Office.[250] Why doesn't the installation's Disabilities Program Manager, who works in the Civilian Personnel Office, run the interactive process? Are the installations even knowledgeable in the Air Force's new plan? Is there any other standardized guidance being pushed down to the bases?

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[249] Interview with Major Shelly Frank, Air Force Judge Advocate, in Washington D.C. (Feb. 23, 2011).

[250] Air Force Instruction 36-2706, Equal Opportunity Program – Military and Civilian, at 1 (Oct. 5, 2010).

It is an assumption to read the Air Force plan and AFI and believe that everyone at the base level is not on the same page when it comes to the interactive process. However, after over twenty phone calls and numerous emails to different Air Force agencies ranging from A1 (Manpower and Personnel), AFPC, Headquarters Civilian Personnel, base EEO Offices, and base Civilian Personnel Offices, no one could explain or produce any guidance on how the Air Force handles the Rehabilitation Act interactive process.[251] Certain agencies were even called twice to check for consistency in answers.[252] The only organization that could explain and produce the relevant guidance was the organization that is called upon to defend the Air Force in accommodation issues, the LLFSC.[253]

A small sampling of the twenty plus phone calls included cold calls to four different EEO and Civilian Personnel Offices. Two smaller bases and two larger bases were picked at random and the bases were in different areas of the country. What was gathered from the phones calls was that there was a general lack of knowledge and confusion about how a request for accommodation should be processed. One Disability Program Manager related how he was unaware about any guidance from higher headquarters and that he recently asked for such guidance while trying to process a request for accommodation.[254] The Disability Program Manager expressed how he was

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[251] Confidential Phone Interviews (Oct. 13-22, 2010).
[252] *Id.*
[253] Interview with Major Shelly Frank, *supra* note 249.
[254] Confidential Phone Interview with Disability Program Manager (Oct. 14, 2010).

forced to seek advice from a civilian lawyer downtown just to fumble his way through the request.[255]

Another Disability Program Manager explained how she just logically thinks through a request and asks an employee's commander if he or she thinks the request is reasonable.[256] She used her most recent request for a ergonomic desk chair as an example and stated how she sometimes gets accommodation requests forwarded from the EEO Office.[257] Lastly, the female declared no knowledge of any Air Force plan or model on how to process an accommodation request.[258] All the EEO offices explained how they just facilitate and forward requests to the Civilian Personnel Office on base. [259]

Even if the Air Force responded to the ADAAA with the most dynamic and proactive plan relating to the interactive process, such a plan must be pushed down by the employer. The employer should strive for standardization in the implementation of the plan and provide front line representatives with the necessary support in order to successfully complete the interactive process. There needs to be a campaign that focuses on notice, education, implementation and inspections for compliance. The campaign needs to infiltrate the key offices involved in the interactive process: Civilian Personnel, EEO Office and Legal. Hopefully, this has been accomplished by higher headquarters and the results of the cold calls and JAGs' experiences are isolated occurrences.

In spite of how the Air Force has implemented its current plan/process, the plan/process must be dramatically expanded and supported. A streamlined process that

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[255] *Id.*
[256] Confidential Phone Interview with Disability Program Manager (Oct. 19, 2010).
[257] *Id.*
[258] *Id.*
[259] Confidential Phone Interviews (Oct. 13-22, 2010).

involves all the key offices on an installation will demonstrate the Air Force's good faith dealings in the interactive process. The Air Force should tailor its model after a successful federal agency in Rehabilitation Act claims, the United States Postal Service (USPS).[260]

3. The USPS's interactive process model

The United States Postal Service (USPS) employed 5,372 individuals with targeted disabilities and thousands of other disabled individuals in fiscal year (FY) 2009.[261] The USPS had a total of 5,659 EEOC complaints filed in FY 2009 and 2,533 of those complaints contained disability discrimination allegations.[262] Disability discrimination allegations were the second most common allegation type filed against the USPS in FY 2009, just after reprisal complaints.[263] The USPS is well versed in processing and winning large volumes of disability discrimination claims.[264] Its success is due to its interactive process.

The Department of the Air Force, in contrast, employed 934 individuals with targeted disabilities in fiscal year 2009.[265] Only 134 of the Air Force's 491 complaints filed with the EEOC contained allegations of disability discrimination.[266] Both agencies have extremely high percentages of "finding no discrimination" in merit decisions for FY

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[260] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE, I-25, I-32, & II-122 (FY 2009).
[261] *Id.* at II-122.
[262] *Id.*
[263] *Id.*
[264] *Id.* at II-123.
[265] *Id.* at II-10.
[266] *Id.*

2009.[267] However, the agencies' processing time for all types of EEOC complaints differ dramatically.[268] The Air Force processed 52.3% of its complaints in a timely fashion as opposed to the USPS processing rate of 99.2%.[269]

While these timely processing percentages relate only to EEOC complaints and most importantly are not specific to only Rehabilitation Act complaints, certain generalizations can be unpacked from the data as related to the Air Force's military justice practices. Agencies or Air Force bases that handle more Rehabilitation Act complaints or court-martials are more experienced in the given process and more efficient due to the local corporate knowledge base. Such agencies or Air Force bases tend to standardize the process with checklists and handbooks. The standardization of the process creates in all the employees the ability to share in the corporate knowledge and the ability to jump into the process at anytime with little need of a refresher.

The USPS has created a standardized framework for its local offices and accommodation requests under the Rehabilitation Act.[270] It can be deduced that this framework, which starts at the local level is the key to the expedient processing of disability complaints and the foundation of any litigation defense for the USPS. The USPS released its most updated plan or framework, Handbook EL-307, in October 2008.[271] The handbook was released just prior to the 2009 effective date of the ADAAA and the USPS process was formulated in a manner to focus on the paramount issues of

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[267] *Id.* at II-11, II-123.
[268] *Id.*
[269] *Id.* at II-10, II-122.
[270] UNITED STATES POSTAL SERVICE, HANDBOOK EL-307 REASONABLE ACCOMMODATION, AN INTERACTIVE PROCESS (Oct. 2008).
[271] *Id.* at transmittal letter.

the employer's duty to accommodate under the interactive process post-ADAAA.[272] The USPS's implementation and practice of its Rehabilitation Act interactive process as presented in EL-307, is proactive, three dimensional and should be considered a best practice by all federal employers.

The very purpose of the handbook is to "establish procedures that enable Postal Service managers and supervisors to make sound decisions regarding reasonable accommodation for qualified individuals with disabilities during the processes of recruitment, examination, or hiring and during the course of their employment, including requests for accommodation to perform a current job or for placement in other jobs."[273] The USPS interactive process model covers the continuum of Rehabilitation Act accommodation requests, from easy requests of moving files down two drawers, to longer more difficult ones that request shift changes or work-at-home accommodations. The USPS process is malleable enough to be standardized to all types of requests. The process has depth and breadth, which makes it the perfect model for the Air Force to pattern its interactive process after.

The USPS interactive process is triggered by a request for accommodation and the handbook immediately sets forth guidance on when a request can be processed by one lower level individual or when a request must be referred to a committee.[274] The USPS model is tailored to refer the vast majority of requests to a committee unlike the Air Force model where one person works through a request.[275] The USPS interactive process

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[272] *Id.*
[273] *Id.* at 1.
[274] *Id.* at 9.
[275] *Id.* at 10.

model allows and undeniably encourages an unknowledgeable or inattentive agent of the employer to refer any request to a committee without even needing to state a reason for referral.[276] The model moreover demands a request be referred to a committee when there are any questions regarding the presences of a disability, reasonable accommodation, undue hardship or essential functions of a job.[277] Every accommodation request will touch upon the topics of disability, reasonable accommodation, undue hardship and essential job functions thus making any question referable to a committee.

Even if a request is not referred to a committee and it is processed on an individual level, the EL-307 mandates the individual go through the USPS's five-step interactive process and provides an individual with record keeping templates.[278] Each step of the process is described in detail with added tips and the handbook spotlights overarching questions that should be asked during the process.[279] Furthermore, documentation of the process via the USPS Reasonable Accommodation Decision Guide is stressed and provides additional guidance.[280] The USPS model favors a committee approach under the interactive process and disfavors ad hock, unknowledgeable, non-standardized individualized processing of a request that could potentially expose the employer to liability under its duty to accommodate.[281] The model funnels the majority of accommodation requests to a Reasonable Accommodation Committee (RAC).[282]

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[276] *Id.*
[277] *Id.*
[278] *Id.* at 11-17, 22-29.
[279] *Id.* at 11-17.
[280] *Id.* at 24.
[281] *Id.* at 10.
[282] *Id.*

Every Postal Service area or district is required to have a RAC.[283] The RAC is labeled as a "multifunctional task force" that works with both the employee and management under the USPS's five-step interactive process.[284] The RAC transforms the duty to accommodate into a truly collaborative interactive process. This transformation is created through the use of teamwork and each member's individual area of specialized knowledge and opinion. The USPS, at a minimum, requires the labor relations manager, a human resources generalist, safety manager, postal service medical doctor, occupational health nurse and operations manager to be standing members of the RAC.[285] The RAC is able to consult with its area law office at anytime and it is not uncommon for a legal advisor to attend a committee meeting.[286] In addition, the RAC can forward an open accommodation request to its area law office in order to vet it through the office.[287] The RAC must consult with its area law office "before making a final determination to deny a request for accommodation or to refuse to hire an individual when" there is no "readily apparent disability" under the Rehabilitation Act, the "individual poses a significant risk of substantial harm to himself or others and when the committee finds an undue hardship."[288]

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[283] *Id.* at 57.
[284] *Id.*
[285] *Id. at 57, 58.*
[286] UNITED STATES POSTAL SERVICE, HANDBOOK EL-307 REASONABLE ACCOMMODATION, AN INTERACTIVE PROCESS 58 (Oct. 2008) *and* Interview with Mr. Basil Legg, Jr., Air Force Attorney-Advisor in the Labor Law Field Support Center, in Rosslyn, Va. (Sept. 29, 2010).
[287] *Id.*
[288] UNITED STATES POSTAL SERVICE, HANDBOOK EL-307 REASONABLE ACCOMMODATION, AN INTERACTIVE PROCESS 58, 59 (Oct. 2008).

EL-307 further supports a transparent and mutually beneficial process by encouraging the employee's and the employee's supervisor's attendance at RAC meetings.[289] Before such a meeting is held, each member of the RAC is required to review the employee's or applicant's file, which includes documentation of impairment and limitations.[290] The review permits RAC members to learn the general background of each request and serves as the initial foundation of facts before the RAC goes through the five-step interactive process in committee. The RAC, the employee, the supervisor and other attendees first start the process by determining whether the employee has a disability.[291] Step one of the USPS interactive process, determining whether the employee has a disability, has been curtailed by the ADAAA since disability coverage is very broad under the Rehabilitation Act and ADA. Nevertheless, the USPS still discusses the issue to be thorough and seeks the expertise of the medical doctor and/or nurse members of the RAC.[292]

Step two of "the five-step reasonable accommodation interactive process is to determine the essential functions of the job".[293] The RAC has the option of using an Essential Functions Review Worksheet in step two.[294] To determine the essential functions of a job according to the handbook, the RAC should carefully consider information from the job description, the employee, the supervisor and even other employees who are employed in the same job. Once the essential functions of a job are

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289 *Id.* at 61.
290 *Id.*
291 *Id.* at 11.
292 *Id.* at 58.
293 *Id.* at 12.
294 *Id.* at 26-28.

determined, the RAC must then identify the abilities and limitations of the employee.[295] The employee's participation in step three is crucial. [296] Step three, identifying the abilities and limitations of the employee, is where the implementation of the RAC starts to transform into a three dimensional process that continues feeding off of everyone's input and interaction until the conclusion of the process at step five.

With the essential functions of a job and the employee's abilities and limitations identified in steps two and three, the RAC must next brainstorm and identify all potential accommodations.[297] The heart of the interactive process under the Rehabilitation Act and the ADA is to employ disabled individuals through workplace accommodations.[298] The more minds an employer can provide to the process of identifying potential accommodations, the more dynamic and successful the process will be for the employee and the employer. No offered accommodation should be rejected or tabled. There is no valuation or balancing of accommodations in step four of the USPS process.[299]

Step five is the final step in the interactive process. In step five, the RAC determines the reasonableness of all the potential accommodations and selects an option.[300] An option may be one of the potential accommodations. Or an option may be a conclusion, for example, that all the potential accommodations violate a provision of

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[295] *Id.* at 13.
[296] *Id.*
[297] *Id.* at 15.
[298] *A Guide to Disability Rights Laws*, *supra* note 56.
[299] UNITED STATES POSTAL SERVICE, HANDBOOK EL-307 REASONABLE ACCOMMODATION, AN INTERACTIVE PROCESS 15 (Oct. 2008).
[300] *Id.* at 16.

the collective bargaining agreement causing the RAC to reject the request for an accommodation.[301]

The USPS five-step interactive process employed by the RAC can occur over several meetings depending on the intricacies of a request.[302] In between meetings and steps in the process, the RAC can gather more information and consult with a number of people depending on the given issues involved in an accommodation request.[303] Every step of the USPS model is documented either through templates or meeting minutes.[304] In addition, all final acts of the RAC are reduced to written form and filed in a reasonable accommodation folder "for the duration of the employee's tenure with the Postal Service or until any appeals are adjudicated, whichever is longer."[305] Under the USPS model, the reasonable accommodation folder will be retained and accessible to the employer if it needs to adapt or reconsider an accommodation due to changes in an employee's disability. The folder will also be available to the employer if an informal or formal EEOC complaint is filed and if there is any federal litigation involving the accommodation request. The accommodation folder would be central to any defense an employer may have in a complaint.

4. Applying the USPS model to the Air Force

The USPS five-step interactive model, to include the RAC, should be implemented by the United States Air Force. What makes the USPS five-step interactive process so attractive to the Air Force as a best practice is its familiar framework and the

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[301] *Id.*
[302] *Id.* at 11.
[303] *Id.* at 11-17.
[304] *Id.*
[305] *Id.* at 21.

model's completeness. The five-step interactive process is a rational decision making model, which is characterized by its structure and sequenced approach to decision making.[306] The rational decision making model is already a common tool in the Air Force because the model ensures that discipline and consistency are built into the decision making process.[307] The framework and application of the model should be familiar to all Air Force officers via their professional military education (PME). The implementation of the USPS model would allow the Air Force to properly respond to the ADAAA and ultimately allow the Air Force to have a proactive, standardized, Rehabilitation Act compliant interactive process.

The implementation of the USPS model would involve some tailoring and education to affected units. The most attractive part and the heart of the USPS model is the RAC. In order for the Air Force to reap the benefits of reduced liability that flows from the USPS model, the Air Force must also create a reasonable accommodation committee (RAC). These committees should be set up at a base or installation level. A base level committee should include the following mandatory members: Civilian Personnel Representative, JAG Representative, EO Representative, Medical Group Representative, employee or applicant making the request for accommodation and the supervisor of the employee or applicant. The committee head of the Air Force RAC and the office of primary responsibility (OPR) must be the representative with the most knowledge and day to day interactions with Rehabilitation Act accommodations. That individual is the Disabilities Program Manager from the Civilian Personnel Office.

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[306] THE HAPPY MANAGER, http://www.the-happy-manager.com/rational-decision-making-model.html (last visited Dec. 21, 2010).
[307] *Id.*

If the Air Force adopts the USPS model, then all requests for an accommodation at a certain base should be funneled to the Disabilities Program Manager in the Civilian Personnel Office. As the committee head or OPR, the Disabilities Program Manager would be in charge of assembling an accommodation file just as the USPS does and fleshing out or completing any accommodation requests. Time is of the essence once a request is received and any delay detrimentally affects an employer's interactive process. The Air Force's current interactive process has acknowledged the importance of speed and provides certain goals or metrics for processing a request that could be combined with the adopted USPS model.[308] Once a request is completed and documented, the Disabilities Program Manager should immediately schedule a committee meeting. Depending on the number of requests, the committee may need to hold a meeting every week or only have to meet in the rare occurrence the Disabilities Program Manager intakes a request for an accommodation. Each installation will differ and the number of requests could ebb and flow.

At a minimum, a committee meeting should be held within seven duty days of the date of the request. Swiftness in scheduling the meeting is important because every day that passes is a day the employee is potentially needlessly struggling in his or her job, a day the Air Force is potentially not meeting its duty as an employer to accommodate and a day where the employee's duty section is not optimally functioning. Seven duty days is adequate time for the Disabilities Program Manager to clarify and finalize a request. The

[308] Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force, at 12 (Jan. 2011) (on file with author).

whole interactive process does not need to be competed in seven days but the first committee meeting should not be postponed past seven duty days.

At all times, the Disabilities Program Manager must keep the process and the parties moving forward. Some requests may require further medical records, quotes from suppliers of adaptive disability equipment, or a trial time period to test an accommodation. However, the Disabilities Program Manager's central function should be to motivate and provide a sense of urgency to the process. Just as when a person is ordered into pretrial confinement, the government must touch the request daily and move the request forward. The government's position in court will be prejudiced in either a pretrial confinement case or an accommodation request case if the government does not act continuously and with purpose. Every day that passes with no action on the part of the government only weakens the government's position and strengthens the plaintiff's case.

The JAG's main function in the committee will be two-fold. First, as with any other committee, the JAG will serve as the committee's legal advisor. The JAG Representative must echo the importance of processing a request in a timely manner. In addition, the JAG Representative can educate the committee on the Rehabilitation Act and the ADA and provide any legal guidance the committee may need. Second, the JAG Representative will function as the committee's lead facilitator. No other career field is better suited to keep the committee on track under an analytical decision making model. The JAG Representative could ensure that no other members try to transform the cooperative process into an adversarial process and could make sure that the committee methodically works through the process. The JAG Representative's job is to make

certain that the interactive process is done the right way and that both the employee and the supervisor are satisfied with the process if possible. Success of the new process may be judged in the reduced number of EEOC complaints filed or the Air Force's success rate of "no liability" being assessed in Federal Court.

Currently, the Air Force's leading regulation, AFI 36-2706, Equal Opportunity Program - Military and Civilian, encompasses disability accommodations procedures and the role of the EEO Office on a base. Including an Equal Opportunity (EO) Representative on the committee will bring corporate knowledge to the committee and his or her presence will also put the employee who made the accommodation request at ease. The EEO Office is seen as an advocate or as an office whose duty is to protect the rights of an employee. This impression will not be lost on an employee who requested an accommodation. The EO Representative can provide comfort to an employee who is potentially unsure of his or her place in the workforce and is faced with attending a committee meeting. The thought of the meeting could be intimidating for an employee and could cause the employee to feel guarded without the presence of the EO Representative.

Another welcomed face for the employee and other members at the committee round table will be the Medical Group Representative. The Medical Group should strive to provide a doctor as the representative but could request a physician's assistance (PA) fill the role on the committee. The Medical Group Representative will be entrusted with securing any medical records the employee or committee may require, communicating with an employee's doctor (with permission), evaluating any limitations an employee or applicant may have due to a disability and educating the committee on various medical

issues that may arise with accommodations such as medication and accommodation devices. The Medical Group Representative will be able to share a unique perspective that will be imperative when the committee must identify all potential accommodations (step four) and then when the committee must determine if a reasonable accommodation exists (step five). The committee's breadth in brainstorming and debate will also be well served by the presence of the Medical Group Representative.

Lastly, the committee would be incomplete and dramatically hampered in its efforts without the presence of the employee or applicant and the employee's or applicant's supervisor. It is the employee and the supervisor who possess all the firsthand knowledge and experience relating to the disability and the essential duties of the job. Buy-in from the employee is central for the success of the process. The Air Force should mandate the presence of the supervisor thus showing how seriously the Air Force takes a request for accommodation and the Rehabilitation Act.

Every effort and encouragement should be made and documented to gain the employee's presence at a meeting. The Air Force should extend an invitation to the employee or applicant, document the invitation action and provide duty time for the employee to attend all committee meetings. Nevertheless, an employee or applicant should never be allowed to transform the interactive process into a gripe session against the Air Force or the supervisor. Such misdirection is not conducive to the process and is within the authority of other base agencies like the Inspector General's Office and not the accommodations committee.

If an employee does not wish to attend or chooses not to provide information that the committee requests, then the committee must still attempt to undergo the five-step

interactive process under the Rehabilitation Act's duty to accommodate. However, without the presence of the employee, the interactive process is doomed. In the event of a subsequent lawsuit by the employee, the employee and not the Air Force will be blamed for the breakdown of the interactive process.[309] The Air Force should never be the party at fault for the breakdown if it follows the USPS five-step model.

When an Air Force RAC proceeds through the USPS five-step process, each RAC member will focus his or her knowledge base and expertise in different steps but as the old saying goes " the whole is more than the sum of its parts".[310] The whole, in this case, is a three dimensional, proactive, interactive process which assists the Air Force in fulfilling its duty to accommodate under the Rehabilitation Act. An employer who has a process and attempts to comply with its accommodation duty in good faith and in consultation with the employee, will not be liable for damages. The key according to the EEOC "is good faith and working with the employee".[311]

The Air Force can demonstrate good faith through its process and the committee members who take part in the process. Each step of the process and the communications between the RAC members demonstrates an interactive and not a directive process. Under step one, determining if an employee or applicant has a disability, the Medical Group Representative's expertise will be called upon. In determining the essential functions of the job, step two, the committee will rely heavily on the supervisor, the Disabilities Program Manager and the JAG Representative. The viewpoints of the

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[309] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.
[310] THE LITERATURE NETWORK, ARISTOTLE, http://www.online-literature.com/aristotle/ (last visited May 2, 2011).
[311] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.

employee, EO Representative and Medical Group Representative will drive the committee through step three of the process, identifying the employee's abilities and limitations. All members will activity participate in step four, identifying all potential accommodations, but it can be expected that the employee, Medical Group Representative, and supervisor will be more likely to lead the committee to effective accommodations due to their knowledge of the disability. To finish, both the supervisor and JAG Representative will be advising the committee the most in step five, when the committee must determine the reasonableness of the accommodations and then select an option. The supervisor will share his or her viewpoint of the accommodation in light of the job and the JAG Representative will advise the committee on how a selected option fulfills or breaches the Air Force's duty under the Rehabilitation Act.

Not every request will demand an Air Force RAC meeting. If an accommodation is obvious when the request is made, then the Disabilities Program Manager should be empowered to process the request and route the completed accommodation file through the JAG Representative for coordination.[312] The EEOC provides employers with the following example to illustrate when a formal interactive process is unnecessary: "If an employee who uses a wheelchair requests a desk be set on blocks to elevate it above the wheelchair's arms, and the employer complies, an appropriate accommodation has been rendered without the necessity of a formal process."[313]

This thesis not only recommends that the Air Force adopt the USPS five-step interactive process model and tailor a RAC around an Air Force base structure but it also

[312] *Id.*
[313] *Id.*

suggests an annual review or audit be conducted on all files maintained by the Disabilities Program Manager. The audit will ensure the proper implementation of the five-step process, that all accommodation files are complete and identify any requests that need to be revisited or tailored. Such a review should be conducted by the base Legal Office and can be developed after the annual Staff Judge Advocate (SJA) Unfavorable Information File (UIF) review.[314] An employer's duty to accommodate an individual with a disability is not a single isolated event but it is instead an ongoing process.[315] "In many cases the accommodation involves the way an employee is supervised, the way work is performed over time, or other on-going aspects of employment."[316] Any employer should recognize the process and in turn monitor the process.

5. Advantages and disadvantages of the Air Force's adoption and implementation of the USPS five-step process

There are many advantages that flow from the Air Force adopting some form of the USPS five-step interactive model under an employer's duty to accommodate. First, the model will provide the Air Force with a clearly defined and structured process to evaluate all requests for accommodation. The adoption of the USPS interactive process will usher in much needed, in-depth guidance to the base level agents and provide

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[314] Air Force Instruction 36-2907, Unfavorable Information File (UIF) Program, at 10 (June 17, 2005). Unit commanders and the Staff Judge Advocates (SJA) must review UIFs annually. UIF monitors provide the commander and the SJA a computer listing of all UIFs. The commanders will compare the listing to the actual documents in the UIF folder to ensure personnel database integrity. Document the review via memorandum signed by the unit commander and the SJA.

[315] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.

[316] *Id.*

uniformity in how the Air Force handles disability accommodation requests. Second, the adoption and implementation will solidify the Air Force's commitment to the Rehabilitation Act and the ADA. Once the Air Force employs a "committee centered" model, it will be very difficult for any plaintiff to prove that the Air Force did not meet its good faith duty of accommodation. The Air Force will not be at fault for the breakdown of the interactive process if the Air Force simply moves through the steps until a reasonable decision has been made or the employee fails to participate in the process.

Built into the implementation of the USPS interactive process model is a focus on documentation. The depth of documentation and the consistency of the documentation is a third advantage. The use of standardized Air Force forms will transform the Air Force's Rehabilitation Act policy from being reactive to being proactive. With disability discrimination claims on the rise and the broadening of the term "disability" through the ADAAA, the Air Force will be optimally situated as an employer, in and out of court, due to the advantageous documentation scheme created by the USPS interactive process. Fourth, the process will bring together all the key players on a base and their respective knowledge to search for and fashion dynamic accommodations for employees under the Rehabilitation Act, thus insuring that the Air Force satisfies its duty of accommodation.

Finally, a non-calculated but inevitable advantage of the implementation is the rise in awareness of the Rehabilitation Act and the ADA and their protections. There will be more offices involved in the process. In addition, the newly implemented process will likely be placed on a commander's radar through briefings or commanders courses. With commanders supervising an increasing number of civilians under the Total Force

Structure, the more a commander will look to his or her JAG legal adviser for help on matters such as employee or applicant disability issues. An increase in awareness and understanding can only be characterized as a victory for an employee, employer, the JAG Corps and the Rehabilitation Act/ADA.

Obviously, as with any new plan or process, there are disadvantages or problems that may persuade an employer like the Air Force not to commit to or implement the process. Any employer must always weigh the advantages and disadvantages and determine if the disadvantages are too numerous or fatal. First and foremost, if the Air Force adopts and implements the USPS interactive process model, the Air Force will have to expend additional money and man-hours. Some may say the adoption and implementation is not necessary since the Air Force already has a process in place. Critics could add that the USPS model will only cause a redistribution of roles and authority from the EEO Office to the Civilian Personnel Office and the acquisition of additional roles due to the accommodations committee. Critics could also argue the USPS model will simply create another government bureaucracy and not streamline the Air Force's interactive process. Moreover, the AFI will have to be revised and different agencies in the Air Force involved in the transformation, such as Civilian Personnel, will need to be persuaded about making the changes.

If the Air Force implements the USPS model, each member of the Air Force RAC will be tasked with yet another additional duty and meeting to attend on a regular basis. In the era of doing more with less, additional resources for such an implementation may not be desired or even considered crucial. In addition, rolling out a new process will demand a time intensive and costly education and training program, from the top down.

The new process is worthless if no one knows about it and if the key offices are not trained in their respective responsibilities.

Another disadvantage is the potential for "pencil whipping".[317] The danger could happen at any level. The Disabilities Program Manager could process a request by himself and not refer the request to the Air Force RAC. Members of the RAC could not participate or "surface" participate, resulting in members just going through the motions with no true interaction.[318] Also, any documentation could be pencil whipped and thus useless to the Air Force in any court proceeding. However, due to the number of individuals involved in the process and their level of commitment to their jobs, the individual RAC members should police each other and keep each other honest. The yearly inspection of the accommodation files by the SJA should also prevent or at the very least alert an SJA to the problem of pencil whipping.

A critic of the adoption and implementation process can furthermore argue that the Air Force should not expend all this time and effort in a process, when the chances that a disability discrimination claim will make it all the way to court and include a large payout to an employee are low. Under a cost benefit analysis, it could be less expensive to just keep the current process and simply payout small amounts of money in settlements or judgments down the road than front load a large amount of money through

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[317] URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=Pencil%20Whipped (last visited May 4, 2011).

[318] In labor law, for example, "surface bargaining" is considered a violation of the duty to bargain in good faith. Surface bargaining is the "pretense of bargaining" and includes conduct such as attending meetings with no intention of reaching agreement and submitting proposals on a take-it-or-leave-it basis. ABA SECTION OF DISPUTE RESOLUTION, RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS 8 (2004), www.americanbar.org/content/dam/aba/migrated/dispute/draftres2.doc.

implementation based only on potential claims. The USPS model is a large investment and it could cost more money to stand up and maintain the process than to just settle Rehabilitation Act claims due to the Air Force's current inadequate interactive process. However, money should never be the tipping point especially when the topic is a federal law where the Federal Government is suppose to lead by example.[319]

Lastly, if the suggested model is adopted, employees and applicants who must participate in the interactive process may voice privacy concerns. Indeed, it is unlikely that employees or applicants who have a disability will be rushing to publicize their medical issues or want to adjust the workplace spotlight onto themselves. An employee under the new model will be forced to share his or her medical records and disability not with just one person, but with a whole committee. Also, records on their disability will be created and maintained by the Civilian Personnel Office. The level of privacy an employee or applicant has under the proposed model is lower. Yet, the communication and knowledge that lower the bar of privacy are vital aspects under the USPS model. A true interactive process is not possible without an open dialogue between the employee or applicant and the committee. Modesty in the matter will only lead to ineffective accommodations. Privacy concerns will be protected and maintained through the Privacy Act and the Health Insurance Portability and Accountability Act (HIPAA); tools that the Air Force and its agents are already familiar with and are in practice in the Air Force.[320]

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[319] Press Release, The White House, Executive Order – Increasing Federal Employment of Individuals with Disabilities (July 26, 2010), *available at* http://www.whitehouse.gov/the-press-office/executive-order-increasing-federal-employment-individuals-with-disabilities.

[320] Privacy Act of 1974, 5 U.S.C. § 552a (2010) *and* The Health Insurance Portability and Accountability Act of 1996 (HIPAA) P.L. No. 104-191, 110 Stat. 1938 (1996).

The Air Force is not done and not ready to rest on its laurels once it adopts and implements the USPS interactive process.[321] The Air Force must instead standup with other employers and hold the defining line that marks the end of an employer's duty to accommodate. An employer, like the Air Force, can be flexible in its duty to accommodate in areas of alternative work sites, alternative work schedules, job sharing and part-time employment. But no employer should be given the responsibility of a social welfare program as opposed to a duty.[322] Whether public or private, an employer at the end of the day still needs to get a job done and only needs to fulfill its duty to accommodate.

B. Expanding an employer's duty to accommodate

The ADA and the Rehabilitation Act, like any other law, are always in a state of flux.[323] Pressures from plaintiffs, defendants, lawyers, courts, lobbyists and Congress are constantly trying to redefine this area of law.[324] Currently, disability discrimination law is in a state of expansion.[325] In the early 2000s, lower courts were following Supreme Court precedent by defining applicability and coverage under the ADA and the Rehabilitation Act in a relatively limited manner.[326] Congress specifically felt that the standards enunciated by the Supreme Court "and applied by lower courts in numerous

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[321] THE FREE DICTIONARY, http://idioms.thefreedictionary.com/rest+on+laurels (last visited May 2, 2011).
[322] Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures in the Department of the Air Force, at 4 (Jan. 2011) (on file with author).
[323] EMPLOYLAW.COM, http://www.employlaw.com/faq2.htm (last visited Apr. 2, 2011).
[324] *Id.*
[325] Michael D. Tauer & Kendra Tidwell, *ADA Revisions Amount to Significant Expansion*, MARTINDALE.COM (Mar. 18, 2010), http://www.martindale.com/labor-employment-law/article_Glankler-Brown-PLLC_944358.htm.
[326] ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 § 2 (2008).

decisions [ ] created an inappropriately high level of limitations necessary to obtain coverage under the ADA".[327] As a result, Congress dramatically expanded coverage under the 2008 ADA Amendments Act.[328] Whether fueled by Congress' recent action in this area or another motivation, plaintiff attorneys are now attempting to further expand an employer's duty to accommodate to areas outside the workplace.

These areas include parking spaces, transportation reimbursement, shift changes, modified work schedules and work-at-home programs. Such far reaching expansion would jeopardize the ADA and the Rehabilitation Act, the policies behind the two Acts and their goals. Any inquiry into the area must first evaluate the reasonableness of an accommodation. Any accommodation that takes place outside the work environment or violates another legal duty should be deemed unreasonable under an employer's duty to accommodate. Second, an accommodation involving the workplace can be unreasonable if it creates an undue hardship for the employer. In general, accommodations characterized as "outside" the workplace such as off-site parking and transportation reimbursement would be unreasonable under the duty to accommodate and accommodations "inside" the workplace such as shift changes, modified work schedules and work-at-home programs could place an undue hardship on an employer.

[327] ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 § 2 (2008).
[328] *Id.*

1. The main question in duty to accommodate commuting cases

Whether or not an employer's duty to accommodate should or should not be expanded to commuting related issues depends, in part, upon whether "attendance" is classified as an essential function of a job.[329] Employers obviously argue that attendance is the most essential function of any job.[330] An employer's successful business operation depends on the old adage of "ninety percent of life is just showing up".[331] What good is an employee whose attendance is variable? For the vast majority of employers, including the United States Air Force, attendance must be argued as an essential function of a job. Without predicable levels of present employees, an employer's operation will be inconsistent and unresponsive to the employer's customer base.

In *Carr v. Reno*, the employee, Rosemarie Carr worked for the Department of Justice and suffered from Meniere's Disease.[332] The disease caused Ms. Carr to experience "dizziness, nausea, and vomiting, usually in the early morning upon traveling".[333] Four years after the Federal Government hired Ms. Carr "pursuant to a special program for the disabled", Ms. Carr became a Coding Clerk for the United States Attorney's Office.[334] The U.S. Attorney's Office needed Ms. Carr to work regular office hours as a Coding Clerk due to the nature of the duties and responsibilities of her

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[329] Kiburz v. England, 361 F. App'x. 326, 335 (3d Cir. 2010).
[330] Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994).
[331] FAMOUS QUOTES, http://www.famous-quotes.net/Quote.aspx?Ninety_percent_of_life_is_just_showing_up (last visited Feb. 2, 2011).
[332] Carr v. Reno, 23 F.3d 525, 527 (D.C. Cir. 1994).
[333] *Id.*
[334] *Id.*

position.[335] A Coding Clerk is responsible for coding papers on a daily basis related to all recent arrests in the District of Columbia.[336] Once the clerk codes the paperwork, another office retrieves the documents towards the end of each day and inputs the information into a database.[337] Falling behind in coding not only affects another office in charge of the database, but excessively burdens the resources of the U.S. Attorney's Office in catching up on the daily duty of coding.[338]

Unfortunately, Ms. Carr's ear disease affected her mostly in the morning while she was riding to work on public transportation.[339] The spells she experienced could not be anticipated in advance and left Ms. Carr physically unable to call into work when she was sick.[340] The U.S. Attorney's Office provided a sofa as an accommodation but "Ms. Carr was absent for a total of 477 hours in her first seven months of work".[341] The U.S. Attorney's Office consistently requested doctor's notes for periods of absence and medical documentation regarding the disease.[342] However, Ms. Carr never produced such paperwork and ultimately was assessed with fault in the breakdown of the interactive process.[343] The U.S. Attorney's Office, struggling to complete its coding duties, finally discharged Ms. Carr due to poor attendance.[344]

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335 *Id.*
336 *Id.*
337 *Id.*
338 *Id.*
339 *Id.*
340 *Id.*
341 *Id.*
342 *Id.* at 527, 528.
343 *Id.*
344 *Id.* at 528.

Ms. Carr filed a petition for wrongful discharge under both the Rehabilitation Act and the Civil Service Reform Act, arguing that the U.S. Attorney's Office failed to provide her with a reasonable accommodation.[345] Ms. Carr's requested accommodation included a flexible four hour arrival time window and a job restructuring to cover the time-sensitive portions of the job.[346] The U.S. Attorney's Office argued that the position of Coding Clerk was not a job that could function on a flexible schedule due to daily deadlines and therefore the requested accommodation created an undue hardship.[347] The United States Court of Appeals for the District of Columbia found "an essential function of any government job is an ability to appear for work (whether in the workplace or, in the unusual case, at home) and to complete assigned tasks within a reasonable period of time."[348] While this case occurred pre-ADAAA and the U.S. Attorney's Office did prevail on summary judgment, the case illustrates the importance of attendance as an essential job function and highlights the high level of participation on the part of the employer in the interactive process.

The Eleventh Circuit also found punctuality is an essential function of a job.[349] In *Earl v. Mervyns*, the employee was a Store Area Coordinator who had the responsibility of preparing one department of the store for its daily opening.[350] After being habitually late over a two year period, the employee disclosed that she was suffering from

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345 *Id.*
346 *Id.* at 529.
347 *Id.*
348 *Id.* at 530.
349 Earl v. Mervyns, Inc., 207 F.3d 1361, 1363 (11th Cir. 2000).
350 *Id.* at 1364.

Obsessive Compulsive Disorder.[351] The court found that the employer had no duty to engage in the interactive process since the employee's doctor testified no accommodation would enable the employee to be punctual.[352]

In *Salmon v. Dade County School Board*, the court used EEOC regulations about categorizing essential functions to reason that a guidance counselor's regular and punctual attendance is an essential function of providing counseling services to students in a school.[353] The EEOC regulation explained that "a job function may be considered essential because the reason the position exists is to perform that function."[354] Such reasoning again stresses the need for accurate job descriptions in order for an employer to effectively protect itself under the possible expansion of the duty to accommodate.

A disabled employee's ability to attend work everyday not only is predicated on his or her disability but can also in part be affected by parking availability, transportation reimbursement, availability of shifts, availability of modified work schedules and the possibility of work-at-home programs. However, what type of duty an employer should have to accommodate in these areas depends on how expansive one's reading of an employer's duty to accommodate is, coupled with the intent and policies behind the Rehabilitation Act and the ADA. Furthermore, whether an accommodation is portrayed as being reasonable or one that creates an undue hardship on the employer depends on many factors. The determining factors consist of whether or not the accommodation is considered within the confines of the workplace, whether the accommodation affects

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351 *Id.*
352 *Id.* at 1367.
353 Salmon v. Dade County Sch. Bd., 4 F. Supp. 2d 1157, 1161 (S.D. Fla. 1998).
354 *Id.*

another legal duty of the employer and whether the accommodation affects the employer's business operations.

2. Employer's duty to accommodate employees in parking

One of the areas where expansion of the employer's duty to accommodate regarding commuting assistance issues can occur is parking. Parking will obviously only be relevant in certain metropolitan locations where there is no office parking available. Should an employer be responsible for paying for a parking spot for a disabled employee? Or does the employer's duty to accommodate only start once the employee enters the front doors of the employer's premises?

Employers should not be responsible for paying for disabled employee's parking spots as an accommodation. The law should only obligate an employer with a duty to accommodate once the employee physically reports for work at the employer's premises. Requiring an employer to pay for a parking spot as a reasonable accommodation is not reasonable in light of the expanded coverage under both the ADA and the Rehabilitation Act and the principle that attendance is an essential job function. With an increased number of people being categorized as disabled under a broad definition, an employer located in a metropolitan area could be facing numerous requests for the purchase of off-site parking. In addition, it would be unreasonable to create a duty to accommodate in a situation where the accommodation occurs off the employer's premises and is therefore not within the control of the employer.

The Manhattan Legal Aid Society fought against expanding the employer's duty to accommodate in parking before the 2008 ADA Amendments Act broadened the scope

of protection and coverage under the ADA and the Rehabilitation Act.[355] In September 1987, Beth Lyons was employed as a staff lawyer for the Legal Aid Society.[356] After her initial term of employment, Lyons was struck by an automobile when she was leaving her parked car.[357] Lyons spent over three and half years recovering from the accident and was still unable to stand for extended periods, use stairs or walk long distances.[358]

Lyons requested that Legal Aid pay for parking spaces near her office and the courts she would be appearing in.[359] Lyons explained that public transportation was not feasible due to stairs, the need to stand and her inability to walk longer distances.[360] At the time, a parking spot in Manhattan cost roughly $300-$520 a month.[361] Legal Aid refused to pay for any parking spots arguing that such an accommodation was unreasonable.[362]

Lyons' lawsuit for failure to accommodate was brought under the ADA and the Rehabilitation Act.[363] The Second Circuit found that Legal Aid was subject to both or either the ADA and the Rehabilitation Act, that Lyons had a disability and that Legal Aid refused to provide an accommodation.[364] The court stated "the only question [was] whether Lyons' request … [was] not a request for a reasonable accommodation".[365] The court cited *Carr v. Reno*'s principle that an essential function of any government job is an

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355 Lyons v. Legal Aid Soc., 68 F.3d 1512 (2d Cir. 1995).
356 *Id.* at 1513.
357 *Id.*
358 *Id.*
359 *Id.*
360 *Id.*
361 *Id.* at 1514.
362 *Id.*
363 *Id.*
364 *Id.* at 1515.
365 *Id.*

ability to appear for work and that both Congress and the EEOC have never mandated such an accommodation.[366] In the court's mind, whether an employer has a duty to provide a parking space depended on "the employer's geographical location and financial resources, and … the determination of reasonableness."[367] The court's opinion seems to suggest that the duty to accommodate may apply outside the confines of the workplace.[368]

Parking for a handicapped employee was also a tangential issue in *Marcano-Rivera v. Pueblo Intern Inc*.[369] The plaintiff in the First Circuit case was a cashier at the local supermarket.[370] Marcano-Rivera was born with a congenital bone defect, which later resulted in the amputation of both of her legs.[371] After the amputation, Marcano-Rivera used a wheelchair to remain mobile.[372] Her complaint alleged a pattern of discrimination due to her disability.[373]

One of the events that evidenced the discrimination by the employer was when the supermarket informed Marcano-Rivera "that she could no longer use a handicapped parking space" since the spaces were "reserved for customers".[374] The court scoffed at the supermarket's assertion that it acted lawfully when it instructed Marcano-Rivera not to park in a handicapped parking space.[375] The court found the accommodation to be reasonable and could not imagine how an undue hardship would be created by allowing

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366 *Id.* at 1516.
367 *Id.*
368 Sullivan, *supra* note 132.
369 Marcano-Rivera v. Pueblo Int'l, Inc., 232 F.3d 245 (1st Cir. 2000).
370 *Id.* at 248.
371 *Id.*
372 *Id.*
373 *Id.*
374 *Id.* at 249.
375 *Id.* at 257.

the employee to use a handicapped parking space.[376] The court's opinion stressed the following:

> [I]t is not sufficient to treat plaintiff "as all other employees". Plaintiff, due to her disability, must use parking spaces specially set aside for handicapped individuals, because those parking spaces are not only closer to the store but are also designed to accommodate her transfer from vehicle to wheelchair. Her use of such spaces is not a matter of preference or convenience, but a matter of practicality-she simply cannot function in a crowded parking space. For defendant to posit that treating her like everyone else-in other words, like she had no disability-is practically a concession of its failure to accommodate her.[377]

An employer's duty to accommodate should only be extended to the employer's facilities. The supermarket in *Marcano-Rivera v. Pueblo International Inc* should be mandated to provide access to handicapped parking spaces on its property to disabled employees. Any other conclusion would be unreasonable. However, when an employer's facilities do not consist of parking spaces, the duty to accommodate should not be extended to such commuting assistance issues. The ADA's definition of reasonable accommodation differentiates between facilities within the control of the employer and those that are not within the control of the employer.[378] It is only reasonable to apply the duty to accommodate to the employer's facilities since it is the location of the duty and within the complete control of the employer. If an accommodation is within the control of the employer and involves the workplace, then an employer must either argue the accommodation is unreasonable in relationship to another law or duty, or the employer must point to the creation of an undue hardship. At the

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[376] *Id.*
[377] *Id.*
[378] Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2009).

foundation of any accommodation is the goal to aid the employee in the performance of his or her job duties. Such employee performance relates to the "9 to 5" job duties, which includes attendance at the employer's facilities. The duty to accommodate should be restricted to the workplace since that is where the employee performs his or her duties.

If the duty to accommodate is expanded to provide off-site parking spaces, then what would be next? Would an employer have to pay for a taxi when the employee can no longer drive herself or reimburse a family member for his or her time when he or she is forced to drive an employee to and from work every day? In one case, *Gronne v. Apple Bank For Savings*, an employer offered to pay fifty percent of the cost of a private car service to drive an employee to and from work on days when her family was unable to so.[379] The court concluded that transportation reimbursement was an issue of reasonableness and not undue hardship.[380] Since the bank fashioned the proposed accommodation and only an employer can argue an undue hardship defense, the plaintiff employee in the case could only attack the reasonableness of the accommodation.[381] The plaintiff, Mrs. Gronne, never responded to the bank's proposed accommodation and never explained how the bank's accommodation was unreasonable.[382] However, if the employee, instead of the employer, proposed the transportation reimbursement then the employer could argue that such an accommodation is outside the work environment and therefore unreasonable. Also, in the alternative, the employer would be able to entertain

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[379] Gronne v. Apple Bank For Sav., 1 F. App'x. 64, 66 (2d Cir. 2001).
[380] *Id.* at 67.
[381] *Id.*
[382] *Id.* at 66.

an undue hardship defense, as a last resort, based on the cost of the transportation reimbursement.

Such generosity in transportation reimbursement by an employer is outside the work environment's duty to accommodate and should never be mandated under the law. The creation of such a mandate on an employer would result in an unreasonable accommodation. The accommodation would be unreasonable since it would shift responsibility or the legal duty from city and county transportation agencies to the employer. This expansion in the duty to accommodate would occur just as the threshold for who is defined as disabled was drastically lowered, resulting in the perfect liability storm for employers. The policy behind the ADA was to never have an employer bear the sole responsibility of bringing disabled individuals into the workforce. Title II of the ADA places responsibility equally on State and local governments when dealing with transportation issues.[383]

Employers should never accept or surrender to such all encompassing responsibility under either the Rehabilitation Act or the ADA. Instead, it is recommended that employers like the Air Force focus on inserting a mandatory clause in lease agreements, which require a property owner to provide a certain number of handicapped parking spaces in a leased building. An employer can also educate itself on the intricacies of public transportation services on and off an installation, thus becoming an advocate for any improvements that could benefit disabled riders/employees.

[383] *A Guide to Disability Rights Laws, supra* note 56.

3. Employer's duty to accommodate under shift changes

If an employer should have no duty to accommodate an employee with an off-site parking space or with transportation reimbursement as this thesis purports, should the employer be mandated to implement a shift change so a family member can drive the employee to and from work? Is the employer required to implement a shift change to a day shift when public transportation is more readily available? Absolutely, an employer should be mandated under the law to view a shift change as an accommodation under its Rehabilitation Act/ADA duty. Nevertheless, an employer like the Air Force should always be mindful of its other duties under the law, such as its responsibilities under a collective bargaining agreement (CBA). A breach of a duty under a CBA due to an accommodation could make an accommodation unreasonable.

Jeanette Colwell was a part-time cashier in a Pennsylvania Rite Aid.[384] Colwell was diagnosed with retinal vein occlusion and glaucoma in her left eye a couple of months after she started working for Rite Aid.[385] Eventually, Colwell became blind in her left eye and requested that Rite Aid change her shift from 5p.m. – 9p.m. to 9a.m. – 2p.m.[386] Colwell explained to her supervisor that her blindness made it "dangerous and difficult" to drive at night.[387] Both Rite Aid and Colwell determined that public transportation by the store ended service at 6 p.m. and the town had no taxi services.[388] After making two requests to work the day shift, consulting with her union representative

[384] Colwell v. Rite Aid Corporation, 602 F.3d 495, 498 (3d Cir. 2010).
[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *Id.*

and not missing a day of work on a mixed day and night schedule, Colwell resigned and filed suit.[389]

The court in *Colwell v. Rite Aid Corporation* correctly reasoned that an employer is not responsible for how an employee gets to work, but is responsible for scheduling of shifts since such an activity is done inside the workplace.[390] The court pointed to how the ADA's definition of reasonable accommodation lists workplace activities as a defining term.[391] In addition, the court pointed to a House of Representatives report in which Congress acknowledged that "modified work schedules can provide useful accommodations" and noted that "persons who may require modified work schedules are persons with mobility impairments who depend on a public transportation system".[392]

However, the court went too far in a later part of its analysis by citing *Lyons v. Legal Aid Society* and stating that "under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable".[393] Such reasoning is dangerous due to generalizations and it provides no test of applicability for either party, which could lead to confusion. The court's reasoning also confuses the issues of reasonableness and undue hardship. The reasonableness of an accommodation addresses other duties imposed on the employer through laws or regulations and the rights of third parties such as coworkers. An undue hardship addresses cost issues and the affects of the accommodation on the employer's operations.

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389 *Id.* at 499.
390 *Id.* at 506.
391 *Id.* at 505.
392 *Id.*
393 *Id.* at 506.

The line must be clearly drawn when discussing an employer's duty to accommodate regarding getting to work. The line should be drawn based on reasonableness and in what is or is not within the confines of the workplace. An undue hardship analysis only occurs after a reasonableness inquiry. Shift changes are within the absolute control of the employer and occur within the confines of the workplace. Therefore, initially a shift change accommodation is a reasonable request.

While this thesis professes to support the idea that shift changes should be considered a viable accommodation, in the end analysis, terms of a CBA may invalidate such an option as unreasonable for both the employer and the employee or the accommodation could create an undue hardship. The CBA topic was argued by AT&T in an accommodation case.[394] The employee, Paul LaResca suffered from seizures caused by epilepsy.[395] The seizures made it impossible for LaResca to drive to and from work and he therefore relied on public transportation or family, friends and co-workers to drive him to and from work.[396] It was not until 12 years later that AT&T became aware of LaResca disability and upon notice, the company scheduled him to a requested second shift that ended at 8p.m. for commuting reasons.[397]

After a yearlong leave of absence from work for unrelated issues, LaResca returned to work.[398] The only open position AT&T had available at the time was the night shift.[399] The night shift lasted till 10p.m.[400] LaResca explained to AT&T how he

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[394] LaResca v. Am. Tel. & Tel., 161 F. Supp. 2d 323 (D.N.J. 2001).
[395] *Id.* at 326.
[396] *Id.*
[397] *Id.*
[398] *Id.*
[399] *Id.*

was unable to drive himself to and from work due to his epilepsy and how the public transportation that he relied on was not in operation at 10p.m.[401] Due to the lack of available public transportation, LaResca requested a shift change to days that would release him from work at 4p.m.[402]

LaResca argued that AT&T should have approved his accommodation request and should have facilitated the request by asking other employees to switch shifts or by rearranging just LaResca's shift schedule.[403] AT&T, on the other hand, maintained that "it had no legal obligation to accommodate Plaintiff's commute to work."[404] AT&T also relied on a collective bargaining agreement (CBA), arguing that the company could not infringe on the rights of more senior employees to accommodate LaResca.[405] The CBA with the Communications Workers of America Union provided that employees in LaResca's position of Data Processing Associate would ultimately be assigned to a given shift based on seniority.[406]

The court in *LaResca v. AT&T* concluded that seniority was not a litigated issue since LaResca did not dispute the relevant portion of the collective bargaining agreement.[407] The court stated the issue was accommodation "e.g. whether AT&T should have asked other employees to switch shifts" with LaResca or "whether AT&T

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[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.* at 331.

should have tried to rearrange the shift".[408] Regardless of what the court focused on, the collective bargaining agreement and compliance with the agreement was a central issue in the case. The court's avoidance of the seniority issue was explained away in a few sentences without any analysis. The EEOC, in a reference guide for employers, even points out that courts have been fairly uniform in holding that an employer need not breach the seniority provisions of a collective bargaining agreement when dealing with the duty to accommodate.[409]

While it might be possible to respect both the duty to accommodate and the duty under a collective bargaining agreement, an employer should enlist the aid of the union in such a task and tread lightly. Navigating an employer's duty under a collective bargaining agreement is not as irrelevant or as simple as the *LaResca* court infers and a breach of such a duty may have greater consequences than a breach of duty under the Rehabilitation Act or the ADA. In an accommodation case, an employer is susceptible to breaching its duty to one employee. In a breach under a collective bargaining agreement, the employer could be liable for an unfair labor practice against the union, the disabled employee and other employees whose shifts are changed. [410]

Setting aside the seniority and shift issues, the *LaResca* court does cite a number of cases that have held commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate.[411] The school guidance

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[408] *Id.*
[409] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, supra note 139.
[410] *See*, William J. Mcdevitt, *Seniority Systems and the Americans with Disability Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 ST. THOMAS L. REV. 359 (1997).
[411] LaResca v. Am. Tel. & Tel., 161 F. Supp. 2d 323, 333 (D.N.J. 2001).

counselor case of *Salmon v. Dade County School Board* was cited by the *LaResca* court for the premise that "the ADA required an employer to provide reasonable accommodations that eliminate barriers in the work environment".[412] The *LaResca* court piggybacked on the barriers argument by citing *Schneider v. Continental Casualty*, which instructed:

> An employer is required to provide reasonable accommodations that eliminate barriers in the work environment, not ones that eliminate barriers outside the work environment. [citation omitted]. For example, an employer would not be required to provide transportation to work as a reasonable accommodation for an employee whose disability makes it difficult for that employee to use public or private means of transportation, unless the employer provides such transportation for employees without disabilities.[413]

Ultimately, the *LaResca* court found that the employee's accommodation request was "in essence a commuting problem" and AT&T was not legally obligated to accommodate the request.[414] Both Rite Aid employee Coldwell's request and LaResca's request were precipitated in part by a lack of available public transportation in the evening hours and thus could be categorized as a commuting problem. Yet, the *LaResca* court mistakenly focused on what is not within the control of the employer, as opposed to what is within the control of the employer.[415] The employer can't control public transportation schedules, family and friend's availability to drive a disabled employee or even how far a bus stop is away from the employer's premises. All these things are outside the work environment and not within the control of the employer. Requiring an employer to accommodate an employee in such areas would therefore be an unreasonable

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[412] *Id.* at 334.
[413] *Id.*
[414] *Id.* at 335.
[415] *Id.* at 333.

accommodation. But an employer can and should have a duty to consider what it can control. An employer controls the work environment, which encompasses every shift that employees work.

This thesis does not mandate that every shift change accommodation must be approved. Instead, every shift change accommodation must be considered by an employer and analyzed in relation to any other duties an employer may have such as a collective bargaining agreement or other legal duties under the law. Once an employer determines the reasonableness of an accommodation, an employer will next determine if the accommodation becomes unreasonable due to the creation of an undue hardship. Part of the employer's consideration will include available shifts, available positions on a given shift, the commonality of the disability, how the employee's position affects other positions and the affect of the accommodation on the employer's operations. In considering all these factors, it may be an undue burden on the operations for the employer to grant a shift change. Still, the request for a shift change accommodation must always go through the interactive process.

An example of night blindness highlights questions revolving around the undue hardship issue. It can be argued that night blindness will be covered as a disability under the ADAAA's broad disability definition.[416] According to the Sixth Circuit, night blindness is experienced by a number of people over the age of 45.[417] However, if the night blindness only affects commuting and not job performance, how will an employer entertain numerous requests for a limited number of day shift spots? Does the job

[416] Capobianco v. City of New York, 422 F.3d 47, 50 (2d Cir. 2005).
[417] Wade v. Gen. Motors Corp., 1998 WL 639162 (C.A.6 (Ohio)).

position involved in the accommodation require interaction with other employees who only work a certain shift? How often will the request for an accommodation need to be reviewed due to when the sun sets and the shift ends? This example illustrates how in depth the interactive process can be for a shift change request. From time to time a disabled employee does not request a shift change but instead requests a modified work schedule of either a compressed workweek or flexible scheduling.[418]

4. Employer's duty to accommodate under modified work schedules

A modified work schedule involves adjusting arrival or departure times and providing periodic breaks.[419] The Manual of Employment Discrimination and Civil Rights in the Federal Court provides a modified work schedule illustration of an employee with HIV who must take medication multiple times a days on a strict schedule and the medication causes extreme nausea for an hour after ingestion.[420] On a modified work schedule, the employee could work three hours, then have an hour off to recover from the medication, work three more hours, have another hour off and then finish working two more hours in order to put in a eight hour day.[421] For most job positions, "the time during which an essential function is performed may be critical."[422] For example, if a court reporter's job description requires her to rotate through live courtrooms, an hour long break every three hours would create an undue hardship on the

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[418] EHOW, http://www.ehow.com/facts_6901926_modified-work-schedules-defined.html (last visited Apr. 3, 2011).
[419] Richey, *supra* note 130, at par 22.
[420] *Id.*
[421] *Id.*
[422] *Id.*

employer's operations.[423] Although a five minute long break, two or three times an hour, would create no hardship and could be a reasonable accommodation for a court reporter who suffers from incontinence.[424]

The time during which an essential function is performed is also important when an employer is considering creating a special modified shift just for a disabled employee. Modifying the disabled employee's schedule could prevent other employees from doing their job or prevent customers from being served.[425] The Manual of Employment Discrimination and Civil Rights in the Federal Court provides two examples; one representing when an employer would have no duty to accommodate due to the creation of an undue hardship and one where an employer would have a duty to modify an employee's schedule.[426]

> Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

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[423] Gratzl v. Office of Chief Judges of 12th, 18th, 19th, & 22nd Judicial Circuits, 601 F.3d 674, 676 (7th Cir. 2010).
[424] *Id.* at 682.
[425] Richey, *supra* note 130, at par 42.
[426] *Id.*

> Example B: A computer programmer works with a group of people to develop new software. The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m.–7:00 p.m. rather than 9:00 a.m.–6:00 p.m. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.[427]

There can be no hard and fast rule for whether or not an employer should have a duty to accommodate an employee's disability through a modified work schedule. Such an inquiry is very fact specific, centering on the essential functions of a job and how those functions interact with the employer's business as a whole.[428] If an essential function of a job requires an employee to keep a regular and predictable schedule, then a modified work schedule would create an undue hardship for the employer. Each accommodation issue will always be driven by the facts.

Even in the Air Force, the duty to accommodate will turn on the employee's unit mission and how the employee's job contributes to the mission. A civilian working for Civil Engineering who requires twenty minute naps every hour due to narcolepsy will be unable to contribute to the unit's mission of timely removal of snow or restriping a road. However, an undue hardship would not be created by modifying the schedule of a narcoleptic civilian working as a file clerk in a base clinic since the exact timing of the filing throughout the day does not matter. Since so many units and functions on an

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[427] *Id.*

[428] *Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA)* , U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last updated Feb. 2, 2011), http://www.eeoc.gov/facts/diabetes.html.

Air Force base are interrelated or dependent upon each other, modified work schedules may create an undue hardship. Nevertheless, the Air Force must still undergo the interactive process and consider a modified work schedule as an accommodation since it may work for some job positions.

Part of the consideration in the interactive process should include whether there is a need for supervision during the modified work schedule and how to correctly annotate the employee's accommodation time, which should not be reimbursable as work time. If an employee has to physically be at work for twelve hours but only works eight hours because of the amount of breaks he or she requires due to his or her disability, the Air Force should only have the duty to pay the employee for the eight hours. In other cases, the Air Force may face a situation where an employee cannot even make it to work or remain at work throughout the day and therefore requests to work at home.

5. Employer's duty to accommodate an employee working at home

If an employer, like the Air Force, functions in such a manner that a modified work schedule is not possible under current operations, then the last possible area to find an accommodation for a disabled employee who is unable to commute to work would be to consider a work-at-home accommodation. While federal courts have been reluctant to require such an accommodation, working at home, or telecommuting, allows employees with disabilities to remain productive at a time when they are not well enough to commute and/or to tolerate the demands of the workplace environment.[429] However, is a work-at-home accommodation feasible for the Air Force and its operations?

[429] ACCOMMODATING INDIVIDUALS WITH DISABILITIES IS A PROCESS, *supra* note 139.

In today's workforce and as a general rule, the Air Force should have no duty to accommodate a permanent work-at-home or telecommuting policy as a viable accommodation. Generally, a work-at-home policy would not be conducive to the military workplace and would equate to an undue hardship for the Air Force. In addition, in the extreme, the expansion of telecommuting could result in a full 360 degree reversal back to segregation of disabled employees from the workplace.[430]

The Air Force's workplace is structured in a team orientated manner. Every person, whether active duty or civilian, is dependent upon and accountable to other individuals on a daily basis. Under such a structure, each duty position will likely have essential functions rich in interactions, ranging from customer interactions, unit projects and inter-unit duties including mandatory briefings and meetings across the base. The physical presence of any civilian employee in the duty section is an essential element of the Total Force Structure and is essential to the successful accomplishment of attaining the Air Force's mission.[431] The presence of the civilian sector in the Air Force brings continuity, experience and mentorship that can only be shared in an office environment and not a work-at-home environment.

The whole debate on whether or not to create or maintain a work-at-home policy under the topic of undue hardship centers around whether or not the essential functions of a position can be performed at home, to include considering supervision and equipment or tools necessary for the job.[432] The key becomes whether the physical presence of the

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[430] Kristen M. Ludgate, *Telecommuting and the Americans with Disabilities Act: Is Working at Home A Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1324 (1997).
[431] Air Force Policy Directive 36-26, Total Force Development, at 2 (Aug. 27, 2008).
[432] Richey, *supra* note 130, at par 33.

employee is an essential function.[433] In *Moore v. Walker*, the United States General Accounting Office (GAO) was faced with a work-at-home request.[434] Mr. Moore, the disabled employee, was employed as an evaluator who was responsible for performing audits and evaluations of federal agencies.[435] Mr. Moore suffered a head injury in a car accident and requested to work at home in order to reduce workplace distractions.[436] Instead of approving Mr. Moore's accommodation, the GAO provided Mr. Moore with a private office to reduce any distractions and allowed him time to rest during the day due to his disability.[437] Furthermore, when possible, Mr. Moore's supervisor would give him tasks that could be accomplished at home. Nevertheless, the GAO was unwilling to let Mr. Moore work from home on a permanent basis.[438]

The court in *Moore* found that the GAO acted as a model employer.[439] The GAO did consider the work-at-home request but concluded that Mr. Moore's essential job functions, which included interviewing people, gathering data, attending team meetings and collaborating with co-workers could not be performed at home.[440] On the other hand, the D.C. Circuit found the Federal Aviation Administration (FAA), not to be a model employer.[441] The FAA let Mr. Woodruff, a supervisor of a team that produced educational material, work from home only two days a week.[442] The court in

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433 Ludgate, *supra* note 424, at 1339.
434 Moore v. Walker, 24 F. App'x. 924, 926 (10th Cir. 2001).
435 *Id.*
436 *Id.*
437 *Id.*
438 *Id.*
439 *Id.* at 929.
440 *Id.*
441 Woodruff v. Peters, 482 F.3d 521, 523 (D.C. Cir. 2007).
442 *Id.*

Woodruff v. Peters found that the FAA allowed other employees and even supervisors to telecommute as frequently as five days a week. The court also pointed out how self-directed Mr. Woodruff's team was, which in turn did not require Mr. Woodruff to be physically present in the workplace.[443]

The Tenth Circuit, after reviewing several sister circuits, has set forth the consistent rule that a request to work at home becomes unreasonable or creates an undue hardship for the employer if it eliminates an essential function of the job.[444] In the case setting forth the rule, employee Mason had previously worked at a United States Post Office and witnessed the murder of several of her co-workers on the job.[445] After the incident, Mason was diagnosed with post traumatic stress disorder and later became employed by Avaya Communications as a service coordinator.[446] As a service coordinator, Mason was required to schedule service appointments, monitor repair tickets and assign repair tickets to technicians in the field.[447] Two years into her job with Avaya, Mason heard about another employee, Lunsford, who pulled a knife on an Avaya employee and threatened to go "postal".[448] Once Lunsford was allowed to return to work, Mason called in sick.[449] Mason later requested one of three things; that Lunsford be relocated, that she be allowed to transfer or that she be allowed to work from home.[450]

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[443] *Id.* at 528.
[444] Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004).
[445] *Id.* at 1117.
[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] *Id.*
[450] *Id.*

The employer, Avaya, considered the requests for accommodation but denied all three of them as being impractical.[451] For the court, an essential function of a service coordinator was physical attendance at the work center.[452] The court found that a service coordinator's duties required teamwork and such teamwork could not effectively take place at home.[453] The Third Circuit recently echoed that essential duties of working with others, attending meetings and training and providing technical guidance all amounted to teamwork in a Navy case.[454] While no request for accommodation in the Air Force should summarily be denied, the emphasis of teamwork in the Total Force Structure makes such a request nearly impracticable thus resulting in the Air Force having no duty to accommodate.

IV. CONCLUSION

Under the ADAAA, broad scope protection against disability discrimination in employment has returned. The increased protection was the result of redefining what constitutes a disability under the Rehabilitation Act and the ADA in a more general and inclusive manner. Since the definition of disability has become so all-inclusive, employer defendants no longer have a sound litigation strategy in fighting whether or not a plaintiff employee or applicant is disabled and thus protected under the Rehabilitation Act or the ADA. Instead, astute employers must shift resources to operating a dynamic interactive process under their duty to accommodate. Now proper operation and

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451 *Id.* at 1118.
452 *Id.* at 1120.
453 *Id.*
454 Kiburz v. England, 361 F. App'x. 326, 333 (3d Cir. 2010).

documentation of the interactive process is the best defense an employer possesses in a disability discrimination claim or case.

The United States Air Force has responded to the ADAAA in the form of a Plan for Employment and Development of People with Disabilities and Reasonable Accommodation Procedures. The plan however does not adequately operate at the base level and hinders the lawyers who defend the Air Force in Rehabilitation Act litigation. The Air Force's interactive process at the base level is handled by the EEO Office according to Air Force Instructions (AFI). The Civilian Personnel Office's Disability Program Manager also plays a part in the process. The current Air Force interactive process does no optimize the resources and assets available at the base level in order to accommodate disabled applicants and employees. It is also unclear whether the bases are even knowledgeable in the Air Force's plan. However, it is clear that the Air Force must tailor and rework its interactive process to ensure compliance with its duty to accommodate under the Rehabilitation Act.

The Air Force should adopt the "committee centered" interactive process of the USPS. By implementing the USPS five-step interactive process, the Air Force will ensure that it fulfills its duty to accommodate in good faith. Instituting a committee will also allow committee members to check and balance each other and provide the applicant or employee with the best chance at succeeding in the work environment. For the Air Force, the USPS model produces vital documentation and a standardized process to work through any disability accommodation request. In the end, the implementation of a modified USPS model will only strengthen the Air Force's position in court and provide

evidence of the Air Force's commitment to the employment and accommodation of disabled individuals.

Once an employer has an effective interactive process to deal with workplace accommodations, the law must next delineate where an employer's duty to accommodate ceases. First, an accommodation must be analyzed in terms of reasonableness. Next, an employer must inquire as to whether the accommodation creates an undue hardship on its operations. Moreover, an employer's duty to accommodate disabled individuals should not be extended outside the workplace or to situations not within the control of the employer. Currently, different forces in employment law are attempting to extend an employer's duty to accommodate into commuting assistance issues. These issues range from parking spaces, transportation reimbursement, shift changes and modified work schedules to work-at-home programs.

An employer with parking spaces at its facility has a clear duty to provide handicapped spaces to disabled applicants or employees. Such an accommodation is reasonable and creates no undue hardship for the employer. If an employer is leasing office space or does not have parking at its facility, then the employer should have no duty to accommodate. Instead, the employer should be highly encouraged to negotiate office space leases that provide adequate handicapped parking and research public transportation options near the workplace for employees. On the other hand, both shift changes and modified work schedules are viable accommodations that an employer has control over and can provide under both the Rehabilitation Act and the ADA. Yet, it is important to first make sure an accommodation of a shift change or a modified work schedule is not made unreasonable because it conflicts with a collective bargaining

agreement, seniority rights, or other legal duty. Second, it is also important to make sure an accommodation does not create an undue hardship by affecting an essential function of a job, other employees' job functions, or the employer's business operations. All these potential conflicts are possible on an Air Force base and could make an accommodation unreasonable or nonviable due to an undue hardship.

Lastly, any permanent work-at-home program that would allow an employee to spend all of his or her time at home will likely create an undue hardship for the Air Force if the employee is unable to commute to work. The Air Force's reliance on the civilian workforce in the Total Force Structure is important and necessary for teamwork in any duty section. So many civilian jobs on an Air Force base require the interaction and physical presence of a person in the workplace, that a work-at-home program would be next to impossible. However, when dealing with a commuting related accommodation or any accommodation request, an employer like the Air Force must always proceed through its interactive process before a request is summarily denied.