

Determining the Appropriate Framework for Commuting Accommodations Under the Americans with Disabilities Act

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INTRODUCTION

While the Americans with Disabilities Act (ADA) provides comprehensive protection for people with disabilities in several areas of life, including employment, questions about its scope and effectiveness remain. In addition to problems completing tasks at the workplace, many individuals with disabilities have difficulty getting to and from the workplace. Public transportation may be an unavailable, or an unacceptable, solution because it is often unreliable and may prevent an employee from getting to work on time. Employees with disabilities may therefore be unable to get to work without commuting-related accommodations and thus may be unable to keep their jobs though they are otherwise qualified for the position.

Recently, courts have split over whether the ADA's reasonable accommodations framework imposes on employers an obligation to accommodate employees' commuting-related difficulties. Commuting-related accommodations can range from requests for parking spaces¹ and modified work schedules on one end of the spectrum to employer-paid transportation and telecommuting on the other. While cases involving requests for schedule changes² and parking spaces have found success in the Second,³ Ninth,⁴ and Third⁵ Circuits, they have met resistance in other circuits, including the Seventh⁶ and Eighth Circuits.⁷

Courts addressing requests for commuting-related accommodations have split over whether these accommodations are outside the scope of the ADA. The Seventh,⁸ Eighth,⁹ and Eleventh¹⁰ Circuits have held that commuting-related accommodations are outside the scope of the ADA and are thus not required. The Third Circuit also followed this approach prior to deciding *Colwell v. Rite Aid* in

1. Parking space accommodations have generally been treated by courts as commuting-related because they are provided outside of the physical bounds of the workplace and often stem from an employee's inability to walk long distances. *E.g.*, *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995).

2. 42 U.S.C. § 12111 (2006) (listing "modified work schedules" as possible reasonable accommodations).

3. *See, e.g.*, *Lyons*, 68 F.3d at 1516 (finding a request for a parking space to be a reasonable accommodation depending on certain factors).

4. *See, e.g.*, *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738, 741-43 (9th Cir. 2010) (reversing summary judgment for the defendant employer and holding that a request for day shifts could be reasonable under the circumstances).

5. *See, e.g.*, *Colwell v. Rite-Aid*, 602 F.3d 495, 506 (3d Cir. 2010) (finding a request for day shifts to be a reasonable accommodation).

6. *See, e.g.*, *Bull v. Coyner*, No. 97 C. 7583, 2000 U.S. Dist. LEXIS 1905, at *25 (N.D. Ill. Feb. 17, 2000).

7. *See, e.g.*, *Young-Parker v. AT&T*, 4:09-CV-00202, 2009 U.S. Dist. LEXIS 114997, at *5-8 (E.D. Ark. Apr. 29, 2009).

8. *See, e.g.*, *Bull*, 2000 U.S. Dist. LEXIS 1905, at *25.

9. *See, e.g.*, *Young-Parker*, 2009 U.S. Dist. LEXIS 114997.

10. *See, e.g.*, *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998).

2010.¹¹ Since 2010, however, the Second,¹² Third,¹³ and Ninth¹⁴ Circuits have applied a flexible, case-by-case analysis that examines the requested accommodation and conducts a fact-specific inquiry into the reasonableness of providing such an accommodation.

A case-by-case approach to commuting-related accommodations is most consistent with the language and purpose of the ADA's Title I,¹⁵ which Congress enacted to provide a comprehensive prohibition on discrimination against individuals with disabilities in the workplace.¹⁶ This approach is also supported by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), wherein Congress mandated a less rigid interpretation of the ADA and broader protections for disabled individuals. It is imperative that courts use this case-by-case approach if the goals of the ADA—providing equal opportunities to disabled individuals and allowing such individuals to hold meaningful positions in society—are to be achieved. A case-by-case approach is consistent with the intent and goals of the ADA because it (1) forces employers to confront prejudices about employees with disabilities by engaging in an interactive, solution-oriented process, (2) aids employees with disabilities in achieving equal opportunities in terms of finances, and (3) enables employees with disabilities to hold meaningful positions in society by helping them access and retain gainful employment.

Section I of this Note discusses the intent, history, and framework of the ADA as amended by the ADAAA and describes the case law and circuit split. Section II analyzes both approaches with a particular focus on the history and intent of the ADA; it argues that a case-by-case approach is the better approach based on the history and intent of the ADA and the subsequent ADAAA. Section III provides some guidance for implementing a case-by-case approach by producing several examples of accommodations that should be presumed to be reasonable, presumed to be unreasonable, or that should receive a fact-specific analysis to determine reasonableness. Because this Note attempts only to resolve a circuit split based on an analysis of the ADA's legislative history and intent, it does not address the policy arguments regarding whether employers should be responsible for commuting-related accommodations; these arguments are complex

11. *Colwell v. Rite-Aid*, 602 F.3d 495 (3d Cir. 2010).

12. *See, e.g., Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995) (finding a request for a parking space to be a reasonable accommodation).

13. *See, e.g., Colwell*, 602 F.3d at 505–06 (finding that a request for day shifts could be a reasonable accommodation).

14. *See, e.g., Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738, 740–42 (9th Cir. 2010) (reversing summary judgment for the defendant employer and holding that a request for day shifts could be reasonable under the circumstances).

15. 42 U.S.C. § 12101 (2006).

16. *See, e.g., Livingston*, 388 F. App'x at 740–42 (reversing summary judgment for the defendant employer and holding that a request for day shifts could be reasonable under the circumstances).

enough to require their own separate note and are beyond the scope of this project.

I. HISTORY, INTENT, AND FRAMEWORK OF THE ADA

A. The Evolution of the ADA and Its Expansion Through the ADAAA

Congress enacted the ADA to ensure equality for individuals with disabilities and to allow them to participate fully in society.¹⁷ As the first statute to provide a comprehensive set of rights to all Americans with disabilities,¹⁸ the ADA both prohibits discrimination in employment decisions and imposes on employers an affirmative duty to provide reasonable accommodations to qualified individuals with disabilities.¹⁹

Under the ADA, individuals with disabilities are persons whose disability substantially limits a major life activity.²⁰ Once the courts find a plaintiff statutorily disabled, the plaintiff must bear the burden of proving that he or she is also “qualified.”²¹ Qualified individuals are persons who can perform the essential functions of the job with or without the reasonable accommodations.²²

Congress amended the ADA through the ADAAA in 2008 in response to a line of Supreme Court cases that significantly limited the definition of a disability under the ADA.²³ The first of these cases was *Sutton v. United Air Lines*, in which the Supreme Court held that mitigating measures must be taken into account when determining whether an individual is substantially limited in a major life activity.²⁴

The petitioners in *Sutton* were twin sisters suffering from severe myopia²⁵ who had applied to be airline pilots and had been rejected because they did not meet the uncorrected vision requirements. The Court held, however, that the sisters were not substantially limited in a major life activity and thus not disabled under the statute because they had 20/20 or better vision with corrective

17. See 42 U.S.C. § 12101; see also Melissa Ann Ressler, PGA Tour, Inc. v. Martin: *A Hole in One for Casey Martin and the ADA*, 33 LOY. U. CHI. L.J. 631, 637 (2002) (noting that while the ADA was not the first statute enacted to prevent discrimination against disabled individuals, it is considered the “first comprehensive declaration of equality” for disabled individuals).

18. Ressler, *supra* note 17, at 637.

19. 42 U.S.C. § 12112 (2006).

20. *Id.* § 12102.

21. Debra Burke & Malcom Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 816–17 (2001); see *id.* § 12111 (2006) (defining “qualified individual”); *id.* § 12112 (prohibiting discrimination against a qualified individual).

22. *Id.* § 12111.

23. Americans with Disabilities Amendments Act of 2008, Pub. P.L. No. 110-325, § 2, 122 Stat. 3553 (findings and purpose section).

24. *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999).

25. *Id.* at 475.

measures.²⁶ Moreover, although the Equal Employment Opportunities Commission (EEOC) had issued interpretive guidance stating that disabilities should be assessed without reference to any mitigating measures, the Court noted that under the ADA, the EEOC did not have authority to issue these guidelines.²⁷ In dicta, the Court questioned the deference due to the EEOC regulations and reserved this question for a later date.²⁸

The Court further narrowed the definition of a disability under the ADA in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. First, the Court held that the appropriate inquiry for determining disability, defined as whether an individual is substantially limited in a major life activity, is whether an individual's impairment has "prevented or restricted [him or her] from performing tasks that are of central importance to most people's daily lives."²⁹ The Court also held that in order to qualify as a disability, the "impairment's impact must . . . be permanent or long term."³⁰

The plaintiff in *Toyota* was diagnosed with bilateral carpal tunnel syndrome and bilateral tendinitis, which limited her ability to lift and carry objects weighing more than a certain amount.³¹ The Court held that the plaintiff was not disabled under the statute³² and that Congress intended a "demanding standard for qualifying as disabled."³³ In doing so, it reasoned that if Congress meant to include all individuals with physical limitations, then the ADA's findings section would cite a much higher number of individuals with disabilities than it did.³⁴

In response, Congress enacted the ADAAA in 2008, which legislatively overruled *Sutton* and *Toyota* by expanding the types of disabilities that are covered by the ADA.³⁵ The ADAAA also expressed Congress's disapproval of the strict interpretation and exacting standards that the Supreme Court and lower courts following *Toyota* and *Sutton* had imposed on ADA plaintiffs attempting to prove their disability.³⁶ First, Congress provided that the ADAAA's purpose is

to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to

26. *Id.* at 481–82.

27. *Id.* at 479.

28. *Id.* at 480.

29. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 187 (2002).

30. *Id.* at 198.

31. *Id.* at 187–88.

32. *Id.* at 187.

33. *Id.* at 197.

34. *Id.* at 197–98.

35. 42 U.S.C. § 12101 (2006); see also Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act*, 103 NW. U. L. REV. COLLOQUY 217 (2008).

36. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008).

convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.³⁷

Further, the ADAAA expanded the nonexclusive list of major life activities to encompass, for example, several major bodily functions.³⁸

Although the ADAAA clarified Congress's intent with regard to the definition of a disability under the ADA, and even included walking as a major life activity, it nevertheless left many other questions open, including whether driving is a major life activity and whether commuting-related accommodations are within the scope of the statute.³⁹ Despite this, Congress's statement of intent in amending the ADA was a clear endorsement of a broader, more inclusive interpretation of the statute.⁴⁰

B. Intent

In drafting the ADA, Congress found that individuals with disabilities "occupy an inferior status in our society" and traditionally experience isolation and segregation.⁴¹ Congress further found that individuals with disabilities face frequent and pervasive discrimination that denies these individuals the "opportunity to compete on an equal basis" and costs the United States "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."⁴²

As a result of these findings, Congress intended the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴³ The ADA was further intended to "provide broad coverage"⁴⁴ to individuals with disabilities in the hope that these individuals would have the opportunity to become productive and successful members of society.⁴⁵

In order to achieve the statutory goal of equal opportunities for individuals with disabilities, courts should adopt a case-by-case approach to commuting-related accommodations. If employees with disabilities cannot get to the workplace, then providing reasonable accommodations inside the workplace does little to ensure equal opportunities. Moreover, allowing employers to dismiss all requests that resemble commuting-related accommodations does nothing to end discrimination—in fact, it may even perpetuate the stereotypes that the ADA was meant to end.

37. *Id.*

38. 42 U.S.C. § 12101.

39. *See id.*

40. *See* ADA Amendments Act, § 4, 122 Stat. at 3555–57 (2008); *see also* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 108 (2010).

41. 42 U.S.C. § 12101.

42. *Id.*

43. *Id.*

44. ADA Amendments Act, 122 Stat. 3553.

45. H.R. REP. NO. 101-485, pt. 2, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313.

C. Framework and Case Law

Courts have adopted three approaches to cases on commuting-related accommodations: (1) holding that the individual is not disabled because driving is not a major life activity,⁴⁶ (2) holding that commuting-related accommodations are outside the scope of the ADA,⁴⁷ and (3) holding that commuting-related accommodations can be reasonable under the circumstances.⁴⁸ This Note does not discuss the holding—that driving is not a major life activity—because the issue of disability under the statute is separate from the reasonableness of an accommodation. Discussion here will focus on the concept of disability under the ADA only to the extent that Congress’s amendment of the original definition of disability through the ADAAA provides support for a broader reading of the statute itself.

This Note assumes that an employee who requests a commuting-related accommodation is disabled under the ADA, and addresses only the circuit split over whether this accommodation is within the scope of the ADA based on the legislative history and intent of the statute. This Note then argues that courts should adopt a case-by-case approach to commuting-related accommodations as the approach that is most consistent with the intent and goals of the ADA.

1. Reasonable Accommodations Overview

In addition to prohibiting discrimination in employment decisions, the ADA imposes on employers an affirmative duty to provide reasonable accommodations for the known limitations of employees with disabilities⁴⁹ unless providing the accommodations would create undue hardship.⁵⁰ Before the court will perform an inquiry into the reasonableness of an accommodation, however, the plaintiff must show that he or she is qualified for the position under the ADA.⁵¹ A qualified

46. See, e.g., *Winsley v. Cook Cnty.*, 563 F.3d 598 (7th Cir. 2009); *Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1124–26 (10th Cir. 2008) (holding that a safety technician who had epilepsy and was not released to drive was not a disabled individual under the ADA because driving was not a major life activity, as its importance significantly depended on factors such as nearness to transportation); *Chenoweth v. Hillsborough Cnty.*, 250 F.3d 1328 (11th Cir. 2001).

47. See, e.g., *Bull v. Coyner*, No. 98 C. 7583, 2000 U.S. Dist. LEXIS 1905, at *25 (N.D. Ill. Feb. 17, 2000); *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998); *Schneider v. Cont’l Cas. Co.*, No. 95 C. 1820, 1996 U.S. Dist. LEXIS 19631 (N.D. Ill. Dec. 16, 1996).

48. See e.g., *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1516 (2d Cir. 1995); *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010); *Livingston v. Fred Meyer Stores, Inc.*, No. 08-35597, 388 F. App’x 738 (9th Cir. 2010).

49. 42 U.S.C. § 12112 (2006).

50. *Id.*; Elizabeth Clark Morin, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189, 199 (1990).

51. *Burke & Abel*, *supra* note 21; see 42 U.S.C. § 12111 (2006) (defining “qualified individual”); 42 U.S.C. § 12112 (prohibiting discrimination against a qualified individual).

individual can perform the essential functions of the job with or without reasonable accommodations.⁵²

The qualified individual inquiry is a very complicated area of the ADA analysis because every position requires a different set of essential functions. For some jobs, it is essential to be able to arrive on time, which can be difficult for people dependent on public transportation. People with disabilities are often dependent on public transportation because their disabilities prevent them from driving.⁵³ For these jobs, an individual with disabilities may not be classified as a qualified individual because he or she cannot perform essential job functions even with accommodations. In order to decide this issue, courts must apply a case-by-case analysis of the job specifics, the tasks required, and the accommodations requested.

The last and arguably most important component of the ADA framework is the reasonable accommodations provision.⁵⁴ An employer is required to provide reasonable accommodations to employees with disabilities,⁵⁵ which may include “making existing facilities used by employees readily accessible . . . and usable,”⁵⁶ as well as offering the option of “job restructuring, part-time or modified work schedules, reassignment to a vacant position,” and other statutory accommodations.⁵⁷ Determining whether an accommodation is reasonable requires a case by case analysis.⁵⁸ The ADA does not require a plaintiff to prove that an accommodation falls within an employer’s obligations under the statute as an element of the cause of action. This suggests that Congress intended the employer to bear the burden of proving that the accommodation falls outside its statutory obligations as an affirmative defense.

An employer may, however, reject a reasonable accommodation if the accommodation causes undue hardship,⁵⁹ which the ADA defines as subjecting the employer to “significant difficulty or expense” when considered in light of a number of factors in the statute.⁶⁰ Courts that reached the issue of reasonableness in commuting-related accommodation cases have adopted one of the following

52. 42 U.S.C. § 12111.

53. See Michael Lewyn, “*Thou Shalt Not Put a Stumbling Block Before the Blind*”: *The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037 (2001).

54. See H.R. REP. NO. 101-485, pt. 2, at 34 (noting that the “provision of various types of reasonable accommodations for individuals with various types of disabilities is essential to accomplishing the critical goal of this legislation—to allow individuals with disabilities to be part of the economic mainstream of our society”).

55. 42 U.S.C. § 12112.

56. 42 U.S.C. § 12111.

57. *Id.*

58. See H.R. REP. NO. 101-485, pt. 2, at 49; 29 C.F.R. § 1630.15(d), app. (2012); Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1457 (1991).

59. 42 U.S.C. § 12112(b)(5)(A).

60. 42 U.S.C. § 12111.

two approaches: (1) holding that commuting-related accommodations are outside the scope of the ADA,⁶¹ or (2) holding that commuting-related accommodations may be reasonable under the circumstances.⁶² The case-by-case approach is most consistent with the ADA's legislative history and purpose.

2. Not Required by the ADA

Some courts decide ADA claims that involve commuting issues by holding that commuting is outside the scope of employers' statutory obligations. Courts using this approach assert that the ADA addresses discrimination with respect to the "terms, condition, or privilege of employment."⁶³ Finding that commuting falls outside the terms, conditions, or privileges of employment because commuting is outside the bounds of the physical workplace, these courts thus find that employers are not required to accommodate such commuting issues under the ADA. While the two key Seventh Circuit cases that adopted this approach were not the first to hold that problems outside the workplace do not require accommodation, they are generally cited for the proposition that commuting-related accommodations are outside the scope of the ADA.

The Seventh Circuit first adopted this approach in *Schneider v. Continental Casualty Company*.⁶⁴ The plaintiff was a loss control representative who suffered from severe back pain that prevented her from driving the one-hour commute to her position. Citing to an opinion letter from the EEOC's Deputy General Counsel, which stated that employers are only required to provide reasonable accommodations that eliminate barriers inside the work environment, and not those external to the work environment, the court held that the defendant was not required to accommodate the plaintiff's commuting-related difficulties because they occur outside the work environment.⁶⁵

The Seventh Circuit then affirmed this approach in *Bull v. Conyer*.⁶⁶ The plaintiff was a human resources director who was diagnosed with retinitis pigmentosa, a condition that rendered him legally blind and completely prevented him from driving.⁶⁷ After the plaintiff was terminated, he filed an ADA suit asserting that his employer had failed to reasonably accommodate his disability by

61. See, e.g., *Bull v. Coyner*, No. 98 C. 7583, 2000 U.S. Dist. LEXIS 1905, at *25 (N.D. Ill. Feb. 17, 2000); *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998); *Schneider v. Cont'l Cas. Co.*, No. 95 C. 1820, 1996 U.S. Dist. LEXIS 19631 (N.D. Ill. Dec. 16, 1996).

62. See, e.g., *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010); *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738 (9th Cir. 2010); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995).

63. *Bull*, 2000 U.S. Dist. LEXIS 1905, at *25 (citing 42 U.S.C. § 12112).

64. *Schneider*, 1996 U.S. Dist. LEXIS 19631.

65. *Id.* at *24.

66. *Bull*, 2000 U.S. Dist. LEXIS 1905, at *25.

67. *Id.* at *3.

continuing to give him night shifts and by not requiring other employees to drive him to and from work.⁶⁸

The *Bull* court reasoned that because accommodations are directed at enabling an employee to perform the essential functions of the job, and because commuting to and from work is outside the scope of the job, commuting-related accommodations are outside the scope of the employer's obligations under the ADA.⁶⁹ After holding that both of the plaintiff's requested accommodations were essentially commuting-related, the court held that the defendant had no obligation to provide them.⁷⁰

Citing to *Schneider*, a district court in the Eleventh Circuit also held that commuting-related problems are outside the scope of the employer's obligations under the ADA.⁷¹ In *Salmon v. Dade County School Board*, the Eleventh Circuit ruled that a plaintiff who suffered from a condition that caused her severe back pain and left her unable to drive for long periods was not entitled to a transfer to shorten her commute. Because the commute was a barrier outside of the work environment, the court reasoned that the plaintiff's request need not be accommodated.⁷²

Similarly, several Third Circuit courts cited to *Bull* or *Schneider* in order to hold that commuting-related problems are outside the scope of the employer's obligations under the ADA.⁷³ In *LaResca v. American Telephone & Telegraph*, a Third Circuit district court held that an employer did not have an obligation to provide only day shifts to an employee who suffered from epilepsy and was unable to drive, despite the fact that he could not find any transportation to work at night.⁷⁴

Although the *LaResca* plaintiff filed suit under the New Jersey Law Against Discrimination (LAD), the court noted that the same framework that is used for interpreting the ADA is also used for interpreting the LAD.⁷⁵ Citing to *Bull*, *Schneider*, and *Salmon*, the court held that "activities such as commuting to and from work fall outside the scope of the job and are therefore not within the scope of an employer's obligations under the ADA."⁷⁶

In *Parker v. Verizon Pennsylvania, Inc.*, the Third Circuit held once again that an employer had no duty to transfer an employee in order to shorten his commute

68. *Id.* at *24.

69. *Id.* at *24–25.

70. *Id.*

71. *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998).

72. *Id.* at 1163.

73. *Parker v. Verizon Pa., Inc.*, 309 F. App'x 551 (3d. Cir. 2009); *Dicino v. Aetna U.S. Healthcare*, No. 01-3206, 2003 U.S. Dist. LEXIS 26487, at *51–52 (D. N.J. June 23, 2003) (holding that the employer need not accommodate the plaintiff's requests to work from home because employers are not required to accommodate commuting-related problems); *LaResca v. Am. Tel. & Tel.*, 161 F. Supp. 2d 323, 333–34 (D. N.J. 2001).

74. *LaResca*, 161 F. Supp. 2d at 333.

75. *Id.* at 334.

76. *Id.* The court offered little reasoning other than citing to cases that used this approach.

because this barrier existed outside the work environment.⁷⁷ Instead of explaining its reasoning, the court cited to *LaResca*, which adopted the Seventh Circuit's reasoning in *Bull* and *Schneider*, to support the proposition that commuting-related accommodations are outside the scope of the ADA.⁷⁸

Likewise, an Arkansas district court held that even if an employee's request for only day shifts was a required accommodation under the ADA, it was unreasonable.⁷⁹ In *Young-Parker v. AT&T*, the plaintiff suffered from severe fibromyalgia, a degenerative joint condition that prevented her from driving at night. The court noted that while the Eighth Circuit did not address "whether an accommodation related to an employee's commute is required under the ADA," other circuits held that this accommodation was not required. The court also held that even if the employee's commuting-related problems were within the employer's obligations under the ADA, the plaintiff's request was unreasonable because it would prevent the employer from offering day shifts to other, more qualified individuals who had seniority.⁸⁰

3. Case-by-Case Reasonableness Under the Circumstances

Other courts address these cases by holding that commuting-related accommodations may be reasonable under the circumstances. This approach is most consistent with the ADA's text and may, in fact, be necessary to realize its goals. Far fewer cases, however, have adopted a case-by-case reasonableness approach, although the majority of these cases arose or were decided within the last several years.

One of the first cases holding that commuting-related accommodations could be reasonable under the circumstances was *Lynons v. Legal Aid Society*, which involved an attorney employed by the Legal Aid Society in lower Manhattan who was struck by an automobile that inflicted near-fatal injuries and severely limited

77. *Parker*, 309 F App'x at 561. In *Parker*, the plaintiff was diagnosed with sarcoidosis, an autoimmune disease causing pulmonary inflammation and fibrosis. His condition affected his ability to breathe and talk and made it difficult for him to commute long distances. After his request for a transfer was denied, he filed suit under the ADA. The court cited *Kvorjak v. Maine*, 259 F.3d 48, 53 (1st Cir. 2001), in support of its holding that an employee's commute is not part of the work environment and that an employer is not reasonably required to accommodate commuting-related difficulties.

78. *See id.*

79. *Young-Parker v. AT&T*, No. 4:09-CV-00202, 2009 U.S. Dist. LEXIS 114997 (E.D. Ark. Apr. 29, 2009).

80. While the court did not say that commuting-related accommodations are always unreasonable, shift changes impose relatively little hardship on employers facing requests to accommodate their employees' commuting-related problems. If the court found this request to be unreasonable, then it is hard to imagine a request that it would consider reasonable.

her ability to walk long distances.⁸¹ The attorney asked the Legal Aid Society to pay for a parking space near her office and the court where she worked.⁸²

The lower court in *Lyons* held that the ADA did not impose this obligation on employers and dismissed her complaint.⁸³ However, the Second Circuit reversed the dismissal, noting that “[i]t [was] clear . . . that Congress envisioned that employer assistance with transportation to get the employee to and from the job might be covered.”⁸⁴ The court held that determining the reasonableness of such accommodations would require the development of a factual record and should be done on a flexible, case-specific basis.

Lyons paved the way for other courts to hold that commuting-related accommodations can be reasonable under the circumstances.⁸⁵ In 2010, the Third Circuit held in *Colwell v. Rite-Aid* that “under certain circumstances the ADA can obligate an employer to accommodate an employee’s disability-related difficulties in getting to work, if reasonable.”⁸⁶ In *Colwell*, an employee developed blindness in one eye and requested day shifts to avoid driving at night.

The district court held that employers had no duty to accommodate commuting-related issues and granted summary judgment for the defendant.⁸⁷ The Third Circuit reversed, however, noting that one circumstance where an employer may have a duty to accommodate an employee’s commuting-related difficulties is where the “condition . . . is entirely within an employer’s control.”⁸⁸

The Ninth Circuit followed *Colwell*’s reasoning in *Livingston v. Fred Meyer Stores, Inc.*⁸⁹ In *Livingston*, the plaintiff was a wine steward who suffered from a vision impairment that left her unable to safely drive and walk outside at night.⁹⁰ She requested a modified work schedule to avoid driving at night during the fall and winter. Her employer granted her request the first year but denied it the second year; she refused to work her scheduled shifts and was fired.

81. *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1516 (2d Cir. 1995). The court also stated that there was nothing unreasonable about requiring employers to offer reasonable accommodations to otherwise qualified individuals in order to assist them in getting to work.

82. *Id.* at 1513.

83. *Id.* at 1514.

84. *Id.* at 1516. The court also stated that there was nothing unreasonable about requiring employers to make reasonable accommodations to assist otherwise-qualified individuals in getting to work. *Id.*

85. See Carrie G. Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 94 (“*Lyons* has cleared a rough-hewn path towards introducing other transportation-related reasonable accommodations.”).

86. *Colwell v. Rite-Aid*, 602 F.3d 495, 505 (3d Cir. 2010).

87. *Id.* at 499–500.

88. *Id.* at 505. The court noted in dicta that *Colwell* did not render employers responsible for how employees travel to work because the plaintiff did not ask for help in the methods or means of her commute. *Id.* at 506.

89. *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App’x 738 (9th Cir. 2010).

90. *Id.* at 739.

The district court declined to require an employer to accommodate commuting-related limitations.⁹¹ The Ninth Circuit, however, reversed the lower court's grant of summary judgment and noted that modified work schedules are listed as reasonable accommodations under the ADA.⁹² Further, it held that the plaintiff raised a triable issue of material fact on whether the defendant failed to reasonably accommodate her. In so doing, the court "recognized that an employer has a duty to accommodate an employee's limitations in getting to and from work."⁹³

II. ANALYSIS OF THE PROPER METHOD FOR ADDRESSING COMMUTING-RELATED ACCOMMODATIONS

Based on an analysis of the ADA's legislative intent, the best approach to commuting-related accommodations is the case-by-case approach implemented in *Colwell* and *Livingston*. By providing that the "definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act,"⁹⁴ the ADA as amended by the ADAAA clearly indicates Congress's intent for courts to adopt a broader definition of the term "disability" than the one adopted following the Supreme Court's decisions in *Toyota* and *Sutton*. Congress's broadening of this definition and its instruction to courts to focus on whether employers have fulfilled their obligations under the ADA (rather than on whether the individual is disabled) can be seen as a broader instruction to courts to focus on the overall intent and goals of the ADA instead of finding ways to quickly dispose of cases. The ADAAA also conveys that ADA cases should emphasize whether an employer upheld its obligations under the ADA rather than whether an employee is disabled under the statute.⁹⁵

Additionally, the ADA's purpose is to enable individuals with disabilities to become productive members of society through the enjoyment of equal opportunities.⁹⁶ It is not enough to provide reasonable accommodations to individuals with disabilities inside the workplace without providing reasonable accommodations that allow disabled individuals to reach the workplace. After discussing the implications of the circuit split described in Section I above, this Section explains why a bright-line rule that excludes commuting-related accommodations as outside the scope of the ADA leads to the wrong result and why a case-by-case approach that examines the reasonableness of the accommodations under the circumstances leads to the correct result.

91. *Id.* at 740.

92. *Id.* at 740–41 (citing *Colwell*, 602 F.3d at 506).

93. *Id.* at 740.

94. 42 U.S.C. § 12101(4) (2006).

95. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3559 (2008).

96. *See* 42 U.S.C. § 12101.

A. Commuting-Related Accommodations Should Not Be Outside the Scope of the ADA

The approach to commuting-related accommodations that holds them to be outside the scope of the ADA, or per se unreasonable, ignores the intent and purpose of the statute. In the House Notes on the ADA, 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 that is not currently fully accessible.’”⁹⁷ In its Interpretive Guidance on Title I of the ADA, the EEOC also noted that “[p]eople whose disabilities may need modified work schedules include . . . people with mobility and other impairments who find it difficult to use public transportation during peak hours, or who must depend upon special para-transit schedules.”⁹⁸ Additionally, the EEOC specifically stated that required accommodations might include “making employer provided transportation accessible, and providing reserved parking spaces.”⁹⁹ Further, a House of Representatives Committee on Education and Labor report noted that an employee with disabilities who worked in an inaccessible shopping mall was entitled to employer assistance in getting to and from the job site.¹⁰⁰ Quoting this language, the *Colwell* court reasoned that the ADA does not “strictly limit the breadth of reasonable accommodations to address only those problems that an employee has in performing her work that arise once she arrives at the workplace.”¹⁰¹ Instead, the statute provides that reasonable accommodations may include “part-time or modified work schedules.”¹⁰² Because the ADA explicitly includes modified work schedules as possible reasonable accommodations, and because modified work schedules are

97. *Colwell v. Rite Aid*, 602 F.3d 495, 505 (3d Cir. 2010) (citing H.R. REP. NO. 101-485, pt. 2, at 62–63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345). For more examples of courts associating modified work schedules with commuting-related accommodations, see *Livingston*, 388 F. App’x 738 (reversing the lower court’s finding that a modified work schedule request was a commuting-related difficulty that was outside the scope of the ADA), *LaResca v. American Telephone & Telegraph*, 161 F. Supp. 2d 323, 333 (D.N.J. 2001) (rejecting the employee’s request for only daytime shifts on the grounds that it was a commuting-related accommodation and thus outside the scope of the ADA), and *Bull v. Coyner*, No. 98 C. 7583, 2000 U.S. Dist. LEXIS 1905, at *24–25 (N.D. Ill. Feb. 17, 2000) (rejecting an employee’s request for a modified work schedule on the grounds that it was a commuting-related accommodation).

98. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § III-3.10(3) (1992).

99. EEOC’s Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. at 376 (2010).

100. H.R. REP. NO. 101-485, pt. 2, at 61 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 343. The House Report did not note whether the employee would be entitled to assistance to a specific store or how that employee should be assisted. But it did note that the employer should determine whether the individual with disabilities was qualified for the position and could reach the job site with a reasonable accommodation.

101. *Colwell*, 602 F.3d at 505.

102. 42 U.S.C. § 12111(9) (2006).

often associated with commuting-related difficulties, courts may infer that Congress contemplated commuting-related accommodations when enacting the statute.¹⁰³ That Congress did not list other possible commuting-related accommodations does not negate the fact that it referenced parking spaces and modified work schedules, both of which are often associated with commuting-related difficulties.

Thus, based on the statutory language, the House Notes, and the EEOC's Interpretive Guidance on the statute, it is clear that both Congress and the EEOC have recognized that commuting-related accommodations may be reasonable under the circumstances. Holding them automatically outside the scope of employers' obligations is therefore contrary to what Congress and the EEOC have envisioned.¹⁰⁴ Moreover, the findings section of the ADA provides that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."¹⁰⁵ Congress crafted the ADA with these findings in mind. It could not accomplish these goals, however, if the statute only covered disability-related problems inside the workplace because the resulting accommodations would be useless to individuals with disabilities who could not even access the workplace.

The findings section of the ADA also provides that

the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.¹⁰⁶

If the inability of individuals with disabilities to travel to and from the workplace prevents them from holding productive jobs, they will be unable to compete on an equal basis. They will continue to be dependent on the United States government for support. Thus, accommodating only those problems that are confined to the physical bounds of the workplace would not realize the goal of assuring full participation and economic self-sufficiency for individuals with disabilities. Because this method would exclude many individuals who might be able to hold a meaningful job but for their inability to reach the workplace, these individuals would be unable to fully participate in society and become economically self-sufficient.

103. See *Cobwell*, 602 F.3d at 505.

104. See *id.*; see also 42 U.S.C. § 12111(9)(B); H.R. REP. NO. 101-485(II), at 62-63 (1990), reprinted in 1990 U.S.C.C.A.N. 330, 345.

105. 42 U.S.C. § 12101 (2006).

106. *Id.*

Moreover, the ADA has never required employees to demonstrate that their requested accommodations are within the scope of the ADA or employers' obligations under the statute. Adding this requirement would mean that employees must not only demonstrate (1) that they have a disability under the ADA, (2) that they can perform the essential functions of the job with or without reasonable accommodations, and (3) that their requested accommodations are reasonable, but also (4) that their request is within their employer's obligations under the ADA. This is unnecessary because the existing framework already limits accommodations that cause undue hardships for employers.¹⁰⁷ Adding this requirement would increase the already strenuous burden on plaintiffs and improperly shift the employer's burden of asserting the affirmative defense of undue hardship onto employees with disabilities.

B. Why a Case-by-Case Approach Is Proper

The correct approach to commuting-related accommodations is the case-by-case approach adopted by the Second, Third, and Ninth Circuits. This approach conforms most closely to the intent and purpose of the Act and best achieves a balance between the interests of employers and employees.

The EEOC's guidance states that the reasonable accommodations analysis is a fact-specific inquiry that is performed on a case by case basis.¹⁰⁸ An employer cannot determine reasonableness without examining the employee's capabilities and qualifications, the essential functions of the job, and the implementation costs of the accommodation.

As discussed earlier, the ADAAA clarified that Congress intended the ADA to provide broad coverage in order to promote equal opportunities and "address the major areas of discrimination faced day-to-day by people with disabilities."¹⁰⁹ If the statute is not construed to provide broad coverage, then prejudice will continue to prevent individuals with disabilities from participating fully in society. Compared to the per se rule, a case-by-case approach is more in line with the broad coverage that Congress intended.

Further, in the ADA's findings section, Congress provided:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification

107. See 42 U.S.C. § 12112 (2006).

108. 29 C.F.R. § 1630, app. (2012); see H.R. REP. NO. 101-485, pt. 2, at 49, *reprinted in* 1990 U.S.C.C.A.N. 303, 314; Cooper, *supra* note 58, at 1457.

109. 42 U.S.C. § 12101.

standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.¹¹⁰

These findings reflect the ADA's purpose of mandating the "elimination of discrimination against individuals with disabilities."¹¹¹ If an employer denies an employee's request for accommodations before making fact-specific inquiries, then its decision is likely to be arbitrary or biased. The reasonable accommodations framework is best for achieving the ADA's goals because it instead forces employers to assess employees with disabilities on the basis of their merit.¹¹²

Essentially, a policy that excludes all commuting-related accommodations without regard for whether the accommodations are reasonable allows employers to fire their employees on the basis of their disabilities through a statutory loophole. By contrast, a policy that compels a case-by-case evaluation of commuting-related accommodations requires employers to judge their employees on the basis of their qualifications.

Additionally, a case-by-case approach best achieves a balance between the competing interests of employers and employees. Under this approach, employees can attempt to show that their commuting-related accommodations are reasonable under the circumstances. This does not mean, however, that employers must grant requested accommodations. Instead, employers can attempt to show that the accommodations are unduly burdensome or that they eliminate an essential job function.¹¹³

When an employer successfully shows that a commuting-related accommodation is unreasonable—for instance, when the requested accommodation subverts an established seniority system¹¹⁴—the employer should have no duty to grant it.¹¹⁵ But before an employer can refuse an accommodation, it should be required to consider the request under the ADA framework to determine that it is, in fact, unreasonable.

110. *Id.*

111. *Id.*

112. *See* Basas, *supra* note 85, at 113 ("[A]n employer short-changes the interactive process when she automatically concludes that an accommodation is outside the scope of the company's operations, without creating a dialogue with the employee about alternatives and her sources of concern.").

113. *See* Colwell v. Rite-Aid, 602 F.3d 495, 506 (3d Cir. 2010) (applying a case-by-case approach to commuting-related accommodations, but noting that the employer had not argued that the requested accommodation created undue hardship and that "those questions are ultimately for the jury").

114. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 394 (2002) (noting that an employer is not ordinarily required to assign a employee with a disability to a position that another employee is entitled to hold under an established seniority system; the employee with a disability has the burden of showing that the requested accommodation is nonetheless reasonable).

115. *See id.*

A case-by-case approach will also not significantly broaden the scope of employers' obligations or cause much uncertainty. Admittedly, this approach requires employers to invest more effort in examining commuting-related accommodations. Specifically, employers may need to assess more factors in determining the reasonableness of accommodations outside the physical workplace than inside the workplace, where the circumstances are entirely within their control. Additionally, they will need to offer more accommodations than if commuting-related difficulties were automatically considered outside the scope of their obligations under the ADA.

A case-by case approach to requests for accommodations outside the workplace, however, follows the same framework as requests for accommodations inside the workplace. Thus, by carefully analyzing the requested accommodations, employers will equally be able to determine which commuting-related accommodations and non-commuting related accommodations are reasonable or unreasonable. They will also be able to assert the defense of undue hardship or argue that a commuting-related accommodation will eliminate an essential job function. Therefore, a case-by-case approach will merely be consistent with the framework already applied to requests for accommodations inside the workplace and will not radically change the scope of employers' duties under the ADA.

Finally, a case-by-case approach is the only approach that avoids drawing arbitrary doctrinal lines. It is irrational to hold that modifications to the architecture of a building can be reasonable¹¹⁶ while simultaneously holding that parking spaces or shift changes are per se unreasonable or beyond the scope of the ADA. Ending an employer's statutory obligations at the doorway to the workplace is illogical because of the absence of a principled justification for providing elevators inside the building, but not parking spaces directly outside it. A case-by-case approach avoids the meaningless distinction between the elevator and the adjacent parking area and draws a more rational line at whether or not an accommodation is reasonable.

C. Benefits and Drawbacks of a Case-by-Case Approach

Although the flexible case-by-case approach is best for addressing commuting-related accommodations, it is not without drawbacks. While this approach allows courts to assess the needs of individuals with disabilities more closely, it also compels employers to examine more factors and litigate more cases. Suits that would never be litigated, or would be dismissed early under a bright-line rule, may be fully litigated under a case-by-case-approach. Considering the length and cost of many ADA cases, employers may thus be forced to expend valuable resources on litigation when they could have used these resources to accommodate their employees. Thus, a bright-line rule that excludes commuting-

116. 42 U.S.C. § 12111 (2006).

related accommodations or labels them inherently unreasonable may allow employers to better anticipate which requested accommodations must be granted. This would enable employers to better allocate their resources.

However, a case-by-case approach counters these drawbacks by allowing courts to prevent discrimination while also better meeting the needs of individuals with disabilities. While this approach does expand the scope of employers' ADA obligations and associated litigation costs, it does not impose a new, unfamiliar standard; employers already interpret the reasonable accommodations framework for problems occurring inside the workplace. And, while it is true that this approach may increase the costs of litigation, all statutes that provide a group with rights and a means to sue to protect those rights increase litigation. The need for statutes protecting suppressed minorities outweighs the risk of increased litigation expenses.¹¹⁷

Additionally, a case-by-case approach may increase the courts' docket loads. Instead of granting early dismissals in commuting-related cases, such as on a motion to dismiss or motion for summary judgment, courts will generally need to allow more fact gathering. Again, however, courts will not be forced to apply a new, unfamiliar standard because courts already apply the reasonable accommodations framework to problems occurring inside the workplace. Further, while efficiency and workload are certainly valid considerations, they are outweighed by the compelling individual rights at stake.

Finally, one might ask why employers (not the government or the employees with disabilities themselves) should be responsible for commuting-related costs. Because this Note does not argue for an extension of already existing law, but instead argues that commuting-related accommodations are within the scope of the ADA, it assumes that Congress has already made this policy determination and attempts only to resolve a circuit split based on an in-depth look into the ADA's legislative history and intent.

III. GUIDANCE FOR IMPLEMENTING A CASE-BY-CASE APPROACH

The ADA itself provides little guidance on defining reasonable accommodations. However, the EEOC has issued its own regulations on the

117. It is important to consider the argument that construing the ADA more broadly will create a backlash, prompting employers to hesitate to hire disabled employees. While the ADA prohibits employers from discriminating against disabled employees in employment decisions, many scholars question the effectiveness of the ADA and its reasonable accommodations framework. For a discussion of the relevant competing literature, see Robert C. Bird & John D. Knopf, *Do Disability Laws Impair Firm Performance?*, 47 AM. BUS. L.J. 145, 168–82 (2010); see also Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 20 (2004) (noting that certain commentators argue that the ADA increases unemployment for individuals with disabilities because the cost of accommodations has created an incentive for employers to refuse to hire them, and that this problem is compounded by the fact that the ADA's antidiscrimination provisions are difficult to enforce at the hiring stage).

subject,¹¹⁸ and courts addressing commuting-related accommodations under the case-by-case approach have assessed several factors in making their determinations.¹¹⁹ First, courts should investigate the costs of the accommodation to the employer.¹²⁰ Next, they should assess the employer's financial resources, including all available outside funding.¹²¹ Further, they should inspect the employer's geographic location.¹²² Since these factors are not exclusive, courts may consider other similar factors, including the type of operation, the impact of the accommodation on other employees, and the impact of the accommodation on the facility.¹²³ While this Section provides examples of accommodations that should receive a presumption of reasonableness, accommodations that should receive a presumption of unreasonableness, and accommodations that do not clearly fit into either category, it is important for courts to decide each case by examining the specific facts involved.¹²⁴

A. *Presumption of Reasonableness*

Certain commuting-related accommodations should be presumptively reasonable, but courts should allow the employer to rebut this presumption by showing undue hardship. These accommodations should include "change[s] to a workplace condition that [are] entirely within an employer's control and that would allow the employee to get to work and perform her job,"¹²⁵ for example, modified work schedules for employees who seek to avoid night shifts¹²⁶ and paid parking spaces for employees who are unable to walk to work at locations with limited available parking.¹²⁷

118. See 29 C.F.R. § 1630.2(p) (2012).

119. *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1517 (2d Cir. 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995).

120. *Lyons*, 68 F.3d at 1517; *Borkowski*, 63 F.3d at 140; see 29 C.F.R. § 1630.2(p)(2)(i) (providing that courts should consider "the nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding").

121. 29 C.F.R. § 1630.2(p)(2)(ii); *Lyons*, 68 F.3d at 1516.

122. *Lyons*, 68 F.3d at 1516; see 29 C.F.R. § 1630.2(p)(2)(iii) (providing that courts should consider the type and location of an entity's facilities).

123. 29 C.F.R. § 1630.2(2)(iv)–(v).

124. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 2002 WL 31994335 (E.E.O.C. Guidance Oct. 17, 2002).

125. *Colwell v. Rite-Aid*, 602 F.3d 495, 505 (3d Cir. 2010).

126. According to EEOC regulations promulgated under the ADA, modified work schedules are examples of reasonable accommodations. 29 C.F.R. § 1630.2(o)(2)(ii). However, for positions where timeliness is an essential job function, modified work schedules might be unreasonable. As discussed above, the concept of essential functions is larger than this Note can address.

127. As noted above, the *Lyons* court upheld a request for a paid parking space on the grounds that the request could be a reasonable accommodation. *Lyons*, 68 F.3d 1512; see also *Basas*, *supra* note 85, at 90–91 ("Parking can be one of the most cost-effective and easily implemented forms of transportation-related accommodation for people with disabilities who can drive and have access to cars."). In discussing why employers should provide parking spaces when it does not impose undue hardship, *Basas* notes that (1) parking can "be a ramp of sorts to the workplace," (2) parking is

For modified work schedules, an employer could rebut the presumption of reasonableness if granting an employee's shift request would interfere with an established seniority system.¹²⁸ In *U.S. Airways v. Barnett*, the Supreme Court held that an employer has no obligation to give preference to an employee with disabilities over qualified individuals with more seniority unless the employee with disabilities has evidence of special circumstances.¹²⁹ For example, a court may find an accommodation unreasonable if granting an employee with disabilities the right to work only day shifts interferes with a system that rewards senior employees with the right to pick their shifts or if the employee fails to present evidence of special circumstances.¹³⁰

Alternatively, an employer could demonstrate undue hardship if the employee's position requires extensive training and could be filled by one individual on the condition that he or she could work any shift. In this case, the employer might have to invest much time and money in training a second employee to work only night shifts, a cost that it could avoid by hiring a single individual able to work both day and night shifts. Accordingly, the cost of training a second employee might impose undue hardship on an employer that is relatively small and financially limited.

B. Generally Unreasonable

On the other hand, some accommodations, including floating start and end times, should generally be considered unreasonable unless the employee can show that such accommodations do not modify the essential job functions.¹³¹ Since predictability is often critical to determining schedules and generally necessary for conducting business,¹³² most positions require employers to know when employees will arrive at work.¹³³ However, although floating start and end times would create unpredictability for employers and would generally be

sometimes part of the employment package that is provided to employees, and (3) parking can be relatively inexpensive. *Id.*

128. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002); *Young-Parker v. AT&T Mobility Corp.*, No. 4:09-CV-00202, 2009 U.S. Dist. LEXIS 114997 (E.D. Ark. Dec. 9, 2009).

129. *U.S. Airways*, 535 U.S. at 394. The court noted that special circumstances could include showing that the employer can unilaterally change the seniority system and does so frequently, so that employees do not expect the system to be followed. Thus, it seems that merely needing the accommodation is not enough to overcome the presumption that an accommodation that would cause an employer to violate a seniority system is unreasonable.

130. However, in its Interpretive Guidance on Title I of the ADA, the EEOC states that accommodations that merely interfere with other employees' morale do not create undue hardship. Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act, 2002 WL 31994335 (Oct. 17, 2002).

131. See *Pagonakis v. Express LLC*, 534 F. Supp. 2d 453 (D. Del. 2008) (holding an employee's requests for late arrivals and early dismissals without penalty unreasonable because they modified the essential functions of the job).

132. See *Salmon v. Dade Cnty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1162 (S.D. Fla. 1998).

133. See, e.g., *Pagonakis*, 534 F. Supp. 2d 453; *Salmon*, 4 F. Supp. 2d 1157.

unreasonable,¹³⁴ a court should conduct a fact-specific inquiry into the circumstances of the case and the costs to the employer before making that determination.

C. More Difficult Requests

The more difficult cases involve accommodations that impose higher costs, such as the payment of transportation expenses and the provision of transportation. The reasonableness of these accommodations depends on an individual employer's size and resources. These accommodations may impose less hardship and therefore be more reasonable for larger employers with more resources. They may also depend on the salary of the employee and his or her value to the employer.¹³⁵

For example, if the employer is a national corporation with many resources, and if the employee with disabilities lives outside of walking distance but within several miles of the workplace, then it might be reasonable for the employer to pay transportation costs because, based on an assessment of the factors listed above, the accommodation would likely not be an undue hardship.¹³⁶ Moreover, if an employee without disabilities lives near the employee with disabilities, then it might also be reasonable for the employer to pay that employee to drive the employee with disabilities to and from work.

Courts should generally consider employers' financial resources in determining whether a requested accommodation imposes undue hardship.¹³⁷ But the undue hardship assessment will necessarily require more information regarding an employer's financial situation where the accommodation is more expensive. Thus, while all inquiries into the reasonableness of an accommodation require an individualized review, these accommodations will require an even closer, more

134. See, e.g., *Pagonakis*, 534 F. Supp. 2d 453; *Salmon*, 4 F. Supp. 2d 1157.

135. See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (noting that the ADA's legislative history equates "undue hardship" to "unduly costly" and that "these are terms of relation. . . . [p]resumably . . . to the benefits of the accommodation to the disabled worker as well as to the employer's resources"). Therefore, an employee must first show that the accommodation is reasonable "in the sense both of efficacious and of proportional to costs." *Id.* If this showing is met, the employer then has a chance to show that the costs are excessive "in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Id.* For instance, an accommodation costing more than the employee's salary would likely be found to be unreasonable or, alternatively, to impose undue hardship.

136. See *id.* (suggesting that the reasonableness of an accommodation depends partly on the employer's resources and the cost of the accommodation in proportion to those resources). This accommodation might impose less hardship if the employer is large and has many resources, and if the employee lives nearby and therefore needs lower transportation costs. However, it might impose more hardship if the employer is small and has few resources, and if the employee lives farther away and thus necessitates higher transportation costs.

137. See generally 29 C.F.R. § 1630.2(p)(2) (2012).

fact-specific examination because they involve high financial costs and more resources.

CONCLUSION

In order for Congress to achieve its goal of enabling individuals with disabilities to keep their jobs, and become productive members of society it is not enough simply to prohibit discrimination and provide reasonable accommodations in the workplace. Individuals with disabilities must be able to reach the workplace. Thus, to fully realize the goals of the ADA, courts should apply a case-by-case approach to commuting-related accommodations.

Lyons and the ADAAA have set the stage for courts to consider the reasonableness of commuting-related accommodations on a case-by-case basis. In *Lyons*, the court explicitly held that under the ADA, an employer may have an obligation to assist employees with disabilities in getting to and from work. Moreover, although the ADAAA did not address the issue of whether driving constitutes a major life activity and whether the ADA requires commuting-related accommodations, it reprimanded courts that narrowed the statute's coverage and reminded them to construe the ADA more broadly.

Thus, *Lyons* and the ADAAA provide compelling reasons for courts to address the reasonableness of commuting-related accommodations through a fact-specific inquiry. After the promulgation of the ADAAA, it seems no coincidence that in 2010, the Third and Ninth Circuits applied a case-by-case approach to hold that commuting related accommodations may be reasonable under the circumstances.¹³⁸ Both courts used a case-by-case approach to reverse a grant of summary judgment given on the grounds that these accommodations are automatically outside the scope of employers' obligations.

In order for individuals with disabilities to achieve their full potential, it is not enough to provide accommodations inside the workplace if they cannot reach the workplace. Further, a case-by-case approach is most consistent with the goals of preventing discrimination on the basis of disability and allowing equal opportunities for individuals with disabilities. Without a case-by-case approach, otherwise qualified individuals might be denied a position on the basis of prejudice. By contrast, a case-by-case approach forces employers to evaluate all employees on their merits. The case-by-case approach allows employees with disabilities to access the same employment opportunities as employees without disabilities.

138. Specifically, the *Colwell* court cited to *Lyons* to support the proposition that commuting-related accommodations may be reasonable under the circumstances. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010) (citing *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995)). The *Livingston* court cited to *Colwell* to sustain its holding. *Livingston v. Fred Meyers*, No. 08-35597, 388 F. App'x 738, 740 (9th Cir. 2010) (citing *Colwell*, 602 F.3d 495 at 506).