

Accommodating the Employment Disabled

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I. Introduction

The Americans with Disabilities Act (ADA) forbids an employer from discriminating against employees or applicants with disabilities by “not making reasonable accommodations” to the disabled person unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”¹

A recurring issue under the ADA is what constitutes a “reasonable accommodation.” The issue has not proved tractable. Judge Posner writes,

It is understood in [negligence] law that in deciding what care is reasonable the court considers the cost of increased care. (This is explicit in Judge Learned Hand’s famous formula for negligence. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).) Similar reasoning could be used to flesh out the meaning of the word “reasonable” in the term “reasonable accommodations.” It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit . . . The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs.²

Two thoughtful scholars, arguing that order may emerge from chaos, write,

[T]he ADA calls for a far more individualized process of fitting individuals to jobs than the anti-discrimination and affirmative action principles of Title VII. While it is certainly possible that this case-by-case approach to enforcement could deteriorate into purely ad hoc judicial decision making, precedent counteracts this tendency, both at the level of formal legal doctrine and by providing the parties with

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1. Americans with Disabilities Act § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (1990). In this essay, I do not deal with the question of what an “undue hardship” for the employer might mean. In the absence of a defensible meaning of “reasonable accommodation,” qualifying that term with “undue hardship” does not help the analysis. The survey of cases described *infra* disclosed no cases in which unreasonable hardship was an issue.

2. *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d 538, 542–43 (7th Cir. 1995).

templates of reasonable accommodation for settlement and compromise. Accommodations imposed, or approved, in prior cases simplify the process of later negotiations over accommodations for other employers and employees. With the accumulation of decisions, the adequacy of any particular accommodation will become both better known to the parties and more easily evaluated by a court.³

Accommodation issues in employment arise in a variety of contexts. For example, a warehouseman with arthritis may be able to perform his job only with a piece of equipment, a dolly, that is not ordinarily provided by the employer. The warehouseman asks the employer to supply a dolly. Second, the warehouseman with arthritis may be able to do all aspects of his job except lift boxes of cigarettes from a pallet to storage shelves. The warehouseman asks his employer to reassign that task. This may have only a small impact on other employees. Third, a sight-impaired warehouseman requests to work on the day shift because his impairment precludes his driving a car to work, and there is no public transportation to the plant at night. This request requires that a more senior warehouseman be reassigned from the preferable day shift to the night shift. Fourth, a sight-impaired warehouseman who cannot read the labels on many of the boxes in the warehouse asks that a reader (an assistant who is not sight-impaired) be supplied to him at the employer's expense.⁴

II. Disabled Workers in Competitive Labor Markets

In the idealized competitive labor market, at any point in time many firms are matched with many workers. When adjusted for differences in location, working conditions, and the like, wages reach equilibrium. Any individual firm has ample workers available to it at the equilibrium wage. Workers have numerous job opportunities at the equilibrium wage. Real labor markets contain substantial transaction costs, but it is useful to explore the concept of reasonable accommodations in the context of a perfectly competitive market.

Suppose that workers in some groups in a competitive labor market are perceived by employers to be less valuable to the employer than average workers. I call these workers PLVs—perceived as less valu-

3. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 21 (1996).

4. It is possible that under section 504 of the Rehabilitation Act and the cases applying the Rehabilitation Act the use of assistants may be required accommodations. See *Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Financial Assistance*, 34 C.F.R. § 104.12(b) (Feb. 6, 2001) ("Reasonable accommodation may include: . . . (2) . . . the provision of readers or interpreters, and other similar actions."); see also *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (stating that an assistant to speak on the phone may be a required accommodation for an individual unable to communicate effectively by phone); *Arneson v. Sullivan*, 946 F.2d 90, 93 (8th Cir. 1991) (requiring that a reader must be provided as an accommodation); *Nelson v. Thornburgh*, 567 F. Supp. 369, *aff'd*, 732 F.2d 146 (3rd Cir. 1984) (holding that the hiring of readers is a required accommodation for blind employees).

able. These groups can include, and have historically included, racial minorities, women, and disabled persons. At the equilibrium wage, PLVs will not be hired, whether they are, in fact, less valuable or not.

In the idealized competitive market, PLVs will underbid the equilibrium wage. Some firms will hire them at this lower wage. Over time, if the PLVs are in fact as valuable as other workers, the firms that hire them will prosper. Other firms will follow suit and compete for these workers. This process will eliminate discrimination if discrimination means the refusal to hire a worker because of a false perception that the worker is less valuable.

Suppose that because of a legal rule, such as the ADA or Title VII, or a strong social norm, managers are not permitted to hire PLVs at less than the equilibrium wage. PLVs will not be able to underbid the equilibrium wage and so will not be hired. Even a manager who does not believe these workers to be in fact less valuable will not hire them as long as the manager believes there is a *risk* that they are less valuable. There is no reason for the firm to take this risk in the face of an ample supply of workers who do not carry the risk. Only if there were an upside possibility that the PLVs were in fact *more* valuable would they be hired.

It becomes clear why a government which legislates that PLVs be paid the equilibrium wage must also legislate that firms hire them. To do otherwise will condemn PLVs to be unemployed.

Disabled persons fall into two categories: those who are incorrectly perceived as less valuable and those who are in fact less valuable. Disabled workers who require an accommodation to be fully productive are less valuable than those who do not—less valuable by the cost of the accommodation. In a competitive labor market, the disabled person underbids the equilibrium wage in order to be hired. The amount of the underbid is dictated by the cost of the accommodation and any amount necessary to overcome the firm's perception that the disabled worker is less productive, notwithstanding accommodation. If the latter perception is false, the market will eliminate this component of the underbid wage. The result is that the disabled person will absorb the costs of his or her disability.

In summary, if legal rules and/or social norms do not permit disabled workers requiring accommodation to be paid less than the equilibrium wage, these workers will not be hired (absent compulsion). This makes all the relevant parties worse off.

III. Efficient Accommodations

Legal rules forbid firms from refusing to hire disabled workers and from hiring them at less than the equilibrium wage. The rules require firms to make reasonable accommodations to disabled workers unless the accommodation entails an "undue hardship." A possible meaning

of *reasonable accommodation* is that firms must only make accommodations that carry “de minimus” costs.⁵ This suggests a transactions costs analysis. The labor market is not frictionless. Firms fail to notice trivial changes, such as a small fan for an employee who suffers from Multiple Sclerosis, that make a disabled worker fully valuable. A judge uses the statute to correct the flawed market outcome, but the change must be nearly costless, or else it is hard to explain why managers failed to notice it.

Alternatively, reasonable accommodations might entail a cost/benefit analysis. If this means comparing the costs *to the firm* of making the accommodation to the benefits *the firm* derives from the now-productive disabled worker, the analysis will produce only de minimus accommodations, at best. A cost-effective major accommodation is only consistent with a belief that at the equilibrium wage accommodated disabled workers are *more* productive than other workers and that employers are ignorant of this fact. Moreover, if the accommodation is de minimus, legal compulsion is often unnecessary. The disabled worker who needs a dolly to do his job is well advised to buy one out of his own pocket. The only theory supporting a finding that the cost of a dolly is substantial to the disabled employee but de minimus to his employer is some version of deep pockets. Where a defendant is a large-scale firm, any accommodation is reasonable on a deep pocket theory.

For those who believe the enactors of Title VII had more than de minimus accommodations in mind when they required reasonable accommodations, the task is to find an analytical framework for determining which accommodations are reasonable. One candidate is to compare the costs to the firm of an accommodation to the benefit realized by the accommodated disabled worker. When the benefits to the worker exceed the costs to the firm, they have the flavor of Kaldor-Hicks efficiency: changes that benefit some people more than they cost others so that the gainers can fully compensate the losses and still come out ahead. The compensation is not actually paid, thus distinguishing Kaldor-Hicks efficiency from Pareto efficiency.⁶

5. This is the rule when workplace accommodations of religious beliefs are at stake. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

6. Thomas S. Ulen, Book Review, *Law's Order: What Economics has to do with Law and Why it Matters*, 41 SANTA CLARA L. REV. 643 n.9 (2001) (stating,

Kaldor-Hicks efficiency stands in contrast to Pareto efficiency, which is the more fundamental economic concept of efficiency. An allocation of goods and services is 'Pareto efficient' if it is impossible to reallocate the current holdings among the current holders so as to make one or more people better off (in their own estimation) without making someone else worse off (again in his or her own estimation). That is, under Pareto, efficiency reallocations must be consensual—the losers must be compensated by the winners so that there is a clear net gain from any reallocation. An allocation that cannot be consensually altered is said to be 'Pareto efficient' or 'Pareto optimal.' 'Kaldor-Hicks efficiency' is an easier standard under which to reallocate goods and services.

Often it is easy to quantify the costs of an accommodation to the firm. When the firm constructs a ramp to allow a worker in a wheelchair to gain access to a part of the plant, the cost of accommodation is the cost of the ramp. The costs of a reader to help a sight-impaired worker are the reader's wages and benefits. However, costs to the firm are not as easy to quantify where the interests of other employees are concerned. If a disabled worker needs to work the day shift and this requires a more senior employee to lose her shift preference, in theory the cost can be measured by the amount of money necessary to persuade the senior employee to give up the day shift. Whether the senior employee's price can actually be measured is a different story, unless the firm in fact makes the offer. As accommodations become more complex, calculating the employer's costs is more difficult. Examples include organizational rearrangements, such as giving the employee permission to work from his home.

Calculating the benefit to the worker is difficult, perhaps impossible. Take the easiest case: Bill is disabled, but if it were not for his disability, he could do the work of a repairman B at a local electronics factory. The position pays \$30,000 per year. What is the benefit to him of an accommodation that permits him to fill the position?

One needs to know the value to Bill of his next best job. The difference between the value to Bill of the repairman B job and his next best job is the benefit to him of the accommodation. Knowing the value of Bill's next best job will not be easy, and often there will be no hard data. Moreover, it is incorrect to calculate the difference between repairman B and Bill's next best job merely by using salary figures. Even assuming that the salary differentials perfectly take into account differences in working conditions, it is not accurate to assume that salary differentials accurately measure the value of a particular job in terms of a worker's self-esteem.

For instance, take law professors: Some law professors gain considerable self-esteem from the position; others gain less or none. Market salaries may reflect the self-esteem value of a position (by producing lower salaries than if the position did not carry prestige), but there is no occasion actually to convert the self-esteem to dollar values. Professors who gain the self-esteem may stay in the profession; those who do not may stay or go depending on other factors. Comparing the difference in value between Bill of the repairman B position and Bill's next best job requires such a calculation, and it cannot be done with any confidence.

Under the Kaldor-Hicks criterion a reallocation is superior if the winners could have compensated the losers, but they do not have to do so. In essence, this criterion recommends changes on the basis of a cost-benefit analysis: if the benefits of a reallocation exceed the costs, then the reallocation is Kaldor-Hicks efficient.)

Even if repairman B were Bill's only job prospect, the calculation would not be easy. At some wage, Bill prefers to stay at home. Thus the cost to the employer of the accommodation will have to be compared to the value to Bill of the repairman B position, including the value of the self-esteem Bill enjoys by being a member of the workforce, less the wage at which Bill prefers to stay at home.

There is a situation in which an accommodation that an employer ordinarily does not make is efficient in a Kaldor-Hicks sense. Assume that six disabled applicants could perform jobs in the plant if an entry ramp were built, and the benefit of the ramp-accommodation to the group of six is greater than the cost of constructing it. Absent a legal rule or social norm requiring the ramp to be built by the employer, it may not be. The value of the ramp to any single employee may be less than the cost of construction. The difficulties of collecting contributions toward ramp construction from the disabled workers are serious. There are the familiar hold-out problems, and they are exacerbated by the fact that the precise identity of the disabled persons who will be successful job applicants will not be known in advance of the building of the ramp. In addition, some disabled beneficiaries of the ramp will come to the firm after the initial beneficiaries leave. The employer will not build the ramp absent compulsion so long as it is assumed that the disabled workers will not be more productive after the ramp is built than are workers who need no ramp.

Requiring the employer to build the ramp is Kaldor-Hicks efficient under these conditions, and measurement costs will not necessarily be insuperable. What is required is a finding that the cost of the ramp (certainly knowable) is less than the estimated benefit to present and future disabled beneficiaries of the ramp. The latter calculation, in theory, requires a comparison of the value of this job to each beneficiary's next best job; but because the net gain is summed over all present and future beneficiaries, I may be more confident that even an inexact approximation produces a surplus when the gain to the beneficiaries is multiplied by their numbers.⁷

IV. Normative Conclusions

It is little wonder that courts and commentators alike have no theory for what constitutes a reasonable accommodation under the ADA. If such a theory is grounded on a cost-benefit analysis, a calculation will be impossible when the accommodation of a single employee's disability is at stake, not because the cost to the employer of the accommodation is unknowable but because the gain to the disabled worker is.

7. This suggests that public accommodations of the disabled requires an analysis different from the analysis of employment accommodations. Collective action problems are common in public accommodations (could disabled bus riders collectively pay for wheelchair-accessible buses?); they arise much less frequently in employment.

This essay suggests these candidates for justifiable accommodations:

- A court-ordered accommodation is justifiable if the cost to the employer is *de minimis*, the gain to the disabled employee is positive, and the employee cannot secure the accommodation on his own. This does not include providing a dolly or a reader, but it might include shifting some job tasks from a disabled worker to a fully able worker. The disabled worker may not be able to accomplish a shift of tasks without the employer's assistance.
- A court-ordered required accommodation is justifiable when it benefits many disabled workers, and collective action problems prevent the disabled workers from paying for the accommodation. This might include a ramp; it does not include a dolly or a reader. Neither a dolly nor a reader is a collective good.

A final point deserves mention. If those who are not disabled are generally benefited by workplace accommodations of disabled workers, should these benefits count in any cost/benefit calculation? I cannot refute the claim, nor do I wish to, that many derive psychic benefits from seeing disabled persons perform dignified jobs in the workplace. Moreover, assigning the costs of accommodations over employers is generally not a bad way to spread the costs since it approximates the population generally. The problem is that these benefits are not quantifiable. Of the 200 million people in the United States over age eighteen, what annual dollar amount ought to be assigned as the average increase in well-being experienced by the fully able in observing disabled workers accommodated in the workplace? These benefits may be real, but the magnitude is purely speculative. Their inclusion in a particular decision of whether to compel an accommodation does not yield predictable or consistent outcomes.

V. Outcomes in the Courts

To gain a sense of how courts treat the accommodation issue under the ADA, I read fifty federal courts of appeals opinions and fifty federal district court opinions from 1999. Each case raised ADA issues in an employment context.⁸ I made several interesting discoveries. Of seventy-two ADA appellate cases, fifty were unpublished and twenty-two were published.⁹ This may be some evidence that the courts of

8. This sort of empirical research runs the risk that cases which produce opinions do not accurately reflect the legal landscape. For example, the majority of ADA law suits may be settled favorably to plaintiffs, with only the particularly weak claims requiring a court adjudication and opinion. Were that the case, a sampling of opinions would indicate a low success rate for plaintiffs, whereas in fact the success rate was high.

9. I read seventy-two in order to get fifty that could be reviewed. The twenty-two that I rejected were unpublished, so I summarize in form that the facts could not be discerned.

appeals do not take the issues raised by a typical ADA employment case very seriously.

There were few accommodation issues. In only eighteen of the one hundred cases were accommodation issues raised.¹⁰ The employer won on the merits in thirteen of those cases while the plaintiffs won none, and five were sent to a fact finder for disposition.

The employers' success rate in defending accommodation claims was matched by the employers' overall success rate in defending ADA claims. Of the one hundred cases, the employer won outright in seventy-four. Meanwhile, the employee won outright in three cases and thirteen were sent to a fact finder.

The most common ADA issue was whether the plaintiff was disabled and otherwise qualified to do the job. The courts often treat these two conceptually distinct questions as the same issue. For example, a plaintiff discharged for repeated tardiness may allege that a sleep disorder prevents him from regularly arriving to work on time. The court is likely to rule along the following lines: "We have considerable doubt that the disorder interferes with a major life activity, but even if it does, the ability to arrive at the workplace on time is an essential element of the job."

The disabled/otherwise-qualified issue was dispositive in sixty-two of the one hundred cases. In another thirty cases, the court was willing to assume the plaintiff was disabled and otherwise qualified, and the issue was therefore whether the disability was the cause of the plaintiff's discharge.¹¹

My conclusion from the cases is that courts see the ordinary ADA employment case as a wrongful discharge case. Instead of a discharged employee alleging lack of good cause, as she may under a collective bargaining agreement, or alleging that the discharge violated public policy, as she might in an appropriate at-will employment state, she alleges that the discharge was because of a disability. The statistics from past cases suggest that the ADA plaintiff has a very poor chance of success.

10. The requested accommodations included

- (i) two requests for part-time work;
- (ii) six requests for job reassignment;
- (iii) one request for restrictions on lifting and overhead work;
- (iv) two requests for a helper (such as a sign-language interpreter);
- (v) one request for a device (such as a large magnifying glass);
- (vi) five requests were not specifically requested by the employees;
- (vii) three requests for an extended leave of absence; and
- (viii) one request for more time to get to work.

The list is longer than the number of cases because in some cases more than one accommodation was suggested.

11. In four cases, the issue was whether the employer had retaliated against the employee for raising an ADA claim.

Another purpose of surveying the cases was to determine what percentage of the accommodation cases included an accommodation request that would benefit employees in addition to the individual making the request. Only one of eighteen accommodation cases involved a request for an accommodation that would benefit a group of workers. In *EEOC v. Rockwell International Corp.*, the EEOC sued to prevent an employer from refusing to hire applicants because they failed a nerve conduction test.¹² The case was not decided on the merits.

In no other case was an accommodation requested that would benefit any employee other than the one making the request.¹³

VI. Summary of the Data

Defining *reasonable accommodation* is an issue in comparably few ADA cases. In cases where it is an issue, the employer ordinarily prevails. Most ADA cases raise issues of causation and whether the plaintiff is "otherwise qualified."

Usually, accommodations of trivial cost are not worth a lawsuit by either side. If the refused accommodations were to produce a collective good, they would not be found in the litigated cases.

Dispositions on the merits

Employer	74
Plaintiff	3
Fact Finder ¹⁴	19

Types of issues

Disabled or Otherwise Qualified	62
Causation	30
Retaliation	4
Accommodation	18

12. 36 F. Supp. 2d. 1056 (N.D. Ill. 1999).

13. A typical case would be one in which a plaintiff, suffering from asthma, requests a transfer to a different job where the effects of the working conditions on the asthma will be lessened. The first issue is whether the employee's asthma impairs a major life activity. This is an individual determination because not all asthma sufferers are equally afflicted. If the plaintiff prevails on this issue, the question will be whether the transfer to a different job is *reasonable*. This will turn on a host of issues, such as whether there is a formal seniority system that the plaintiff seeks to avoid, whether there is another job open (or whether another employee must be bumped), and so forth.

It could be argued that the asthma sufferer, who successfully establishes his disability status and gains the job transfer, sets a precedent that will be enjoyed by future asthma sufferers at this employer; thus, the accommodation benefits a class larger than the individual employee. Looking at the cases, I do not treat this precedent-setting argument as carrying force. The cases turn on the facts of the individual claim. (A counter-example may be the asymptomatic HIV-positive worker. If that worker is found to be disabled, then presumably all asymptomatic HIV-positive workers are also disabled, as nothing distinguishes one asymptomatic individual from another.)

14. By *fact finder*, I mean that neither side gained a summary judgment.

Dispositions on the merits in accommodation cases

Employer	13
Plaintiff	0
Fact Finder	5