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THE HEALTH CARE WORKFORCE: HOW TO UNDERSTAND ACCOMMODATIONS

LESLIE FRANCIS* AND ANITA SILVERS**

I. INTRODUCTION

The celebrations of the twenty-fifth birthday of the Americans with Disabilities Act (ADA) have sounded the somber note that people with disabilities continue to be under-employed and unemployed in disproportionate numbers. In his speech at the reception honoring the ADA, President Obama remarked: “But we all know too many people with disabilities are still unemployed -- even though they can work, even though they want to work, even though they have so much to contribute.”¹

Representing as it does nearly twenty percent of gross domestic product (GDP),² health care has the potential to contribute either to the creation or to the alleviation of apparently endemic employment problems for people with disabilities. Third party payers pay for so much of health care that arguably any costs associated with workplace accommodations—if indeed there are any—are widely shared. And one way in which health care contributes to the general society is to return to citizens who have suffered illness or injury the capacity to work. So if any employers should understand accommodating individuals with disabilities who can work and want to work, the health care industry might seem to be the place.

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1. Press Release, The White House, Office of the Press Secretary, Remarks by the President on the Americans With Disabilities Act (July 20, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/20/remarks-president-americans-disabilities-act>.

2. Ctrs. for Medicare & Medicaid Servs., *National Health Expenditure Data Historical*, CMS (Oct. 16, 2015), <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nationalhealthaccountshistorical.html>.

Yet employment in health care for people with disabilities can appear to pose intractable problems not found elsewhere in the workforce. How can a paraplegic—much less a quadriplegic—physician effectively conduct patients’ physical examinations? How can a deaf psychologist interact with patients appropriately, unless she is delivering services as a sign language user to another member of the Deaf community? How can a visually impaired nurse manage the complexities of intensive care unit (ICU) care? How can a person with chronic fatigue syndrome who requires flexible scheduling often with little notice, or a person with diabetes who requires frequent breaks for testing blood sugar, provide the time-sensitive staffing for respiratory care service? And how can a person with intellectual disabilities function in the complex world of health care, except for very limited tasks such as laundry delivery or waste removal? These and many other questions suggest that health care might not be a likely venue to address the myriad employment issues facing people with disabilities today.

To be sure, there are some common answers to these questions. The assumptions on which they rest reflect stereotypes about people with disabilities and how their capabilities may be limited. The assumptions also reflect a failure of imagination about readily available alternative ways of accommodating tasks that are familiar to people with disabilities and thus relegate people with disabilities only to the tasks that they can perform in standard fashion. They fail to appreciate other skills that people with disabilities may bring to health care, such as the expansive understanding that people with disabilities working in rehabilitative medicine can provide to others based on their own experience with making use of these services. These are all important points, but they will not be our concern in this article, for employment success of people with disabilities will continue to be marginal at best without a fuller and deeper account of what is meant by “reasonable accommodations”³ within the context of the ADA as a civil rights statute.

In this article, we deploy an approach to reasonable accommodations that challenges the depiction of health care as a problematic target to expand employment opportunities of people with disabilities. After an explanation of what we mean by reasonable accommodations as a civil right, we turn to themes in the case law involving requests for accommodations by health care workers. In some cases, courts have engaged in a careful assessment of employers’ claims about essential job responsibilities—assessments that might be undertaken more widely by health care employers. On the other hand, where employers raise concerns about patient safety or about supposedly neutral on-the-job rules, courts may be too likely to defer. Further, courts have had a history of giving problematic deference to medical professionals’

3. 29 C.F.R. § 1630.2(o) (2015).

judgments about training programs and assessment of qualifications that adversely affect the pipeline of potentially qualified health care workers. We conclude by suggesting that our analysis has broader implications for how the health care profession may comply with the ADA in addressing employment of people with disabilities.

II. REASONABLE ACCOMMODATIONS

The ADA provides that it is employment discrimination to fail to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business”⁴ Similarly, it is discrimination to deny employment opportunities to a job applicant or employee who is otherwise qualified based on the need to make reasonable accommodation.⁵ The ADA gives examples of what might be reasonable accommodations without providing a definition of the concept:

[Accommodations] may include (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁶

The proscriptions on employment discrimination in the ADA are subject to a “direct threat” defense. Qualification standards may include a requirement “that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”⁷ This is a defense: the employer bears both the burden of producing the evidence and the burden of persuasion.⁸ The employer’s proof may not rest on stereotypes but must provide an individualized, objective analysis of why the individual poses risks in the actual circumstances of the job, based on the best medical knowledge.⁹

4. 42 U.S.C. § 12112(b)(5)(A) (2012).

5. *Id.* § 12112(b)(5)(B).

6. 42 U.S.C. § 12111(9) (2012).

7. 42 U.S.C. § 12113(b) (2012). This provision has been interpreted to cover threats to self. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 87 (2002).

8. *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-72 (8th Cir. 2007).

9. 29 C.F.R. § 1630.2(r) (2015); *see, e.g., Jarvis v. Potter*, 500 F.3d 1113, 1121-22 (10th Cir. 2007).

Before implementation of the ADA Amendments Act (ADAAA)¹⁰ in 2009, many plaintiffs claiming disability discrimination found their cases dismissed because they did not meet the Supreme Court's very stringent test for being disabled and thus coming within the coverage of the statute. The ADAAA reversed this trend with its rule of construction favoring "broad coverage."¹¹ Now surviving motions to dismiss or motions for summary judgment on the question of disabilities, many plaintiffs are facing similar motions on whether they are qualified to perform essential functions of the job with or without accommodations.¹² This development places significant pressures on essential job functions, reasonableness of accommodations, analysis of undue hardship, and assessment of dangers that might be cited in a direct threat defense.¹³

In *Accommodating Every Body*, we, with our coauthors, argued that accommodations should be tested by whether they were effective in enabling the person with disabilities to perform the job in question.¹⁴ This is the initial showing that it is reasonable for the employee to make: that with the accommodation, the employee would be able to do the job. The burden of going forward would then shift to the employer to explain why the employee could not succeed in performing the job with the suggested accommodation, why the employee has misconstrued the essential functions of the job, or why the accommodation would be an undue hardship. The employer might also advance the defense that the employee poses risks to the health or safety of others. The burden of persuasion would remain on the plaintiff to demonstrate that the accommodation would enable her to do the job; as undue hardship and direct threat are defenses, these burdens of persuasion would lie with the employer.

Accommodating Every Body further explained that when reasonable accommodations are civil rights needed to achieve equality in the face of salient differences, they are not special benefits or privileges.¹⁵ They enable

10. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101-12213).

11. 42 U.S.C. § 12102(4)(a) (2012).

12. See Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 721-23, 726-28 (2014).

13. See generally Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010) (discussing accommodation requirements, the meaning of reasonable accommodation, and undue hardship); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 518-19, 556, 558 (2008) (discussing accommodations and definition of direct threat).

14. Stein et al., *supra* note 12, at 693 (arguing that this approach should be broadened to apply to all work-capable individuals in need of accommodations, without the need to establish disability identity).

15. *Id.* at 695-96.

individuals to perform on the same terms as others when workplace design, job structures, employer policies, or other features of the work environment might otherwise have excluded them.¹⁶ They start from the background that these workplace features are not neutral; they bear differently on people who do not fit paradigms of the typical or usual worker. If these differences track historical exclusions, as they do with disability, holding them up to scrutiny is a matter of civil rights: would proposed changes (“accommodations”) be reasonable? Or, would proposed changes still leave the employee unable to perform the job (unable to perform “essential functions of the job”), be too burdensome for the employer (an “undue hardship”), or be too risky for anyone (a “direct threat”)? Thus understood, the reasonable accommodation requirement serves the inclusion goals of the ADA.

This accommodation requirement includes adjustment of the physical construction of the work place: routes of access; workstations; accessibility of bathrooms and other facilities; and parking.¹⁷ It also includes equipment design such as computers, telephones, or methods of intra-office communication.¹⁸ It requires employers to permit employees to perform tasks in non-standard ways, so long as the performance is accomplished safely and effectively.¹⁹ It may require employers to adjust non-essential job responsibilities²⁰ or workplace rules.²¹ It may even require employers to reassign employees to different positions,²² but this mandate does not extend to eliminating essential job requirements or to creating new positions.²³ Nor does it require employers to assign employees to positions for which they are not qualified.²⁴

16. *Id.* at 696-97.

17. 42 U.S.C. § 12111(9) (2012); *e.g.*, *Feist v. La. Dep’t of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 453 (5th Cir. 2013) (on-site parking); *Nixon-Tinkelman v. NYC Dep’t of Health & Mental Hygiene*, 434 F. App’x 17, 19-20 (2d Cir. 2011) (noting employers may also have the obligation to assist with the employee’s commute under certain circumstances such as a job transfer to a difficult-to-reach location).

18. *E.g.*, *Noll v. Int’l Bus. Machs. Corp.*, 787 F.3d 89, 92-93, 95 (2d Cir. 2015) (noting the requirement of reasonable accommodations does not require the employer to provide accommodations demanded by the employee, so long as the accommodations provided are reasonable).

19. *E.g.*, *Osborne v. Baxter Healthcare Corp.* 798 F.3d 1260, 1264, 1269-70 (10th Cir. 2015). In this case, a deaf applicant for a plasma center technician position at a plasmapheresis facility proposed that she could monitor donor safety with visual rather than auditory alarms; the appellate court reversed the district court’s grant of summary judgment for the employer on the question of reasonable accommodations. *Id.*

20. *Shell v. Smith*, 789 F.3d 715, 721 (7th Cir. 2015).

21. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 418 (2002).

22. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999).

23. *E.g.*, *Dalton v. Ctrs. for Disease Control & Prevention & Agency for Toxic Substances & Disease Registry*, 602 F. App’x 749, 755 (11th Cir. 2015).

24. *Gera v. County of Schuylkill*, No. 14-4789, 2015 WL 4269963, at *2 (3d Cir. July 15, 2015).

Not surprisingly, requirements further along this list have proved especially contentious, far more so than alterations of the physical work environment, technology, or means of communication. Employers may contend that non-standard methods of performance are not effective, as when a deaf employee argues that she can use visual rather than auditory cues but the employer questions the reliability or feasibility of the visual cues.²⁵ When an employee requests adjustment of job responsibilities, the employer may contend that the responsibilities in question are essential job functions and so the employee is not qualified to perform the job as defined by the employer.²⁶ Employers may contend that otherwise neutral work rules are non-discriminatory²⁷ or that it would be an undue hardship to change them, particularly when changes in the rules would affect other employees. And safety remains ever-present as a means to challenge whether the employee is qualified, with the direct threat defense remaining in the background to challenge whether the employee poses future risks.²⁸

The Supreme Court's only ruling on accommodations, *U.S. Airways, Inc. v. Barnett*,²⁹ has left a complex legacy with respect to otherwise neutral workplace rules that may affect other employees. In *Barnett*, the employee injured his back on the job as a cargo handler.³⁰ Unable to continue to lift as required for a cargo handler, he transferred to a position in the mailroom.³¹ A mailroom position, however, was eventually opened to seniority-based bidding under a seniority system voluntarily adopted by U.S. Airways; Barnett lost out to a bid from an employee with greater seniority.³² The seniority system was not part of a collective bargaining agreement, and in announcing it, U.S. Airways specified that it was not a contractual obligation.³³ Thus, U.S. Airways could not claim undue hardship on the basis of breach of contract.³⁴ Nonetheless, the district court granted summary judgment for U.S. Airways, holding that the seniority system precluded the accommodation sought by

25. *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1272-74 (10th Cir. 2015).

26. *E.g., Shell v. Smith*, 789 F.3d 715, 717 (7th Cir. 2015).

27. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51-53 (2003).

28. For example, an employee is not capable of performing essential job functions if he makes death threats to coworkers, even though his inability to handle stress is a symptom of his mental illness. Such an employee is not qualified and the employer does not need to provide the individualized assessment necessary to demonstrate that the employee is a direct threat because he poses risks of future harm. *Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 943-45 (9th Cir. 2015).

29. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

30. *Id.* at 394.

31. *Id.*

32. *Id.*

33. *Id.* at 404, 423.

34. *See Barnett*, 535 U.S. at 409-10.

Barnett.³⁵ The appellate court reversed, applying the standard that the presence of the seniority system was one factor among many to be considered in determining whether the employer could succeed with an undue hardship defense.³⁶

Justice Breyer, writing for the Court, said that seniority systems normally prevail “in the run of cases.”³⁷ The plaintiff, however, should be permitted to show that special circumstances demonstrate the reasonableness of an exception to this presumption and so the district court’s grant of summary judgment was mistaken.³⁸ To argue that seniority systems are presumptively reasonable, Justice Breyer cited the expectations of other workers created by these systems.³⁹ He left open, however, the possibility that Barnett might be able to show that the presumption did not apply because U.S. Airways had operated its seniority system sporadically and so had not created the usual employee expectations.⁴⁰

In reaching this result, Justice Breyer on the one hand rejected Barnett’s argument that the only test for the *reasonableness* of an accommodation is its effectiveness.⁴¹ Instead, Justice Breyer linked the idea of effectiveness to the *accommodation* itself: an alteration that does not enable the employee to do the job would not be an “accommodation” on his view.⁴² In support of linking efficacy with accommodation, Justice Breyer first advanced the linguistic claim that what makes something an “accommodation” is that it will work.⁴³

Second, Justice Breyer was concerned that on Barnett’s view the undue hardship defense would remain, but would function as a “mirror image” of reasonableness: the only way for an employer to argue that an accommodation is unreasonable would be to show that it comes within the defense.⁴⁴ That is, an employer would not be able to argue that an accommodation was unreasonable without demonstrating that it would be an undue hardship.⁴⁵ Justice Breyer rejected this interpretation of the statute because he thought the employer might have other reasons for finding an accommodation unreasonable:

Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—

35. *Id.* at 395.

36. *Id.*

37. *Id.* at 394.

38. *Id.*

39. *Barnett*, 535 U.S. at 404.

40. *Id.* at 405-06.

41. *Id.* at 399.

42. *Id.* at 400.

43. *Id.*

44. *Barnett*, 535 U.S. at 400.

45. *Id.* at 400-01.

say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.⁴⁶

So Barnett would need to show something more to demonstrate reasonableness: here, that operation of the seniority system was such that an alteration in this case would not be disruptive to other employees.

On the other hand, Justice Breyer disagreed with U.S. Airways' contention that whenever a requested accommodation violates an otherwise neutral workplace rule, it is thereby a "privilege," a special benefit for the employee with a disability rather than equal treatment.⁴⁷ Neutral workplace rules, Justice Breyer emphasized, must sometimes be subject to change to create equal opportunity.⁴⁸ Justice O'Connor, concurring, would have drawn the narrower conclusion that seniority systems only receive special protection when they are legally enforceable.⁴⁹ And Justice Scalia, dissenting, would have agreed with U.S. Airways that neutral employer rules are not disability discrimination, whether or not they concern seniority.⁵⁰

Justice Breyer's opinion in *Barnett* can fairly be characterized as a balancing act between deferring to employer rules or practices only when changes in them would be an undue hardship and full deference to these rules or practices unless they explicitly discriminate on the basis of disability. Much territory lies unexplored between this Scylla of Barnett's argument and Charybdis of Justice Scalia's position, however. A particularly troubling question is when and how much of the burden of showing undue hardship will be in practice on Justice Breyer's analysis shifted to plaintiffs claiming discriminatory failure to accommodate. Barnett argued that to require him to demonstrate more than efficacy would in practice shift the burden of proving undue hardship onto the employee.⁵¹ Justice Breyer's final point in support of the identification of efficacy with accommodation rather than reasonableness was that it would not shift the burden of proof to the employee in the way asserted by Barnett.⁵² That is, according to Justice Breyer, identifying efficacy with accommodation would not leave the employee with burdens of demonstrating reasonableness that ought to be for the employer to prove as undue hardship.⁵³ However, if the decision in *Barnett* is read to extend beyond seniority systems to hold that all neutral employer rules are reasonable in the

46. *Id.*

47. *Id.* at 398.

48. *Id.* at 397.

49. *Barnett*, 535 U.S. at 408 (O'Connor, J., concurring).

50. *Id.* at 411-18 (Scalia, J., dissenting).

51. *Id.* at 400 (majority opinion).

52. *Id.* at 401.

53. *Id.* at 402.

run of cases and only subject to challenge if the employee can show problems with their application in the particular case, this shift in the burden of persuasion will be exactly the result Barnett feared.

In *Accommodating Every Body*, we argued that efficacy should be the touchstone for reasonable accommodations.⁵⁴ Our argument was that an accommodation is reasonable when it enables a work-capable individual to perform the job.⁵⁵ It was also important to our argument that apparently neutral employer policies should be scrutinized as barriers to potentially effective performance just as other features of workplace design should be.⁵⁶ That is, we contended that once employees have shown that an accommodation would enable them to do the job, it should not also be up to them to demonstrate that apparently neutral employer policies are unreasonable.⁵⁷ It should instead be up to the employer to show that the policies are reasonable in the sense that changing the policies would constitute a hardship. This would put employers to the test of defending their policies, rather than requiring employees to show that it would be reasonable to change policies on grounds in addition to that changes would enable them to work successfully. If Justice Breyer's identification of efficacy with accommodation is read to reach beyond treating seniority as a special case, and instead to establish a presumption of reasonableness for existing employer rules, the ADA will not achieve its full purpose of bringing work-capable individuals into jobs for which they are qualified. Instead, employer rules will remain set in stone unless the employer can show an undue hardship. Moreover, as Mark Weber carefully details, Justice Breyer's analysis is at odds with the legislative history of the ADA, which suggests that reasonable accommodation and undue hardship are "two sides of the same coin," with the duty to accommodate going up to the point at which an undue hardship defense comes into play.⁵⁸ The undue hardship defense, Weber argues, should be read to bar accommodations that would function as fundamental alterations to the workplace.⁵⁹ Such an argument could, of course, be made about a workplace that has long been governed by a

54. Stein et al., *supra* note 12, at 719.

55. *Id.* at 693, 744.

56. *Id.* at 698, 748-49.

57. *Id.* at 739.

58. Weber, *supra* note 13, at 1133.

59. *Id.* at 1138; *Alexander v. Choate*, 469 U.S. 287, 309 (1985) (holding that modifications to programs such as Medicaid to enhance access for people with disabilities were not required if they would be fundamental alterations in the program). Courts have also held that universities are not required to make alterations to accommodate students with disabilities if these are fundamental changes to academic programs. *See, e.g., McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 858-59 (5th Cir. 1993) (holding accommodations requested by law student, including permission to attend classes on a part-time basis, would have required "substantial modification" in law school program, and were not required).

seniority system.⁶⁰ Any broader interpretation of the employee's burden, moreover, would appear to construe it more narrowly than the regulations, which state that the undue hardship defense includes the impact on the ability of other employees to perform their duties.⁶¹ This is information in the control of the employer rather than the employee, and thus should be part of the employer's defense to the employee's claim that an accommodation would be reasonable.

In sum, changes in employer rules and practices, just like alterations of the physical contours of workplaces, should be considered as reasonable accommodations. The Supreme Court's only decision on accommodations has left a problematic legacy about when plaintiffs must show more than efficacy in arguing that an accommodation is reasonable and how much is left to the employer to raise as a defense. As ADA litigation moves beyond whether plaintiffs fit within the statutory definition of disability, courts can be expected to face increasing numbers of cases placing at issue whether plaintiffs are qualified to perform essential job responsibilities with or without accommodation, as well as whether employers can succeed on undue hardship or direct threat defenses. If entrenched employer practices and rules serve as unalterable barriers to more inclusive workplaces, however, employee gains from the ADAAA may prove largely illusory. In the next section, we turn to some examples of disability discrimination litigation by health care workers that suggest how employers' stipulations of essential job functions can be challenged successfully. Subsequent sections reveal how courts may be too deferential to employers' judgments about hardships or risks of change and too ready to accept apparently neutral workplace policies or rules. We have identified these cases from a search of reported decisions in the past three years involving health care workers' requests for reasonable accommodations.⁶²

60. We leave aside here the more general problem of whether the protections given to seniority systems in employment discrimination law, *e.g.*, 42 U.S.C. § 2000e(h) (2012) (Title VII of the Civil Rights Act), continue to serve as problematic barriers to the civil rights of employees who have experienced prior exclusion and so cannot benefit from these systems. *See generally*, Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1164-67 (2015); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 325-26 (1977).

61. 29 C.F.R. § 1630.2(p)(v) (2015).

62. We performed a Westlaw search of the federal cases database for (ADA & "Title I" & accommodation & employment & (hospital or nurse or physician or "nursing home")) & DA(aft 08-02-2012)). We also reviewed the litigation update on the EEOC website. *See*, OFFICE OF GEN. COUNSEL, FACT SHEET ON RECENT EEOC LITIGATION-RELATED DEVELOPMENTS UNDER THE AMERICANS WITH DISABILITIES ACT (INCLUDING THE ADAAA) (2015), http://www.eeoc.gov/eeoc/litigation/selected/ada_litigation_facts.cfm. Numbers of the reported decisions involving health care workers are too small to permit reliable statistical analysis of the data, so we present illustrative cases only.

III. REASONABLE ACCOMMODATIONS IN THE HEALTH CARE WORKPLACE:
EMPLOYER DEFINITIONS OF ESSENTIAL JOB RESPONSIBILITIES

Under the ADA, employees claiming discrimination must show that they are qualified to perform essential job functions with or without accommodations.⁶³ “Essential job function” is not a defined term in the ADA⁶⁴ although the statutory definition of “qualified individual” includes the following:

For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.⁶⁵

Essential job function is defined in the regulations as “fundamental job duties.”⁶⁶ Reasons that employers may consider in determining that a job function is essential include that the job exists to perform that function, that a limited number of employees are available to perform the function so that it is difficult to redistribute, or that the function is highly specialized.⁶⁷ Evidence of essentiality may include: the employer's judgment about essentiality; written job descriptions prepared before advertising the position; amount of time spent on the job performing the function; the consequences of not requiring the job holder to perform the function; the terms of a collective bargaining agreement; the work experience of past holders of the job; or the current work experience of others holding similar jobs.⁶⁸

Inclusion of the employer's judgment about essentiality in the statutory definition of qualified individual and in the regulations' list of factors to be considered invites courts to defer to employers' determinations of job responsibilities.⁶⁹ One study indicates that courts consider employers' judgments and written job descriptions far more than the other factors listed in the regulations.⁷⁰ However, if employers' stipulations merely reflect unchallenged assumptions about what functions jobs must include or how these functions are to be performed, they may effectively exclude people with

63. 42 U.S.C. § 12111(8) (2012).

64. *See id.* § 12111(8); 42 U.S.C. § 12102 (2012).

65. 42 U.S.C. § 12111(8).

66. 29 C.F.R. § 1630.2(n)(1) (2015).

67. *Id.* § 1630.2(n)(2)(i)-(iii).

68. *Id.* § 1630.2(n)(3)(i)-(vii).

69. Michael E. Olsen, Jr., Note, *Disabled but Unqualified: The Essential Functions Requirement as a Proxy for the Ideal Worker Norm*, 66 HASTINGS L.J. 1485, 1498-99, 1515 (2015); Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067 (2015).

70. Olsen, *supra* note 69, at 1499-1500.

disabilities who are capable of performing the job in non-standard ways. Several recent cases involving health care workers illustrate courts' efforts to scrutinize employers' claims about job responsibilities.

Consider the dispute over the job responsibilities of Kristy Sones, a home health care nurse whose case was litigated by the Equal Employment Opportunity Commission (EEOC).⁷¹ Sones originally worked as a field nurse for the LHC Group, Inc. traveling to see six to eight patients per day.⁷² She was in the process of becoming a team leader—the facts were in dispute whether she had actually moved to the team leader position—when she had an epileptic seizure at work.⁷³ Her physician cleared her to return to work, but with driving restrictions for a year and on medications that, she claimed, left her tired and struggling with memory.⁷⁴ She requested help in learning team leader duties and computer skills on a timeline that would permit adjustment of her seizure medications.⁷⁵ She also requested permission for her mother to drive her to scheduled visits with patients on one day, which her supervisor granted.⁷⁶ After she missed work without approval to take her child to the doctor and a patient requested assignment of a different home health nurse, LHC terminated Sones, stating that she was “a liability” to the company.⁷⁷

The district court granted summary judgment for LHC Group on the basis that the EEOC had not shown that Sones was qualified for either the field nurse or the team leader position, even with accommodations.⁷⁸ The appellate court upheld the grant of summary judgment on the field nurse position because driving was an essential job function; here, it considered the amount of time employees were actually expected to spend driving and observed that the EEOC had not produced evidence that it would be feasible for Sones to use alternative methods of transportation with the frequency required.⁷⁹ In contrast, the appellate court reversed summary judgment on the team leader position, finding the EEOC had raised questions of fact about the frequency with which team leaders were expected to see patients in the field and whether Sones might have been able to perform occasional field visits with van or taxi service, help from her mother, or public transportation.⁸⁰ The court's analysis

71. EEOC v. LHC Group, Inc., 773 F.3d 688, 692 (5th Cir. 2014).

72. *Id.*

73. *Id.*

74. *Id.* at 693.

75. *Id.*

76. *LHC Group, Inc.*, 773 F.3d at 693.

77. *Id.*

78. *Id.*

79. *Id.* at 698-99. It is unclear from the opinion whether the EEOC had simply failed to produce the evidence, believing that the employer's permission to allow Sones' mother to drive her to cases on one day would suffice, or whether the evidence was simply not available.

80. *Id.* at 699.

is a good illustration of how courts should consider actual time spent performing the alleged job responsibility in determining whether it is an essential function rather than simply relying on the employer's representations.⁸¹

In other cases, employers have stipulated that job responsibilities require employees to demonstrate individual capability to perform all tasks that are the responsibility of a workplace team. Employees with intellectual disabilities, for example, may be able to function well when they can work in concert with others but not if they are left to perform on their own.⁸² In one successful case, an employee with significant cognitive and physical disabilities from a cerebral abscess and strokes argued that rotating through all functions of the environmental services team was not an essential job responsibility.⁸³ The hospital contended that all employees with his formal title of Environmental Technician "have the same primary job description and are expected to be able to perform all positions within the department."⁸⁴ The employee had worked successfully for several years as a housekeeper cleaning operating rooms; when he was transferred to removing trash from patient rooms on several hospital floors, he could not cope with the complexity and was fired despite his request for reassignment to cleaning the operating rooms.⁸⁵ The district court granted summary judgment for the hospital based on the job description.⁸⁶ In reversing, the court of appeals stated that evidence of how jobs actually function could rebut written job descriptions listing essential functions.⁸⁷

In another decision in which the employee contended that he could function as part of a team, the court rejected his argument based in large part on patient safety concerns.⁸⁸ Stern was the chief psychologist at St. Anthony's

81. The court also concluded that the EEOC had raised an issue of fact regarding whether LHC had engaged in required interactive process regarding Somes' request for accommodations to master team leader duties. *LHC Group, Inc.*, 773 F.3d at 700.

82. *E.g.*, Leslie P. Francis, *Employment and Intellectual Disability*, 8 J. GENDER RACE & JUST. 299 (2004).

83. *Mobley v. Miami Valley Hosp.*, 603 F. App'x 405, 406, 412, 413-14 (6th Cir. 2015).

84. *Id.* at 412.

85. *Id.* at 406-07.

86. *Id.* at 408.

87. *Id.* at 412.

88. *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 286 (7th Cir. 2015) (citing *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011), in which a bridge worker argued that it was a reasonable accommodation for him not to have to work in exposed positions over twenty-five feet high). The *Miller* court stated:

We are confident that some high work in exposed or extreme positions is an essential function of the bridge crew as a whole. IDOT would have us take that point a step further to find that any individual assigned to the bridge crew had to be able to perform each and every task of the entire bridge crew. That would require finding that every task required of the bridge crew as a whole was an essential task of each bridge crew member. On this

Health Center and began experiencing memory loss, possibly attributable to early stage Alzheimer's disease.⁸⁹ The position included administrative responsibilities, supervisory responsibilities, and clinical care; the evidence indicated that these were all essential responsibilities of the position.⁹⁰ Stern had requested several accommodations—reassignment of his supervisory responsibilities, assigning him less complex cases, or putting him on part time status—none of which he had evidence would enable him to perform essential job functions.⁹¹ In affirming the district court's grant of summary judgment to the employer, the court reasoned: "This case may be contrasted with a case involving one member of a team of employees working at an equal level. In a team environment, the ADA may require employers to think more flexibly about which functions are essential and what sorts of accommodations might be reasonable."⁹² In any psychologist position, Stern would be required to see patients, and there were serious questions about whether he could competently treat the complex and sometimes self-harming children who were patients at St. Anthony's.⁹³

In a case illustrating significant deference to employers' judgments about what job responsibilities are essential, Leokadia Bryk, a nurse in the behavioral

record, we cannot make that finding as a matter of law. Plaintiff has come forward with substantial evidence showing that his bridge crew did not actually work that way. The bridge crew worked as a team. No one person was assigned permanently to any one task. Although individual members of the team did various tasks as needed, there was no requirement that the bridge crew members rotate from task to task in an organized, routine fashion, such that it was necessary for any one member of the bridge crew to be able to do every task of the bridge crew as a whole.

Miller has presented evidence that, at least prior to March 23, 2006, the team accommodated the various skills, abilities, and limitations of the individual team members by organizing itself according to those skills, abilities, and limitations. Maurizio could not weld, so the other members did the welding when it was required. Another co-worker refused to ride in the snooper bucket, so those tasks, when needed, went to others. This was also true of bridge spraying, yard mowing, and debris raking for a crew member with allergies.

As in other "team" environments, the individual members took on tasks according to their capacities and abilities. Here, a reasonable fact-finder would have to conclude that *some* members of the bridge crew had to be able to work at heights in exposed or extreme positions so that the bridge crew—as a unit—could do its job, just as some members of the crew had to be able to weld, ride in the snooper bucket, spray, mow, and rake. That conclusion does not mean that the fact-finder would be required to conclude that *each* member of the bridge crew had to be able to do *every* task required of the entire team.

Miller, 643 F.3d at 198-99.

89. *Stern*, 788 F.3d at 279-80.

90. *Id.* at 279, 286.

91. *Id.* at 283-84, 289.

92. *Id.* at 286.

93. *Id.* at 294.

health unit at St. Joseph's Hospital, needed a cane to walk after hip surgery.⁹⁴ The accommodation she requested was use of the cane on a daily basis.⁹⁵ The hospital refused, contending that she worked in a unit where she posed a risk of harm from patients grabbing her cane and that the ability to subdue patients safely was an essential element of the position; they then told her that she would need to apply for other positions or be terminated.⁹⁶ Bryk produced evidence that she had never been involved in a situation requiring her to subdue patients in the three years she had worked at St. Joseph's.⁹⁷ She also pointed out that other implements were readily available to patients—brooms, mops, razors, walkers, and more—and that she used a wrist strap for her cane and was trained in safety procedures.⁹⁸ In ruling on cross motions for summary judgment, the district court determined that subduing patients in emergencies is an essential function for a nurse on the psychiatric unit even if the need arises very rarely.⁹⁹ Because the EEOC had not shown that the plaintiff could have subdued patients safely, it had not made out this part of the plaintiff's prima facie case.¹⁰⁰

Bryk's case was decided by a district court in the Eleventh Circuit; under Eleventh Circuit law, a safety risk analysis is part of the plaintiff's burden in demonstrating that she is qualified to perform essential job functions.¹⁰¹ On this approach, the direct threat defense only comes into play as a genuine defense for the employer to prove when it is unrelated to how the employee performs essential job functions.¹⁰² So, for example, the employer would have to bear the burden of persuasion if an employee could perform job functions just as safely as anyone else but harbors a contagious disease or is likely to be harmed by chemical exposures. With the direct threat defense, the employer must conduct an individualized risk assessment;¹⁰³ when the employee bears the burden of a safety analysis, all the employer needs to do is advance a plausible reason to think there might be a risk. Decisions such as this illustrate how employers' stipulations about essential job functions may erect barriers for plaintiffs who must bear the burden of persuasion that they can perform job

94. EEOC v. St. Joseph's Hosp., Inc., No. 8:13-cv-2723-T-30TGW, 2015 WL 685766, at *1 (M.D. Fla. Feb. 18, 2015).

95. *Id.*

96. *Id.*

97. *Id.* at *3.

98. *Id.*

99. *St. Joseph's Hosp., Inc.*, 2015 WL 685766, at *6.

100. *Id.* at *5.

101. *Id.* at *3.

102. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (explaining that the direct threat defense can be used to support general "qualification standards that are job-related and consistent with business necessity").

103. *Id.* at 84 n.5.

functions safely. Patient safety also becomes a barrier in cases questioning whether jobs can be performed in nonstandard ways, as discussed in the next section.

IV. REASONABLE ACCOMMODATIONS IN THE HEALTH CARE WORKPLACE: EMPLOYER JUDGMENTS ABOUT HOW JOBS ARE TO BE PERFORMED

Some of the cases we surveyed involve workers performing jobs in non-standard ways. Typical examples are deaf employees seeking to use visual cues or visually impaired employees seeking to use auditory cues. In the cases described below, facts relevant to a direct threat defense are incorporated into the plaintiffs' burden of persuasion that the job can be performed safely with their proposed accommodations.

Consider Kelly Osborne, who is deaf and applied to work as a plasma center technician.¹⁰⁴ Biolife conditionally offered her the position, but its human resources director, on reviewing her pre-employment physical, determined that she could not safely perform the position because she would not be able to hear the alarms on the plasmapheresis machine or donor calls for help.¹⁰⁵ She proposed accommodations such as enhanced alerts on the machines, call buttons for donors to use to alert her about difficulties not registered by the machine, or a hearing oral interpreter.¹⁰⁶ The district court granted summary judgment for the employer on the basis that she had not raised an issue of fact about her ability to perform the essential functions of the job with accommodations.¹⁰⁷ In reversing, the appellate court applied a three-step test drawn specifically from *Barnett*.¹⁰⁸ First, Osborne needed to show that the accommodation seemed reasonable "ordinarily or in the run of cases."¹⁰⁹ Then, the burden of going forward shifts to the employer to present evidence of its inability to accommodate in the form of special and specific circumstances that demonstrate undue hardship.¹¹⁰ If the employer succeeds in so doing, the employee must then come forward with evidence concerning her individual capabilities and suggestions for accommodations; the employee "at all times bears the ultimate burden of persuas[ion]...."¹¹¹ This case presented what the appellate court described as "an additional legal standard" in the form of a direct threat defense.¹¹² The evidence indicated significant adverse

104. *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1264 (10th Cir. 2015).

105. *Id.*

106. *Id.* at 1265.

107. *Id.* at 1264.

108. *Id.* at 1267-68.

109. *Osborne*, 798 F.3d at 1267.

110. *Id.*

111. *Id.* at 1268.

112. *Id.*

reactions in 0.0004% of plasma donors.¹¹³ The district court had concluded that this evidence of risk established as a matter of law the plaintiff's failure to show that she was qualified to perform essential job functions safely.¹¹⁴ The appellate court determined that this was the wrong legal standard for the direct threat defense—which required a showing of significant risk—and reversed the grant of summary judgment.¹¹⁵

However, the Tenth Circuit in *Osborne*, like the Eleventh Circuit, incorporated evidence of safety into the plaintiff's prima facie case.¹¹⁶ On remand, Osborne needed to show that the accommodations she proposed—visual alarms coupled with donor call buttons—did not pose significant risks in comparison to other ways of performing the job.¹¹⁷ It would then be the employer's burden of production to bring evidence that these accommodations were an undue hardship or a significant risk.¹¹⁸ Crucially, the appellate court left the burden of persuasion on all these points to the plaintiff, including the showing of risk.¹¹⁹ Like Bryk, Osborne was unable to take advantage of the burden shifting or the individualized risk assessment required for the direct threat defense.¹²⁰

Or consider Reynolds, an art therapist with vision and hearing impairments at a substance abuse and psychiatric treatment facility.¹²¹ Reynolds' hearing was corrected to normal levels, but her vision only allowed her to see at twenty inches or less and to recognize faces at twenty feet.¹²² One of her duties was to ensure a safe therapeutic environment, including monitoring patient behavior and recording observations accurately, duties the employer claimed were essential in a facility where patients were sometimes suicidal or violent.¹²³ The facility used a check board to record observations of patients.¹²⁴ Reynolds requested an accommodation for the board to be made bold or grayscale so that she could see patient names and link them properly to check boxes; the board was not modified, however, and Reynolds was ultimately discharged because of inaccuracies in recording information and complaints by co-workers about

113. *Id.* at 1275.

114. *Osborne*, 798 F.3d at 1265.

115. *Id.* at 1269.

116. *Id.* at 1276.

117. *Id.* at 1278.

118. *Id.* at 1273.

119. *Osborne*, 798 F.3d at 1269-70.

120. *Id.* at 1269.

121. *Reynolds v. Butler Hosp.*, No. 13-cv-10117-DJC, 2015 WL 2083334, at *1 (D. Mass. May 4, 2015).

122. *Id.*

123. *Id.* at *1, *6.

124. *Id.* at *6.

her responsiveness to patients.¹²⁵ The hospital moved for summary judgment, contending that Reynolds was not qualified to perform essential job functions.¹²⁶ All agreed that she had the necessary training and skills to perform the job, but the employer claimed that because of her sensory impairments she could not do so safely.¹²⁷ Like the *Osborne* court, the court in *Reynolds* included demonstration of the ability to perform the job safely as part of the plaintiff's prima facie case.¹²⁸ Although the court concluded that she had raised sufficient issues of material fact about her level of vision, the frequency with which she misidentified patients and staff members, and the reasons for her errors with the check board to survive summary judgment, it cautioned that she would need to meet a difficult level of proof at trial: "[A]t trial, Reynolds must show not only that she is capable of performing the essential functions of the job, but also that she can do so without endangering the safety of others."¹²⁹

Cases such as *Reynolds* illustrate how courts may incorporate concerns for patient safety into the plaintiff's burden of persuasion—and how this approach may confront work-capable individuals with employer stereotypes about what constitute safe methods of performance. The more inclusive alternative is to place the burdens of proof on the employer to show that the employee's proposed method will put patients at risk—surely an important consideration, but one that should not isolate employer assumptions about performance methods from scrutiny.

V. REASONABLE ACCOMMODATIONS IN THE HEALTH CARE WORKPLACE: EXAMINING NEUTRAL EMPLOYER RULES

As described above, *Barnett* has left a conundrum about its generalization: does its ruling reach beyond seniority systems to all neutral workplace rules, assuming them to be reasonable in the run of cases?¹³⁰ Several cases illustrate how presumptions in favor of supposedly neutral rules might preclude challenges to conventional barriers to inclusion.

A frequent problem for employees who are ill or injured is the need for time off work to undergo treatment and hopefully recover. Contract leave or Family Medical Leave Act (FMLA) leave, although helpful, may expire before the employee is able to return to work, subjecting the employee to the risk of

125. *Id.* at *3-4, *10.

126. *Reynolds*, 2015 WL 2083334, at *4.

127. *Id.* at *4-5.

128. *Id.* at *4.

129. *Id.* at *9-10.

130. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002).

discharge for unexcused absences.¹³¹ Many cases hold that requests for indefinite leaves of absence without any idea of when the employee may be able to return to work are not reasonable accommodations.¹³² Employers, however, may have rules that provide for discharge once leaves have run out, even when employees can set a date certain for their return. Employers may have these rules because it is difficult or expensive for them to hold positions open or because leaving a position unfilled may place burdens on other employees. In such cases, however, employers should be required to prove that the leave would be an undue hardship, rather than simply asserting adoption of the discharge rule. Depending on staffing structures, it might not be at all difficult for employers to accommodate employees with needs for extended time off.

Consider Catherine LaFlamme, a nurse at Rumford Hospital.¹³³ After a back injury made it difficult for her to work, she requested a reduced schedule, FMLA leave, a medical leave of absence for surgery, and then transfer to per diem status (on which the employee is part of a pool that can be called into work for shifts when needed by the hospital but is also free to decline these requests).¹³⁴ The hospital had a rule of taking people off their per diem list if they had not worked in six months¹³⁵—a neutral rule. While on per diem status, LaFlamme kept the hospital regularly informed about her condition and desire to return to work; although she updated them that she would be cleared to work by mid-January, she was taken off the list in mid-December after the six months had expired.¹³⁶ Her requested accommodation was extension of the per diem employee termination rule; the hospital's argument was that a request to hold a position open indefinitely is not a reasonable accommodation.¹³⁷ The First Circuit standard is that plaintiffs must propose accommodations that are reasonable on their face.¹³⁸ In refusing summary judgment, the court concluded that LaFlamme had raised triable issues of fact on whether the leave she had requested was indefinite and on whether the short extension she

131. *E.g.*, *McDonald v. SEIU Health Care Pa.*, No. 1:13-CV-2555 2014 WL 4672493, at *17 (M.D. Pa. Sept. 18, 2014).

132. *Id.* at *9; *see, e.g.*, *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012) (holding regular attendance was an essential function of the job after employee was denied an accommodation request for an unspecified number of unplanned absences and an exemption from the employer's attendance policy).

133. *LaFlamme v. Rumford Hosp.*, No. 2:13-CV-460-JDL 2015 WL 4139478, at *3 (D. Me. July 9, 2015).

134. *Id.* at *4, *6, *20.

135. *Id.* at *7.

136. *Id.* at *9.

137. *Id.* at *13.

138. *LaFlamme*, No. 2:13-CV-460-JDL 2015 WL 4139478, at *13.

requested would be an undue hardship for the hospital.¹³⁹ Notably, no questions of patient safety or inconvenience to others were raised in this case; all that was at stake was a request to be kept on the per diem list beyond the sixth-month period.¹⁴⁰

Cases involving neutral rules about attendance policies tend to be far more favorable to employers. For example, Forrester, a diabetic, requested to be able to come in late on mornings when she was having difficulty managing her blood sugar.¹⁴¹ Her employer maintained that they had tried to work with her to accommodate her needs but that “it would constitute a severe hardship on operations if we could not predict [her] arrival times within a reasonable degree of certainty.”¹⁴² The court agreed with the employer and granted summary judgment: “[T]o require an employer to accept an open-ended ‘work when able’ schedule for a time-sensitive job would stretch ‘reasonable accommodation’ to absurd proportions.”¹⁴³ The case was a complex mixed-motives case in which the employer advanced a number of reasons for firing Forrester.¹⁴⁴ However, at no point did the court suggest that exploring a more flexible work schedule might have been a reasonable accommodation unless the employer could show it was an undue hardship. Instead, the court accepted the employer’s representation that its attendance policies were reasonable.¹⁴⁵ Forrester’s position was operations management, so there would have been no direct effects on patient care from her irregular hours.¹⁴⁶

VI. ADDRESSING THE PIPELINE: ACCOMMODATION IN TRAINING AND TESTING

Challenges to workplace barriers will be of limited avail if qualified workers with disabilities cannot be found to fill positions. Yet data indicate that although the number of students identified with disabilities is growing in higher education generally (to 11 percent in 2011-2012) and in graduate programs (to 7.6 percent in 2010), providers with disabilities remain low in comparison to disability percentages in the population overall.¹⁴⁷ One discussion reports research under way at the University of California, San

139. *Id.* at *14.

140. *Id.* at *8.

141. Forrester v. Prison Health Servs., No. 12-CV-363 2015 WL 1469737, at *2 (E.D.N.Y. Mar. 30, 2015).

142. *Id.* at *24.

143. *Id.*

144. *Id.* at *13.

145. *Id.* at *24.

146. See also McClelland v. Permanente Med. Grp., Inc., No. 2:11-CV-1224-LKK-EFB 2013 WL 1195032, at *9 (E.D. Cal. Mar. 22, 2013) (open-ended scheduling not a reasonable accommodation).

147. Lisa M. Meeks et al., *Support students with disabilities in medicine and health care programs*, DISABILITY COMPLIANCE FOR HIGHER EDUC., Oct. 2015, at 1.

Francisco (UCSF) School of Medicine attempting to determine actual numbers of qualified applicants and medical students with disabilities in the U.S.¹⁴⁸ This discussion also underlines the need for study of creative accommodation solutions that eliminate barriers, maintain technical standards, and do not put patient safety in question.¹⁴⁹ To address this knowledge gap, Stanford University and UCSF have appointed researchers to pursue evidence-based research of best accommodation practices.¹⁵⁰ The extent to which the law has kept pace is, however, uneven—as we have seen with respect to employment and as we will explain in this section with respect to education, training, and examinations.

One of the initial and formative cases involving disability accommodations in education concerned an applicant with disabilities to a nursing education program. Even at the time it was decided—1979—the case rested on highly questionable assumptions about the plaintiff’s capabilities and standards for accommodations, but continues to cast a shadow today.

The case was *Southeastern Community College v. Davis*, the first case in which the Court interpreted the Rehabilitation Act.¹⁵¹ Davis was denied admission to Southeastern’s nursing program based on their conclusions that her hearing impairment made it impossible for her to participate safely in the training program or to function safely as a nurse.¹⁵² She brought suit under the Rehabilitation Act section 504 prohibition of discrimination against an “otherwise qualified handicapped individual” in federally funded programs solely by reason of disability.¹⁵³ The evidence indicated that her hearing was correctable to the extent that she could detect sounds but for fully accurate communication would need to look directly at the speaker in order to supplement with lip reading.¹⁵⁴ The trial court, in entering judgment in favor of Southeastern, found that in circumstances such as an operating room physicians and nurses wear masks, making lip reading impossible; also, nurses might need to respond immediately to verbal cues that Davis would be unable to see because of her positioning or the positioning of others.¹⁵⁵ So the trial court drew the conclusion that Davis was not “otherwise qualified” and Southeastern was not required to accommodate her.¹⁵⁶ The appellate court took a different view of the assessment of qualifications, holding that she should be

148. *Id.*

149. *Id.* at 5.

150. *Id.*

151. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

152. *Id.* at 401-02.

153. 29 U.S.C. § 794(a) (2012). This language was later amended, substituting “otherwise qualified handicapped individual” for “otherwise qualified individual with a disability.” *Id.*

154. *Davis*, 442 U.S. at 401.

155. *Id.* at 403.

156. *Id.* at 404.

assessed on the basis of her academic and technical qualifications, leaving her disability aside.¹⁵⁷ If she met these qualification standards, Southeastern should then be required to accommodate her.¹⁵⁸

On appeal, the Supreme Court interpreted the statutory language “solely by reason” of disability to mean that her disability alone could not be the reason for denying Davis admission to the nursing program.¹⁵⁹ Rather, Southeastern could consider her capabilities with the disability in determining whether she was qualified for the program—that is, Southeastern could consider whether she was qualified in spite of her disability, not whether she was qualified except for her disability.¹⁶⁰ The Court then noted that it was “undisputed” that the current constitution of Southeastern’s program would not permit Davis to function safely for patients in clinical components.¹⁶¹ Davis contended that she could function safely with modifications to the program and auxiliary aids and services.¹⁶² The modifications she proposed were individual supervision when directly attending patients and elimination of certain required courses; this last accommodation would leave her qualified to perform some, but not all, of the tasks registered nurses are licensed to perform and allow her to take some but not all nursing positions.¹⁶³ Characterizing these suggested accommodations pejoratively as “affirmative action,” the Court said that they would be a “fundamental alteration” and interpreting the statute to require them would go far beyond the statutory requirement of non-discrimination in federally funded programs.¹⁶⁴ As a non-discrimination requirement, section 504 of the Rehabilitation Act requires “evenhanded treatment” not “affirmative efforts to overcome the disabilities caused by handicaps.”¹⁶⁵

Our argument in *Accommodating Every Body* agrees in one critical respect with the *Davis* interpretation of the Rehabilitation Act and its progeny the ADA: as non-discrimination statutes, these statutes consider whether accommodations can enable persons with disabilities to perform required job tasks capably.¹⁶⁶ Accommodations are required (leaving defenses aside) if they will allow people with disabilities to perform jobs on a par with others. Where

157. *Id.*

158. *Id.*

159. *Davis*, 442 U.S. at 405.

160. *Id.* at 406.

161. *Id.* at 409, 413.

162. *Id.* 407-09.

163. *Id.*

164. *Davis*, 442 U.S. at 409-10.

165. *Id.* at 410 (contrasting between section 504 and other sections of the Rehabilitation Act that did require such affirmative efforts to meet the special needs of people with disabilities).

166. *See* Stein et al., *supra* note 12, at 710-19 (discussing gap between work capability and accommodation).

we part company with *Davis* lies in its uncritical acceptance of Southeastern's judgments about Davis's capabilities or the tasks required of nurses.

In one respect, the destructive effect of *Davis* was soon cabined by a second critical Rehabilitation Act decision, *Alexander v. Choate*.¹⁶⁷ This case addressed Tennessee's decision to cut Medicaid costs by limiting the number of hospital days per year for patients.¹⁶⁸ When patients brought suit claiming that this program was disability discrimination because the limitations were more burdensome for people with disabilities, the Supreme Court stated that the test was whether people with disabilities had "meaningful access" to the benefit in question.¹⁶⁹ It "struck a balance" between the statutory meaningful access requirement and legitimate interests in the integrity of the institutions' programs.¹⁷⁰ Although the Court concluded that the *Alexander* plaintiffs had not shown that they were denied meaningful access, the meaningful access standard has proved a fruitful source for plaintiffs contending that public services are not effectively available for them.¹⁷¹ Only when the requested modification is a fundamental alteration are otherwise qualified plaintiffs denied changes that would give them meaningful access to public programs.

Indeed, practices in educating health care professionals have evolved far beyond the assumptions made by the Southeastern College's nursing faculty. To take one example, the School of Medicine at the University of California at Davis (UC Davis) has used technology in a surgery rotation for a medical student with profound hearing impairments.¹⁷² The technology is tablet technology that links the sounds in the operating room to an off-site transcriptionist and projects the transcript onto a monitor in the operating room.¹⁷³ UC Davis described the technology as creating "a level playing field" that enabled the student to participate actively in the surgery, assisting just like other medical students are able to do.¹⁷⁴

To take another example, Tim Cordes, who is blind, successfully completed the medical scientist training program (M.D., Ph.D.) at the

167. *Alexander v. Choate*, 469 U.S. 287 (1985).

168. *Id.* at 289-90.

169. *Id.* at 301.

170. *Id.* at 300; *Palmer Coll. of Chiropractic v. Davenport Civil Rights Comm'n*, 850 N.W.2d 326, 337 (Iowa 2015).

171. See generally Leslie P. Francis & Anita Silvers, *Debilitating Alexander v. Choate: "Meaningful Access" to Health Care for People with Disabilities*, 35 *FORDHAM URB. L. J.* 447 (2008).

172. *Technology assures deaf student learns surgery at UC Davis School of Medicine*, UC DAVIS SCH. OF MED., http://www.ucdmc.ucdavis.edu/medschool/features/2011-2012/01/20111207_som_deaf_student.html (last visited Nov. 18, 2015).

173. *Id.*

174. *Id.*

University of Wisconsin Medical School.¹⁷⁵ He completed visual portions of the program by using touch and computer programs that converted images into structures that can be felt.¹⁷⁶ His accommodations included books on tape and in Braille, a computer that could download and convert text to speech at high speeds, and a computer that enabled him to make raised line drawings to interpret images via touch.¹⁷⁷ Although the medical school was originally doubtful, concerned that the Association of Medical Colleges would be concerned about a medical student who could not see, he gradually won everyone over and completed all the tasks of other medical students.¹⁷⁸ Cordes is now a practicing board-certified psychiatrist at the VA Hospital in Madison, specializing in treating patients with post-traumatic stress disorder (PTSD) and addictions.¹⁷⁹

David Hartman is another blind physician and was a role model for Cordes—the first blind graduate of a U.S. medical school, Temple University in 1976.¹⁸⁰ Hartman practices psychiatry in Roanoke, Virginia, specializing in addictions, and is board certified in psychiatry.¹⁸¹

There are also blind physicians practicing rehabilitation medicine. Stanley K. Yarnell, a graduate of Ohio State University Medical School and board certified in physical medicine and rehabilitation, recently retired as the medical director of rehabilitation medicine at St. Mary's Medical Center in San Francisco.¹⁸² Stanley Wainapel, graduate of Boston University, is currently chief of the Department of Physical Medicine & Rehabilitation at Albert Einstein College of Medicine.¹⁸³ In family practice, Spencer Lewis continued to practice medicine, with an expanding practice, after becoming blind.¹⁸⁴

175. Todd Finkelmeyer, *Tim Cordes one of few sightless doctors in U.S.*, THE CAPITAL TIMES (June 2, 2010), http://host.madison.com/ct/news/local/health_med_fit/tim-cordes-one-of-few-sightless-doctors-in-us/article_2699c69d-668f-5eea-9410-6f7f29b0b0b0.html.

176. *Id.*

177. *Id.*

178. *Id.*

179. Tom Cramer, *Blind Doc at VA Sees Patients Differently*, U.S. DEP'T VETERANS AFF. (June 13, 2013), www.va.gov/health/NewsFeatures/2013/June/Blind-Doc-at-VA-Sees-Patients-Differently.asp.

180. Ramona Walhof, *The Blind in Medical Professions*, FUTURE REFLECTIONS (July-Sept. 1985), <https://nfb.org/images/nfb/publications/fr/fr04/issue3/f040303.html>.

181. *See generally id.* (providing a more general discussion of blindness and medical professions). *See generally* DAVID HARTMAN & BERNARD ASBELL, WHITE COAT, WHITE CANE: THE EXTRAORDINARY ODYSSEY OF A BLIND PHYSICIAN (1978).

182. Emily Smith Beitiks, *DVP Interview: Emily Smith Beitiks and Stanley K. Yarnell*, DISABILITY VISIBILITY PROJECT (October 23, 2014), <http://disabilityvisibilityproject.com/2015/02/10/dvp-interview-emily-smith-beitiks-and-stanley-k-yarnell>.

183. *Faculty Profile: Stanley F. Wainapel, M.D.*, ALBERT EINSTEIN C. MED., <http://www.einstein.yu.edu/faculty/3657/stanley-wainapel/> (last visited Oct. 17, 2015).

184. Walhof, *supra* note 180.

Eventually, his hospital privileges, withdrawn after he lost his sight, were restored, except for permission to deliver babies.¹⁸⁵ He continued home birth and clinic deliveries, however.¹⁸⁶ In 1981, Dr. Lewis helped to organize the American Society of Handicapped Physicians, which by 1985 had more than 1,000 members.¹⁸⁷ This organization evolved into the Society of Physicians with Disabilities, now a sub-group of the Society of Healthcare Professionals with Disabilities that includes physicians, pharmacists, nurses, and students preparing for these professions.¹⁸⁸

These examples are not isolated cases, moreover. Beyond the empirical research at UCSF and Stanford, one recent study reports a survey of fifty-six deaf or hearing-impaired physicians or trainees (twenty-five practicing physicians and thirty-one trainees) in the U.S.¹⁸⁹ Accommodations included modified stethoscopes, auditory equipment, notetaking, Communication Access Realtime Translation (CART), signed interpretation, and oral interpretation.¹⁹⁰ Most respondents reported satisfaction with their accommodations from educators and employees, although there were frequent needs to spend time arranging the accommodations.¹⁹¹ Interestingly, modified surgical masks were used infrequently although these are available and would permit speech visualization.¹⁹² These physicians reported strong interests in primary care and in treatment of deaf patients, suggesting important advantages for the care of such patients who are frequently underserved, such as language and hearing concordance or understanding of communicative challenges of patients.¹⁹³ A report from Canada indicates that models for success in the United States are becoming influential in Canadian medical education, with impressive gains for diversity in patient care.¹⁹⁴

Actual numbers of students with disabilities in medical schools remain low, however. A recent survey of U.S. and Canadian medical schools indicated that about a half a percent of students had physical or sensory disabilities and the most common accommodations were extra time on exams, accessible

185. *Id.*

186. *Id.*

187. Karen Gallegos, *Disabled Doctors Convene for Mutual Moral Support*, L.A. TIMES (June 7, 1985), http://articles.latimes.com/1985-06-07/local/me-16068_1_disabled-doctors.

188. SOC'Y PHYSICIANS WITH DISABILITIES, <http://www.physicianswithdisabilities.org/p/about-us.html>, (last visited Oct. 17, 2015).

189. Christopher J. Moreland et al., *Deafness Among Physicians and Trainees: A National Survey*, 88 ACAD. MED. 224, 226 (2013).

190. *Id.* at 227.

191. *Id.* at 231.

192. *Id.* at 227.

193. *Id.* at 230.

194. Cathy Gulli, *Diversity Among Doctors: Students with disabilities are finding their place in medical schools—and beyond*, MACLEAN'S, Sept. 28, 2015, at 48.

access, and audio recording of lectures.¹⁹⁵ The most common impairments were hearing difficulties, low vision, spinal cord injury, and brain injury.¹⁹⁶ This study concludes that “people with [physical or sensory disabilities] are grossly underrepresented in U.S. medical schools, and their access . . . may not have improved during the last 30 years.”¹⁹⁷ The study attributes this stasis to the Association of American Medical Colleges’ failure to update technical standards for medical students and technical standards at participating schools, together with medical schools’ inexperience with accommodations and lack of knowledge of new technological possibilities.¹⁹⁸ The data in the study also suggest an unusually high attrition rate for students with disabilities who are admitted to medical schools; possible explanations are difficulties in obtaining accommodations, attitudinal barriers, or inability to demonstrate requisite competencies—as well as more realistic understanding of the demands of medicine.¹⁹⁹

Judicial deference to professional judgments about qualification risks leave existing practices intact without the careful scrutiny needed to see whether they are necessary for professional competence or patient safety. While some decisions have insisted on careful, individual evaluation of capacities with accommodation, others remain highly deferential to existing assumptions about performance. Deference is especially likely in cases involving challenges to examinations.

One successful recent decision involved a hearing-impaired medical student at Creighton University who sought to use CART technology during his clinical rotations.²⁰⁰ During his first two years at Creighton, Argenyi had paid personally over \$100,000 for the technology, but the medical school refused to allow him to continue to use it, claiming that the auxiliary aids they offered were sufficient.²⁰¹ The trial court initially granted summary judgment for Creighton on the basis that Argenyi had not shown his requested accommodations were “necessary” and that Creighton had provided “effective communication.”²⁰² The appellate court reversed, determining that Argenyi had raised issues of fact whether Creighton had provided him with auxiliary aids and services that would give him “an equal opportunity to gain the same

195. Sarah M. Eickmeyer et al., *North American Medical Schools’ Experience With and Approaches to the Needs of Students With Physical and Sensory Disabilities*, 87 *ACAD. MED.* 567, 569-70 (2012).

196. *Id.*

197. *Id.* at 567.

198. *Id.* at 568.

199. *Id.* at 571.

200. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 445 (8th Cir. 2013).

201. *Id.*

202. *Id.* at 445-46.

benefit from medical school as his nondisabled peers”²⁰³—citing *Alexander v. Choate*’s meaningful access standard. On remand, a jury verdict found Creighton had discriminated but not willfully so; Argenyi received the aids he requested but not restitution for his prior expenses for CART.²⁰⁴

Another recent decision concerned a visually impaired student at Palmer College of Chiropractic.²⁰⁵ Aaron Cannon requested the accommodation of a sighted assistant to help him with the visual parts of the program (e.g., reading radiographs).²⁰⁶ Palmer contended that the accommodation would be a fundamental alteration in the program as Cannon would not be performing the tasks himself.²⁰⁷ The College claimed that Cannon was not qualified because its technical standards included a certain level of visual proficiency—a level they claimed was required by the standards of the Council on Chiropractic Education, their national accrediting body.²⁰⁸ Although blind students in the past had graduated successfully from Palmer, the standards had been adopted after their graduation.²⁰⁹ The Davenport Civil Rights Commission decided in favor of Cannon: Palmer’s California campus waived vision-specific technical standards to accord with California civil rights law and Palmer presented no evidence that waiver had jeopardized their accreditation.²¹⁰ The district court decided that the Commission had failed as a matter of law to grant appropriate deference to Palmer’s judgments about curricular requirements.²¹¹ The Iowa Supreme Court reinstated the order of the Commission, invoking the Rehabilitation Act regulations that state that a qualified individual is one who “meets the academic and technical standards requisite to admission or participation”²¹² in the educational program and citing *Alexander v. Choate* for the requirement to set a balance between meaningful access and fundamental alteration.²¹³ The Iowa court summarized two guiding principles for fundamental alteration analysis: deference to the institution’s professional or academic judgment and institutional obligations to seek out suitable means of accommodation together will provide a factual record of conscientiously

203. *Id.* at 451.

204. *Argenyi v. Creighton Univ.*, No. 8:09CV341, 2014 WL 1838980, at *2, (D. Neb. May 8, 2014).

205. *Palmer Coll. of Chiropractic v. Davenport Civil Rights Comm’n*, 850 N.W.2d 326, 328 (Iowa 2014).

206. *Id.* at 330.

207. *Id.*

208. *Id.* at 352.

209. *Id.*

210. *Palmer Coll.*, 850 N.W.2d at 332, 345.

211. *Id.* at 332.

212. 34 C.F.R. § 104.3(l)(3) (2015).

213. *Palmer Coll.*, 850 N.W.2d at 337.

carrying out this obligation.²¹⁴ Institutions cannot simply rely on accepted academic norms, as new alternatives may be available; this is critical to assure that academic claims are not disguised forms of disability discrimination.²¹⁵ Palmer had failed to meet the requirement of in depth individual analysis and so deference to its judgments was not appropriate.²¹⁶

Other decisions have deferred to academic judgments refusing to allow accommodations in which students are provided with performance aids. For example, Emily McCulley was admitted to the University of Kansas Medical School but the program rescinded her admission after they determined that her spinal muscular atrophy meant that she could not meet their technical standard for physical performance.²¹⁷ The accommodation she requested was help with lifting patients but the school determined that she would need to perform procedures such as resuscitation that were beyond her physical capacities.²¹⁸ Noting that in “academic matters, we often defer in substantial part to the professional judgment of educational institutions,” the court of appeals upheld summary judgment for the medical school.²¹⁹ McCulley had no way to rebut the argument that providing a staff surrogate would render her an observer rather than a participant; the clinical procedures that she sought surrogates for were part of the U.S. Medical Licensure Exam that she would need to pass.²²⁰ Thus her request would be a fundamental alteration of the medical school curriculum.²²¹

Cases involving licensure examinations or board certification illustrate similar deference to professional judgments. For example, Roland Saavedra was dismissed from the residency program at the University of Wisconsin after he failed to pass Step 3 of the licensure exam.²²² Saavedra had dyslexia, ADHD, and learning disabilities and required extra time on examinations.²²³ However, he took the Step 3 exam twice without requesting accommodations; after two failures, he was granted an unpaid leave of absence to study for the exam and a final date within which to pass the exam.²²⁴ Although he submitted the requisite information for accommodations, he met with delays in receiving

214. *Id.*

215. *Id.* at 338.

216. *Id.* at 341.

217. *McCulley v. Univ. of Kan. Sch. of Med.*, 591 F. App'x 648, 650 (10th Cir. 2014).

218. *Id.* at 649-50.

219. *Id.* at 651.

220. *Id.*

221. *Id.*

222. *Saavedra v. Bd. of Regents of the Univ. of Wis. Sys.*, 982 F. Supp. 2d 879, 881-82 (E.D. Wis. 2013).

223. *Id.* at 881.

224. *Id.*

them and was unable to take the exam within the specified time period.²²⁵ After receiving the accommodations and passing the Step 3 exam at the next available scheduled time, he applied for reinstatement but was told that the program lacked the resources to accommodate the approximately six month delay.²²⁶ The court, in ruling for the program, determined that the issue of accommodations was between Saavedra and the licensing board, not the program, and that Saavedra was at fault for not having passed the examination within the required time frame.²²⁷ This analysis left unexamined Wisconsin's rule about the time within which residents must pass—an otherwise neutral rule that should be questioned unless changing it is an undue hardship for the program—and places the blame on the person with disabilities for not having requested accommodations early enough in his time in the program.

Or consider Chad Cunningham, a medical student with Irlen syndrome, a condition that causes severe headaches with prolonged reading and is aggravated by bright lights.²²⁸ He completed the first two years of medical school, passing all of his coursework.²²⁹ However, the test conditions for Step 1 of the licensing exam caused him severe headaches and he failed the exam twice narrowly, taking it without accommodations.²³⁰ He requested accommodations before the second attempt, but they were denied based on preliminary review, with the board determining that Cunningham had not received accommodations in the past and needed to provide “extensive and voluminous” records to substantiate his disability—a request that could not be met before the next scheduled exam.²³¹ University of New Mexico Medical School rules required Cunningham to take a leave of absence without working and to pass the exam within three tries and complete medical school within six years—requirements he could not meet given the schedule of the licensing exam.²³² Cunningham's requests to the University for accommodations and for help with his accommodation request to the licensing board were also without avail.²³³ Cunningham's lawsuit was also unsuccessful: his claims against the licensing board were not ripe, because he had only received a preliminary not a final denial of his accommodation request.²³⁴ His claims against the medical school failed: like Saavedra's, Cunningham's problems were with the board,

225. *Id.* at 881-82.

226. *Id.* at 882.

227. *Saavedra*, 982 F. Supp. 2d at 884.

228. *Cunningham v. Univ. of N.M. Bd. of Regents*, 531 F. App'x 909, 912 (10th Cir. 2013).

229. *Id.* at 911.

230. *Id.* at 912-13.

231. *Id.* at 912.

232. *Id.* at 913.

233. *Cunningham*, 531 F. App'x at 912.

234. *Id.* at 916-17.

not his medical school.²³⁵ And his medical school's rules about the time within which students needed to pass the Step 1 examination and complete medical school were reasonable; changes in the program would be a fundamental alteration.²³⁶ In reaching this last conclusion, the court quoted language from other cases stating that "[e]ducational institutions are accorded deference with regard to the level of competency needed for an academic degree."²³⁷ In this case as well, practices of the licensing board combined with apparently neutral—but not carefully scrutinized—time limitation rules to erect a barrier to a student with disabilities in demonstrating his capacity to perform competently as a physician.

The case of David Rawdin brings into sharpest focus the incongruity between competent performance and licensing examinations.²³⁸ Rawdin had a cognitive impairment as a result of surgeries for a brain tumor that affected memory retrieval in abstract contexts.²³⁹ He requested accommodations for the physician licensing exams, which he eventually passed.²⁴⁰ He successfully completed a pediatric residency and "flourished" at the Children's Hospital of Philadelphia—treating over 10,000 babies and exhibiting by all accounts "exemplary" performance.²⁴¹ However, his position required board certification within five years and Rawdin met with persistent failure on the multiple-choice portion of the board certification exam.²⁴² Rawdin requested accommodations in the form of an alternative examination structure.²⁴³ The American Board of Pediatrics (ABP) refused, saying that it would be far too difficult to construct an alternative examination and that the existing examination did not require Rawdin to remember facts out of context.²⁴⁴ The trial court's verdict in favor of the ABP was upheld on appeal.²⁴⁵ Rawdin was not able to find a hospital that would grant him privileges without board certification²⁴⁶ and he currently practices as a certified mohel in Philadelphia.²⁴⁷ At the trial court, the ABP represented that it has an accommodations program with the goal of providing equal access but not equal

235. *Id.* at 920.

236. *Id.*

237. *Id.*

238. *Rawdin v. Am. Bd. of Pediatrics*, 582 F. App'x 114 (3d Cir. 2014).

239. *Id.* at 115.

240. *Id.*

241. *Id.*; *Rawdin v. Am. Bd. of Pediatrics*, 985 F. Supp. 2d 636, 640 (E.D. Pa. 2013).

242. *Rawdin*, 582 F. App'x at 115-16.

243. *Rawdin*, 985 F. Supp. 2d at 643.

244. *Id.* at 644, 652.

245. *Rawdin*, 582 F. App'x at 119.

246. *Rawdin*, 985 F. Supp. 2d at 643.

247. David E. Rawdin, M.D., PHILLYMOHEL.COM, <http://phillymohel.com> (last visited Oct. 12, 2015).

outcomes or unfair advantages; accommodations are not available if they are fundamental alterations of the certification program.²⁴⁸ The trial court found both that Rawdin was not disabled as he was not substantially impaired in the major life activity of test taking (even though he couldn't pass the ABP exam he was a better test taker than the average member of the population) and that he was not entitled to the accommodation he requested.²⁴⁹ In reaching that last conclusion, the court said that just as educational institutions are granted deference about the requirements for academic degrees, "so too should ABP be granted deference regarding accommodations that would devalue certification."²⁵⁰ To be sure, board certification is a measure of qualifications, but in this case deference to professional judgments coupled with institutional rules requiring board certification barred someone from practicing specialty medicine who had demonstrated capability in practice.

In conclusion, progress towards inclusion in medical training remains uneven. Although reports and anecdotal cases illustrate how creative use of technology especially may enable people with disabilities to function capably in training and practice, rules such as time-to-completion requirements remain barriers that have not been put to the full scrutiny required by undue hardship or direct threat defenses.

VII. CONCLUSION

The cases we have discussed illustrate courts grappling with complex issues about accommodating employees with disabilities in the health care workplace or in the training of health care professionals. In these cases, employers' contentions about essential job responsibilities, methods of performance, or workplace rules are accepted too frequently without careful scrutiny. Allegations of risks or hardship may be left to plaintiffs to disprove as part of their initial showing and employers will not be pressed to justify decisions to continue business as usual. The result in practice may be ongoing exclusion of capable employees with disabilities from health care workplaces.

248. *Rawdin*, 985 F. Supp. 2d at 644.

249. *Id.* at 652-53.

250. *Id.* at 654-55.

