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Recapturing the Transformative Potential of Employment Discrimination Law

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Recapturing the Transformative Potential of Employment Discrimination Law

Michelle A. Travis*

The little boy went first day of school
He got some crayons and started to draw
He put colors all over the paper
For colors was what he saw

And the teacher said, What you doin' young man
I'm paintin' flowers he said
She said, It's not the time for art young man
And anyway flowers are green and red . . .

But the little boy said
There are so many colors in the rainbow
So many colors in the morning sun
So many colors in the flower and I see every one

Well the teacher said, You're sassy
There's ways that things should be
And you'll paint flowers the way they are
So repeat after me . . .

Flowers are red young man
Green leaves are green
There's no need to see flowers any other way
Than the way they always have been seen[1]

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1. HARRY CHAPIN, *Flowers are Red*, *on* THE GOLD MEDAL COLLECTION (Elektra/Asylum Records 1988). The full lyrics may be found at http://www.lyricsdepot.com/harry-

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I. Introduction

When Congress enacted the Americans with Disabilities Act of 1990 (the ADA),[2] lawmakers envisioned a tool that would redesign the conventional workplace. The ADA not only prohibits most private employers from acting on invidious animus, but also requires employers to actively modify the workplace to accommodate individuals with disabilities.[3] According to the ADA's primary sponsor, the statute represents the "twentieth century Emancipation Proclamation for all persons with disabilities."[4] The United States Supreme Court provided a similarly reconstructionist vision of Title VII of the Civil Rights Act of 1964 (Title VII)[5] when the Court endorsed the disparate impact theory, which requires employers to replace facially neutral practices that disproportionately affect protected groups.[6] The Court recognized that

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chapin/flowers-are-red.html (last modified 2004) (on file with the Washington and Lee Law Review).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12117 (2000)).

3. *See* 42 U.S.C. §§ 12111(5)(A), 12111(9), 12112(a)–(b) (2000) (defining "employer" and "reasonable accommodation" and providing a multi-part definition of the general antidiscrimination rule).

4. 136 CONG. REC. S17,369 (1990) (statement of Sen. Harkin).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2000)).

6. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (invalidating an employer's requirement of a high school diploma or passing of intelligence and aptitude tests as a condition

eliminating employment discrimination on the basis of race, color, religion, sex, and national origin would require more than just preventing employers from prejudiced decisionmaking.[7] Achieving workplace equality also would require employers to remove all "artificial, arbitrary, and unnecessary barriers," and to eliminate the "built-in headwinds" of the conventional work environment.[8] Because both Title VII's disparate impact theory and the ADA's accommodation mandate were intended to displace established social norms, both statutes properly are characterized as "transformative law."[9]

Initially, advocates were very optimistic that the ADA and Title VII would help restructure the workplace to provide meaningful access and new employment opportunities.[10] As many scholars have explained, however, this hope has gone significantly unrealized.[11] The inability of these laws to

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of employment because the requirements disproportionately excluded black applicants).

7. *See id.* at 429–32 (finding that Congress intended to achieve equal employment opportunities by directing "the thrust of the Act to the consequences of employment practices, not simply the motivation").

8. *See id.* at 431–32 (setting forth Title VII's requirements). When Congress amended Title VII in 1991 to codify the disparate impact model explicitly, Congress directed courts to interpret the statute in accord with *Griggs*. *See* Civil Rights Act of 1991, Pub. L. No. 101-166, § 3, 105 Stat. 1071, 1071 (1991) (codified at 42 U.S.C. § 1981 note) (requiring that Congress "codify the concepts . . . enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . ."); Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 1981 note) (restricting the statements that can be relied upon as legislative history in construing or applying the Act); Interpretative Memorandum, 137 CONG. REC. 28,680 (1991) (commenting on the terms "business necessity" and "job related"); 137 CONG. REC. 28,878 (1991) (statement of Sen. Kennedy) (declaring one of the 1991 Amendment's purposes to be codification of *Griggs*).

9. *See* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 479 (2000) (defining the term "transformative" law).

10. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1196 (1989) (noting that the broad vision of disparate impact in *Griggs* "encouraged advocates to pursue and to eradicate a variety of more subtle, and often more intransigent, forms of discrimination"); Krieger, *supra* note 9, at 495 (noting that when *Griggs* endorsed the disparate impact theory, the Court "seemed poised to displace a broad range of employment-related institutions"); Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 329 (1997) (describing the "transformative effect" that ADA supporters "optimistically anticipated in 1990").

11. *See, e.g.*, RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 163 (2001) (calling the ADA's effects in the workplace "profoundly disappointing"); Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 363 (2003) (noting that "[a]s applied, the ADA has not effectuated wide-scale changes in the structure of employment"); Krieger, *supra* note 9, at 495 (explaining that the initial optimism about Title VII's disparate impact theory has waned as courts have been "sharply circumscribing its transformative effect"); Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. &

fundamentally restructure the workplace is particularly evident with respect to traditional methods of organizing the when, where, and how of work performance, including the default preferences for full-time positions, unlimited hours, rigid work schedules, an uninterrupted worklife, and performance of work at a central location. This bundle of related default organizational structures—referred to collectively as the "full-time face-time norm"—frequently excludes individuals from the workplace, particularly individuals with disabilities and women with significant caregiving responsibilities. Unfortunately, neither the ADA nor Title VII has done much to transform this exclusionary norm.

One of the reasons for this disappointing result is that judges have interpreted the ADA and Title VII through the lens of "workplace essentialism." For either the ADA or Title VII to restructure the workplace successfully, judges first must envision an alternative. To do so, judges must be able—and willing—to parse out the malleable ways that job tasks are organized from the actual tasks that comprise the essence of the job itself. Judges repeatedly have demonstrated an inability—or simply an unwillingness—to take this step. Instead, judges have assumed that jobs are defined at least in part by the default organizational structures that make up the full-time face-time norm, thereby placing those structures beyond the reach of antidiscrimination law and undermining the law's transformative potential. Although this type of workplace essentialism plays a different doctrinal role in ADA accommodation cases and Title VII disparate impact cases, the analytic error is similar in both contexts. Just as the teacher in Harry Chapin's song refused to acknowledge the little boy's suggestion that flowers are still flowers even if painted in many different colors, so judges have refused to acknowledge that a job is still a job even with many different designs for when, where, and how the tasks are performed.

Judicial interpretation of the ADA and Title VII through the lens of workplace essentialism is an example of what Professor Linda Hamilton Krieger has described as "capture through construal."[12] Capture occurs when entrenched norms affect judges' statutory construction in ways that constrain the law's full implementation.[13] These entrenched norms operate as "taken-for-granted background rules," which "systematically skew the interpretations of transformative legal rules so that those rules increasingly come to resemble the

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LAB. L. 315, 318 (1998) (explaining that "courts at all levels have balked at the invitation to unleash fully the power of disparate impact" when applying Title VII to the workplace).

12. Krieger, *supra* note 9, at 486.

13. *See id.* (defining "capture through construal").

normative and institutional systems they were intended to displace."[14] In other words, the danger is not only that the entrenched norm of the essentialized workplace is undermining judges' ability to interpret the ADA and Title VII to realize these laws' full transformative potential. The further risk is that these judicial interpretations are, in turn, relegitimating and reifying the very same default workplace structures that the laws were designed to subvert.

Because the ADA and Title VII have fallen short of initial expectations, some scholars have moved away from antidiscrimination law as a primary tool for achieving workplace equality.[15] Others have continued to suggest future

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14. *Id.*

15. *See, e.g.*, Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 154 (1989) (arguing that the "primary focus" for those seeking to restructure the workplace should be "to acknowledge the limited reach of discrimination analysis, articulate that limit, and move on in search of a broader framework"); Julie Novkov, *A Deconstructing of (M)otherhood and a Reconstruction of Parenthood*, 19 N.Y.U. REV. L. & SOC. CHANGE 155, 185 (1991/1992) (arguing that "Title VII is not a universal solution" to reconstructing the workplace); *see also* Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 305 (1999) (describing the "accepted wisdom" that "discrimination law offers few weapons" to restructure the workplace); *cf.* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 6, 55 (2004) (arguing that "[a]ntidiscrimination laws are not suited to eliminating deep-rooted structural barriers to employment" and that disability advocates should move to "a social welfare approach"); Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 AM. U. L. REV. 393, 402, 440–43 (2003) (proposing a revised accommodation tax provision to create incentives to hire disabled workers); Michael Ashley Stein, *The Law and Economics of Disabiilty Accommodations*, 53 DUKE L.J. 79, 176–77 (2003) (explaining that "the point at which accommodating people with disabilities is no longer reasonable, but still socially beneficial, is an appropriate departure point from which to consider state-funded employment opportunities through the payment of subsidies to employers"); Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1183 n.173 (2004) (listing scholars who have proposed the use of government subsidies in lieu of the ADA's accommodation mandate).

The strongest criticisms of antidiscrimination law have been about its inability to address structural discrimination and to alter workplace norms. *See, e.g.*, Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 758 (2000) (expressing doubt that employment discrimination law "will actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them"); Dowd, *supra*, at 80–82 (arguing that employment discrimination law "is a very partial, limited means" for changing workplace norms because it "fails to reach structural discrimination or mandate structural reform"); Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 94 (1979) (arguing that Title VII will not restructure the labor market dramatically because Title VII "favor[s] the status quo"); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1325–26 (1987) (arguing that Title VII's disparate impact theory "does not allow for challenges to male bias in the structure of business, occupations, or jobs"); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1456 (concluding that employment discrimination law is a "poor tool" for changing workplace

roles for employment discrimination law,[16] while recognizing that no tool can be the single answer to such a multifaceted problem.[17] This Article joins the latter group by identifying a common analytic error in both ADA and Title VII case law and articulating an interpretation that would allow individuals with disabilities and women with caregiving responsibilities to *re*capture some of the untapped transformative potential of employment discrimination law. Part II begins by exploring the phenomenon of workplace essentialism and hypothesizing on its origins and the reasons for its remarkable resilience. Part III reveals the specific doctrinal method by which workplace essentialism has undermined the ADA's and Title VII's ability to redesign default workplace structures. Finally, Part IV demonstrates the ways in which the use of workplace essentialism in judicial interpretation is at odds with the statutory

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norms).

16. *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 104–10 (2000) (explaining how employment discrimination law could be used to provide nonmarginalized flexible work arrangements); Arnow-Richman, *supra* note 11, at 398–400 (urging activists to "continue the project of using existing discrimination laws" as one tool for restructuring the workplace); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92–93, 111–56 (2003) [hereinafter Green, *Workplace Dynamics*] (conceptualizing discrimination in workplace dynamics and proposing a role for antidiscrimination law's disparate treatment theory); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 690–723, 724 (2003) [hereinafter Green, *Workplace Context*] (arguing that Title VII "holds the capacity to trigger change in the organizational structures, cultures, and taken-for-granted institutionalized practices that continue to engender unequal treatment in the workplace" and explaining how class actions with public safeguards could help realize this capacity); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 U.C.L.A. L. REV. 519, 609–14 (2001) (proposing new dispute resolution procedures to make employment discrimination law more effective in the modern work environment); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 318–73 (2003) [hereinafter Travis, *The Virtual Workplace*] (explaining how antidiscrimination law could be used to require employers to provide equitable telecommuting options); Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 282–86 (2003) [hereinafter Travis, *Telecommuting*] (explaining why employment discrimination law may be a valuable tool for preventing telecommuting from entrenching the gendered workplace hierarchy); Williams, *supra* note 15, at 327–36 (explaining how Title VII's disparate treatment theory could protect mothers and how the disparate impact theory could challenge workplace structures built around male norms).

17. *See, e.g.*, Abrams, *supra* note 10, at 1196–97, 1215–16 (advocating antidiscrimination litigation as one of many approaches for transforming workplace norms); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1885 (2000) (arguing that "employment discrimination law alone will not get us where we need to go"); Smith, *supra* note 15, at 1447 (concluding that "no singular approach" can restructure the workplace); Travis, *The Virtual Workplace*, *supra* note 16, at 319, 375–76 (explaining that the "multifaceted problem" of workplace inequality requires a "multifaceted response").

language, legislative purposes, and interpretive regulations. This analysis highlights the fact that, unlike the teacher's response to the little boy's creative flower painting, there is indeed a need to see jobs in ways other than "the way they always have been seen."

II. Workplace Essentialism

Essentialism is a belief in the true essence of something: "that which is most irreducible, unchanging, and therefore constitutive of" that particular thing.[18] To "essentialize" something is to assume that all examples of that particular thing share the same inherent, invariable, and defining characteristics.[19] In discrimination discourse, scholars most frequently have used the concept of essentialism to critique the construction of gender, race, and sexual orientation when assumptions are made that all members of a particular group possess inherent common characteristics or a shared experience.[20] The individuals who are subject to discrimination, however, are

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18. DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE 2 (1989); *see* Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 936 (1995) (defining essentialism as "the belief that a type of person or thing has a true, intrinsic, and invariant nature . . . that is constant over time and across cultures and that consequently defines and constitutes it").

19. *See* KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007–09 (2d ed. 1998) (setting forth seven different meanings of "essentialism"); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 78 (2d ed. 2003) (defining "essentialism" in relation to gender); Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1811 (2000) (defining "essentialism"); *see also* Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 855 (1999) (noting essentialism's use of "false universalism").

20. *See, e.g.*, Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 43–44 (1994) (noting that "theorists who use the categorical term 'lesbian'" may fall into an essentialist trap by assuming that the lesbian experience is "monolithic"); Nancy E. Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185, 187–90 (2000) (revealing how work/family scholarship essentializes the experiences of white, middle-class women and married, heterosexual families as the shared experience); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools To Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) ("Essentialism is the notion that there is a single woman's, or Black person's, or any other group's, experience that can be described independently from other aspects of the person . . . ."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (defining "gender essentialism" as "the notion that a unitary, 'essential' woman's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836 (1993) (explaining that an essentialist view of sexual orientation is "the belief that gayness is an

not the only subjects of essentializing rhetoric. Objects, ideas, institutions, and concepts can be essentialized as well.[21] In the context of employment discrimination, this means that an essentialism critique can be levied not just against the construction of categories of marginalized workers, but also against the construction of the workplace itself.

Today's essentialized workplace is built around the "full-time face-time norm," which assumes that the invariable properties defining the "whatness"[22] of a good job include full-time work with very long hours or unlimited overtime, rigid work schedules for core work hours, uninterrupted worklife performance (with severe consequences for time off during crucial, "up-or-out" phases of career development), and performance at a central location.[23] These default workplace structures characterize not only the best professional, executive, and other white-collar jobs, but also the most desirable blue-collar work.[24] What essentializing rhetoric has done to this full-time face-time concept is to shift it from being merely descriptive to being both normative and definitional. In other words, full-time face-time has become not just the way that successful companies currently *are* designed, but also the way that they *should* and *must be* designed. This essentialist view, like all essentialist outlooks, assumes that the current structure is constant, as well as ahistorical, asocial, and apolitical—all of which are inaccurate.[25]

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intrinsic property," and that all who experience same-sex desire can be treated as a "single group" with stable traits); Roberts, *supra* note 19, at 855 (analyzing whether a BlackCrit theory is essentialist by "erroneously imply[ing] that Blacks share a common, essential identity"); Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 274–75 (1999) (describing essentialism in feminist debates).

21. *See* Ainsworth, *supra* note 18, at 936 (explaining that essentialism can apply to a "thing" as well as to a "type of person"); Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 54 (2003) (recognizing "the possibility of essentializing ideas (as opposed to the more common discussion of essentializing groups of people)"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (applying the concept of essentialism to the legal construction of constitutional rights).

22. *See* FUSS, *supra* note 18, at xi (defining essentialism as "a belief in the real, true essence of things, the invariable and fixed properties which define the 'whatness' of a given entity").

23. *See* WILLIAMS, *supra* note 16, at 1, 5, 71–72, 76, 79–81 (describing the ideal worker norm that defines today's best jobs); *see also* Abrams, *supra* note 10, at 1223–24, 1227 (describing how the best jobs are designed to require "[h]erculean time commitments," "stringent limits on absenteeism," and a "protracted evaluation period (often six to ten years) that precedes promotion decisions").

24. *See* WILLIAMS, *supra* note 16, at 1, 5, 71–72, 76, 79–81 (describing the common characteristics of the best blue-collar and white-collar jobs).

25. *See* Grillo, *supra* note 20, at 19 (explaining that an essentialist outlook "assumes that

In reality, the entrenchment and legitimacy of the essentialized workplace originated with the historic shift in the late eighteenth and early nineteenth centuries from a system of patriarchy to what Professor Joan Williams characterizes as a system of "domesticity."[26] During that period, the growing commercial and industrial economy began to force a separation of "work" from "home," both geographically and temporally.[27] That shift required the development of a new social order from the prior era when work and home were intertwined in space and time, and when both work and home were governed by explicit patriarchal power and hierarchy.[28]

The new social order of domesticity reflected more egalitarian Enlightenment ideals.[29] Domesticity no longer described women as "inferior," but simply as "different," which allowed adult work to become bifurcated into two distinct and ostensibly equal spheres: the home, which was the women's sphere, and the market, which was the men's sphere.[30] Although domesticity was a step forward from the prior patriarchal regime, the result was that the new workplace was designed around that particular social order.[31] Specifically, market work was structured around workers who had no household or caregiving responsibilities and who received a free flow of domestic work.[32] These so-called "ideal workers" could provide a full-time uninterrupted stream of market work, which was the model upon which the new workplace was built.[33] Of course, those most likely to possess "ideal worker" status were and remain able-bodied men. Because of the shifting expectations of the domesticity model, able-bodied men began to link their sense of self to successful market work, rather than to religious, political, and social roles, as

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the experience of being a member of the group . . . is a stable one," with a meaning that is "constant through time, space, and different historical, social, political, and personal contexts"); Ortiz, *supra* note 20, at 1836 (explaining that an essentialist view of sexual orientation sees "gayness" as stable across time, history, and social context).

26. *See* WILLIAMS, *supra* note 16, at 20–25 (discussing the concept and development of domesticity).

27. *See id.* at 31 (noting that there was a shift towards moving market work into factories and towards a set "workday"); Travis, *The Virtual Workplace*, *supra* note 16, at 293–94 (explaining that "the Industrial Revolution . . . was responsible for moving the workplace out of the home").

28. *See* WILLIAMS, *supra* note 16, at 20–25, 31 (describing the development of domesticity over the last two centuries).

29. *Id.* at 23.

30. *Id.*

31. *See id.* at 23–24 (stating that "[d]omesticity gendered not only personality and emotional expressiveness but also market work").

32. *Id.* at 2, 24, 71.

33. *Id.*

previously had been the case.[34] These shared expectations led to established behavior patterns that eventually became institutionalized norms.[35]

The institutionalization of the ideal worker model and the full-time face-time norm has shown remarkable resilience over time despite significant countervailing forces. The default organizational structures have changed very little despite the influx of women and individuals with disabilities into the labor force. These structures also have remained intact despite the dramatic increase in single-parent and dual-earner families that do not possess ideal worker status.[36] And perhaps most surprisingly, these structures have continued despite growing empirical evidence of their negative economic consequences. Data shows that providing flexible work schedules, job sharing, and reduced hour options not only improves recruiting but also reduces absenteeism and turnover, which saves significant rehiring and retraining costs.[37] Additionally, flexible work arrangements can increase worker productivity.[38] Researchers have found similar results with telecommuting, which also can reduce employers' overhead and other fixed costs.[39] The resilience of the full-time face-time workplace despite all of these contrary forces is testimony to the power of essentialized rhetoric. All forms of essentialism, by their very nature, help restrict the possibility of reorganization and change, even when change could produce real economic gains.[40]

The failure to challenge the inherent nature of existing work structures likely is facilitated by a number of different phenomena. Of course, those who possess significant labor market power may have an incentive to essentialize the existing workplace to help reduce competition for limited advancement opportunities and to perpetuate their privileged status.[41] Workplace

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34. *Id.* at 25.

35. *Id.*

36. *See* Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273, 275–76 (2001) (summarizing data on the rise in single-parent and dual-earner families).

37. WILLIAMS, *supra* note 16, at 88–91.

38. *See id.* at 65, 88, 91–93 (describing the effect of flexible work policies on worker productivity).

39. *See* Travis, *The Virtual Workplace*, *supra* note 16, at 364–67 (listing the economic benefits of telecommuting).

40. *See* Elizabeth Grosz, *Sexual Difference and the Problem of Essentialism*, *in* THE ESSENTIAL DIFFERENCE 84 (Naomi Schor & Elizabeth Weed eds., 1994) (defining "essentialism" in a feminist context).

41. *See* WILLIAMS, *supra* note 16, at 28–29 (describing a study revealing widespread resistance of blue-collar workers to "the invasion of unqualified women into their turf," which was based on anxiety over decreasing hourly wages and an inability to be a successful sole breadwinner); *Better on Balance?: The Corporate Counsel Work/Life Report* 35 (Dec. 2003)

essentialism may be perpetuated, however, through many other less conscious ways as well.

Studies show that many men link their sense of self so strongly to work success that they no longer recognize the ideal worker role as a "choice," regardless of how exploitative work becomes.[42] Additionally, most successful managers continue to possess the privileges that allow them to perform as ideal workers, so the conflict between work and domestic responsibilities, and the implicit demand for an able-bodied stature, are simply invisible to those in the best position to alter the organization of work.[43] Most top business managers still have homemaker wives who attend to all domestic responsibilities, and the most successful working men are those most likely to adhere to the "housewife/breadwinner model" upon which the ideal worker norm and its related workplace structures so heavily depend.[44] Not surprisingly, supervisors who are married to homemakers provide less job-related flexibility than supervisors who have spouses employed in market work.[45]

Another contributing factor to the invisibility of existing workplace structures is what social psychologists refer to as the "fundamental attribution error."[46] The fundamental attribution error is the well-documented phenomenon that occurs when observers try to determine the cause of another's behavior. In making these causal attributions, observers systematically overestimate the role of the other person's internal, dispositional characteristics, and they underestimate the power that the situation has in controlling the other person's conduct.[47]

[hereinafter *Work/Life Report*] (explaining how "macho attitudes" and "competition for limited advancement" can help create a culture that rejects part-time work arrangements), *available at* http://www.pardc.org/Publications/BetterOnBalance.pdf (on file with the Washington and Lee Law Review).

42. *See* WILLIAMS, *supra* note 16, at 30, 60 (noting men's dissatisfaction with the ideal worker norm).

43. *See id.* at 27, 74–75 (noting one study finding that successful men took on limited household responsibilities); *see also Work/Life Report*, *supra* note 41, at 35 (explaining that one thing that helps "create a culture that rejects or undermines part-time policies" is "management that is not itself in a position of juggling the demands faced by a two-income earner family").

44. WILLIAMS, *supra* note 16, at 27, 74–75.

45. *Id.* at 74.

46. *Cf.* Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes"*, 55 VAND. L. REV. 481, 519–25 (2002) [hereinafter Travis, *Perceived Disabilities*] (using the fundamental attribution error to help explain why employers overestimate employee impairments and misperceive nondisabled employees as disabled, rather than focusing on the limiting aspects of workplace design).

47. *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 198–200 (Leonard Berowitz ed., 1977) (describing the fundamental attribution error). The seminal study

In one typical experiment demonstrating the fundamental attribution error, researchers asked subjects to observe two actors participate in a general knowledge "quiz game."[48] The subjects watched a researcher randomly assign one actor the role of "questioner" and one actor the role of "contestant."[49] The subjects knew that the researcher instructed the questioner to write ten difficult and esoteric questions that would display the questioner's own unique expertise.[50] The subjects then watched the questioner pose the ten questions to the contestant, who inevitably performed poorly because the game conferred an extraordinary role advantage on the questioner.[51] At the end of the game, the researcher asked the observers to rate the questioner's and the contestant's general knowledge, and the observers consistently ignored the powerful situational constraints.[52] The observers attributed the game's outcome to characteristics of the actors and, therefore, rated the questioner as vastly more knowledgeable than the contestant.[53] What the observers failed to recognize was that the questioners "did not possess any superiority in general knowledge—they merely had exploited the opportunity to choose the particular topics and specific items that most favorably displayed their general knowledge."[54]

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on the fundamental attribution error was in 1967. *See* MILES HEWSTONE, CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS 50–51 (1989) (noting that the experiment is "generally used as an illustration" of the fundamental attribution error); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 121 (1980) (calling the experiment a "demonstration of people's overwillingness to ascribe behavior to enduring dispositions"). In that study, experimenters asked subjects to read a student exam answer in a political science course. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1, 4 (1967). The experimenters told some subjects that the exam question asked the student to defend Fidel Catro's Cuba, and the experimenters told some subjects that the exam question asked the student to choose whether to write a defense or a criticism. *Id.* The experimenters then asked the subjects to predict the student's true attitudes. *Id.* Even in the former scenario in which the answer was dictated solely by the situation—by the exam question—the subjects attributed the essay to the student's personal beliefs. *Id.* at 5–7.

48. *See* Lee D. Ross et al., *Social Roles, Social Control and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485, 485, 490–91 (1977) (describing the "quiz game" experiment).

49. *Id.* at 485–87.

50. *Id.*

51. *Id.* at 485–88, 490–91. Of course, the questioner also would have performed poorly if placed in the disadvantaged contestant role. *See id.* at 485–88 (noting that the quiz was "designed to confer a self-preservation advantage upon questioners relative to contestants").

52. *Id.* at 491.

53. *Id.*

54. *Id.*

When employment decisionmakers observe employees who lack ideal worker status struggle to succeed in the existing workplace, the fundamental attribution error predicts that the decisionmakers will attribute such failure to internal characteristics of the workers rather than to the situational constraints of a workplace that is organized around the full-time face-time norm. One reason for this attribution bias is perceptual.[55] People simplify their cognitive processing by focusing on stimuli that are the most salient or attention-grabbing.[56] Salience often leads to the perception of causality, even if the most salient stimuli are not the most causally influential.[57] When observers attribute a cause for another person's behavior, that person typically is more salient than the environment in which the person is behaving, which leads to trait attributions instead of situational ones.[58] When an employment decisionmaker tries to decide why women or individuals with disabilities are not succeeding in the workplace, the workplace itself simply fades into the background.

Social science research indicates that the fundamental attribution error is particularly likely to occur in the employment setting.[59] The tendency to

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55. *See* NISBETT & ROSS, *supra* note 47, at 123–25 (explaining that observers usually pay more attention to people than to background situational factors, which leads to dispositional attributions).

56. *See* HEWSTONE, *supra* note 47, at 52–53 (noting that observers are more likely to focus on other people than on the situation); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1194 (1995) (discussing distinctiveness-based distortions in a person's perception and judgment); Leslie Zebrowitz McAurthur, *What Grabs You?: The Role of Attention in Impression Formation and Causal Attribution*, *in* 1 SOCIAL COGNITION 201, 201–03 (E. Tory Higgins et al. eds., 1981) (asserting that "salient, though trivial, stimuli often exert a strong influence upon our attentional focus"); John B. Pryor & Mitchell Kriss, *The Cognitive Dynamics of Salience in the Attribution Process*, 35 J. PERSONALITY & SOC. PSYCHOL. 49, 53 (1977) (noting that salience is a "stimulus quality that attracts an observer's attention"); Shelly E. Taylor & Susan T. Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, *in* 11 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 249, 259–64 (Leonard Berkowitz ed., 1978) (discussing the role of salience in behavioral attribution).

57. *See* HEWSTONE, *supra* note 47, at 52–53 (posing a possible explanation for the fundamental attribution error); McAurthur, *supra* note 56, at 201–06 (discussing how salient stimuli are perceived); Taylor & Fiske, *supra* note 56, at 264–65 (discussing salience and perception).

58. *See* HEWSTONE, *supra* note 47, at 152 (noting that on "the intra-personal level . . . the actor's behavior is often more salient than the situation"); NISBETT & ROSS, *supra* note 47, at 122–25 (providing experimental evidence); Pryor & Kriss, *supra* note 56, at 53–54 (asserting that a "tendency to see persons as disproportionately causal in relation to their environment may be related to the prominence of persons . . . in memory").

59. *See* Ross et al., *supra* note 48, at 494 (noting that differentiated social roles, such as employer-employee roles, can bias interpersonal judgments); *see also* Travis, *Perceived Disabilities*, *supra* note 46, at 524 (explaining that high differentiation in roles between employers and employees creates a situation particularly prone to the fundamental attribution

overattribute another person's behavior to that person's internal characteristics rather than to situational constraints is heightened when the observer views the person as a member of a different group, when the person's performance can be characterized as a failure,[60] or when the person's conduct has consequences for the observer.[61] All of those elements exist in the typical employment decisionmaking context where a member of the management group is evaluating a member of the employee group because of an employee's performance problem. Because observers disproportionately attribute out-group members' failures to internal characteristics of those individuals, rather than to situational constraints, it is not surprising that the existing workplace structure remains unquestioned and unchanged.

The tendency to overattribute an employee's poor performance to a shortcoming of the employee, rather than to a shortcoming in workplace design, likely is exacerbated by the challenges that managers face in assessing performance in the first place. In many new jobs in the information and service economy, productivity is difficult to assess. As a result, face-time often becomes a convenient proxy for productivity and performance quality.[62] Social psychologists have documented the cognitive biases that contribute to this equation of talent with face-time.[63] The risk that face-time will become a productivity proxy is highest in companies that lack a formal performance evaluation system or do not conduct regular employee reviews, or in companies where employee evaluations are heavily dependent on "politics," "perceptions," and "popularity."[64] When managers equate the inability to put in face-time with low productivity and then attribute that perceived low productivity to individual

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error).

60. *See* Krieger, *supra* note 56, at 1191–92 (citing relevant studies).

61. *See* John S. Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology*, *in* COGNITION AND SOCIAL BEHAVIOR 13, 20 (John S. Carroll & John W. Payne eds., 1976) (discussing relevant studies).

62. *See Work/Life Report*, *supra* note 41, at 43 (focusing on the stigma of part-time work in in-house counsel jobs). In a recent workplace study, one employee reported a typical supervisor's response to her request to work part-time and be judged on the results of her work, rather than on face-time. *See* WILLIAMS, *supra* note 16, at 73 (describing the details of the study). The supervisor responded: "I don't know how to do part-time. My experience is that people who put in the hours are the ones who succeed . . . . What matters is how much time you put into the job . . . . That's all I know how to understand as a basis for getting ahead." *Id.*

63. *See* Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2236 (2002) (citing work by Professor Lotte Bailyn of the Massachusetts Institute of Technology).

64. *See Work/Life Report*, *supra* note 41, at 36, 43 (noting this risk in particular for in-house counsel jobs).

employee shortcomings, the essentialized workplace gets perpetuated in the process.

The social science theory of cognitive dissonance reduction may facilitate the perpetuation of the essentialized workplace as well. "Cognitive dissonance" refers to the uncomfortable feeling that arises when one acts in a way that is at odds with one's beliefs or knowledge.[65] Researchers have demonstrated that people will go to great lengths—both consciously and unconsciously—to reduce such cognitive dissonance by modifying one's beliefs or knowledge, even at the expense of rational judgment.[66] In other words, belief systems often follow behavior, rather than the other way around.

One situation in which cognitive dissonance can occur is when a person changes roles, such as when a factory worker gets promoted to foreperson.[67] The behavior required in the new role, including giving orders instead of receiving them, may be at odds with opinions and values that the individual held as a low-level worker.[68] The resulting cognitive dissonance generally results in the individual's opinions coming in line with the values of other supervisors.[69] In more general terms, workers who do what it takes to move up in the existing workplace hierarchy predictably tend to become more committed to the values embraced by those in the upper hierarchy of the existing structure as a way to reduce any dissonance that their new position may produce.

Another situation that can create cognitive dissonance is when a person completes a course of conduct that does not end up being worth the sacrifice and perseverance that the conduct required.[70] As one social scientist has explained, "[o]ne does not work hard for nothing," so when one finds that the result of hard work is something less desirable than anticipated, cognitive

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65. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–3 (1957).

66. *See id.* at 3 (hypothesizing that people are motivated to selectively avoid information that will increase cognitive dissonance); Elliot Aronson, *The Theory of Cognitive Dissonance: A Current Perspective*, *in* 4 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 3–5 (Leonard Berkowitz ed., 1969) (describing experiments in which people rationalize their behavior to reduce cognitive dissonance); Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 637 (Thomas Gilovich et al. eds., 2002) (referencing dissonance research exploring "the barriers to rational judgment" that are created by prior commitment to controversial beliefs).

67. FESTINGER, *supra* note 65, at 272–73.

68. *Id.* at 273.

69. *Id.*

70. *See* Pronin et al., *supra* note 66, at 637 (giving the example of "Vietnam War veterans who were injured or held in POW camps and draft resisters who left the country or went to jail for their actions [and must now] either continue to disagree . . . or else pay a heavy psychic price").

dissonance will occur.[71] Individuals who succeed in the full-time face-time workplace may find themselves in this situation, if such success required them to sacrifice health, sleep, or time for family, leisure, or other social endeavors.

One way to reduce the resulting dissonance is simply to distort one's view of the result in a more favorable direction.[72] Another strategy is to seek social support from people who are in the same dissonance-producing situation.[73] People in the same situation may help convince each other that negative aspects of the situation are in fact very important and even pleasurable. This process may explain workplace cultures in which successful workers wear their extreme work hours as a badge of honor and actually "prize[] the ability to work long hours at the expense of all else."[74]

Another form of dissonance reduction that occurs once a person has committed to a dissonance-producing course of action is that the person tends to seek out information that will decrease the dissonance and, more importantly, to avoid information that would increase it.[75] In particular, the person seeks out information indicating that the course of action was wise and correct, and the person avoids information to the contrary. If the person is exposed involuntarily to such contrary information, the person often ignores, misinterprets, or discredits the information in order to preserve the perceived validity of his or her prior conduct.[76] This process may explain why data revealing the economic benefits of flexible work arrangements have not produced significant changes by presumably economically efficient employers. Cognitive dissonance theory predicts that individual decisionmakers who have succeeded under the conditions of the full-time face-time workplace will tend to become more committed to the existing structure. Social scientists believe that

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71. *See* Aronson, *supra* note 66, at 4, 10–12 (describing how cognitive dissonance can result from effort); *see also* JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE 29–30 (1962) (describing how cognitive dissonance may result by expending effort or experiencing negative consequences from a committed course of conduct).

72. *See* Aronson, *supra* note 66, at 4, 10–12 (describing studies showing that people who had to exert significant unpleasant effort to gain admission to a group that turned out to be uninteresting reported the most favorable perceptions of the group to reduce the cognitive dissonance produced by their efforts).

73. FESTINGER, *supra* note 65, at 192–96; *see* Aronson, *supra* note 66, at 3 (describing various methods for a smoker to decrease the cognitive dissonance that results from continuing to smoke while knowing that smoking causes cancer, including "associat[ing] with other cigarette smokers").

74. *See Work/Life Report*, *supra* note 41, at 22 (focusing on in-house legal departments and also describing law firm cultures in which attorneys proudly boast about their billable hours).

75. FESTINGER, *supra* note 65, at 3, 123–31.

76. *Id.* at 131–36.

it is more accurate to assume a group of "rational*izing*," rather than objectively rational, decisionmakers.[77]

A recent workplace study provides an illustration of this phenomenon. The study recorded a senior manager's reaction to a junior manager who reported a survey showing that employees wanted a more balanced worklife.[78] The senior manager responded:

> Don't *ever* bring up "balance" again! . . . Everyone in this company has to work hard. *We* work hard. *They* have to work hard. That's the way it is. Just because a few women are concerned about balance doesn't mean we change the rules. If they choose this career, they're going to have to pay for it in hours, like the rest of us.[79]

By the tone of the senior manager's response, it appears that his history of ideal worker status and having "to pay" for his career in hours created cognitive dissonance when the value of long work hours was questioned. The manager appeared to reduce that dissonance by becoming rigidly committed to the existing workplace structure, despite its negative aspects, and by seeking social support for that structure from other managers—that is, "we"—who were in the same dissonance-producing situation. The result was to justify and ultimately essentialize the existing workplace as simply "the way it is."

Cognitive dissonance represents one strand of a broader phenomenon that social psychologists call "system justification," which refers to the general motive that people have to justify the existing social order.[80] System justification theory analyzes and documents the "social and psychological needs to imbue the status quo with legitimacy and to see it as good, fair, natural, desirable, and even inevitable."[81] This theory would predict that various cognitive biases not only may allow the essentialized workplace to perpetuate, but also may help further legitimate and retrench it.

Although researchers have studied system justification theory primarily in the context of large-scale political and economic systems, similar processes may

77. Aronson, *supra* note 66, at 3; *see also* Pronin et al., *supra* note 66, at 637 (explaining that social psychologists have "showed unparalleled ingenuity in demonstrating the ways in which people rationalize their actions and reduce discrepancies in their belief systems").

78. WILLIAMS, *supra* note 16, at 73–74 (citing ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 71 (1997)).

79. WILLIAMS, *supra* note 16, at 74 (quoting HOCHSCHILD, *supra* note 78, at 71).

80. *See* John T. Jost et al., A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo 1 (2004) (providing an overview of system justification theory) (unpublished manuscript, on file with the Washington and Lee Law Review); *see also* Pronin et al., *supra* note 66, at 637 (noting the large body of social psychological research demonstrating "the human capacity for rationalization").

81. Jost et al., *supra* note 80, at 9.

be affecting the justification of the work environment. Researchers believe that people have developed a general capacity to internalize and rationalize their socially constructed environments, particularly environmental features that are very difficult to change.[82] This tendency is so strong that it often occurs even at the expense of one's individual or group interests.[83] Even those people who the status quo excludes or devalues are biased toward naturalizing the status quo's existence, rather than engaging in strategies for change.[84] For example, one study found that low-income subjects were more likely than high-income subjects to agree that large pay differentials were "necessary" to provide "an incentive for individual effort."[85] Another study found that workers in low-paying jobs had adjusted their expectations in line with the status quo and believed that their work on difficult tasks was worth less than workers in high-paying jobs.[86] Other studies have documented this depressed sense of entitlement among members of other disadvantaged groups, such as women accepting conventional definitions of sex roles and often feeling that they deserve lower wages than men.[87]

In the context of the essentialized workplace, evidence suggests that even those most likely to be excluded, including women with caregiving responsibilities and individuals with disabilities, may have internalized the status quo. For example, studies show that most women do not question their husbands' right to perform as ideal workers, and most provide "unquestioned support for men's careers."[88] In a long-term study of the autobiographies of individuals with disabilities, researchers similarly have documented instances in which employers' discriminatory conduct is "simply accept[ed] as natural."[89] Both advantaged *and* disadvantaged workers seem to have accepted the existing workplace design and the notion that employers are entitled to a workforce of ideal workers who can meet the full-time face-time norm.[90]

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82. *See id.* at 39 (summarizing the similar findings of several published works).

83. *See id.* at 4, 33 (providing examples of against-interest behaviors in disadvantaged classes).

84. *See id.* at 12–36 (analyzing why members of low status groups favor the status quo even though they are disadvantaged by it).

85. *Id.* at 35.

86. *Id.* at 30.

87. *Id.* at 29, 33.

88. WILLIAMS, *supra* note 16, at 30.

89. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 11 (2003).

90. *See* WILLIAMS, *supra* note 16, at 20 (discussing employees' perceptions of employer entitlement).

Although all of this evidence explains why employers have been, and likely will continue to be, resistant to voluntarily restructuring the workplace, the phenomenon of workplace essentialism exists against the backdrop of affirmative mandates in employment discrimination law. When Congress enacted the ADA's accommodation model and the Supreme Court first recognized Title VII's disparate impact theory, the potential for combating workplace essentialism and redesigning exclusionary workplace norms became a reality. Realizing that transformative potential, however, requires judges to be able and willing to resist the gravitational force exerted by the status quo that so effectively keeps employers tethered to the full-time face-time norm. Unfortunately, judges have not been immune to the status quo's pull. As Part III will demonstrate, workplace essentialism not only has affected employment decisionmakers, but also has captured judges' interpretation of employment discrimination law.

III. The Capture of Employment Discrimination Law's Transformative Potential

This Part describes the particular doctrinal methods by which workplace essentialism captures the law's transformative potential in both ADA accommodation claims and in Title VII sex-based disparate impact claims. In both contexts, the plaintiff must state a prima facie case of discrimination, and then the employer may affirmatively defend its conduct. When that conduct involves the decision to organize the workplace around the full-time face-time norm, judges frequently have used workplace essentialism to defeat the plaintiff's claim before it reaches the affirmative defense stage. As a result, employers are shielded from ever having to provide a business justification for exclusionary workplace norms, and the conventional workplace design is placed beyond the reach of antidiscrimination review. Although workplace essentialism has infiltrated judicial interpretation through different doctrinal paths in ADA and Title VII cases, the following discussion will demonstrate that the underlying analytic errors are analogous.

A. Defining "Essential Job Functions" Under the ADA

To state an ADA claim, the plaintiff must prove that he or she is disabled and can perform the "essential functions" of the job "with or without a

reasonable accommodation."[91] The plaintiff is then deemed a "qualified individual," who is within the ADA's protected class and for whom the employer is required to redesign workplace policies, practices, equipment, and procedures.[92] Employers may refuse such accommodations by invoking the affirmative defense of "undue hardship,"[93] which requires the employer to prove that the accommodation imposes "significant difficulty or expense" in light of the company's operations and financial resources.[94]

When an employer's default organizational structures exclude individuals with disabilities from the workplace, courts have two possible approaches to interpreting the ADA's accommodation mandate: a transformative approach that would require employers to restructure the existing workplace design or an essentialist approach that treats the existing design as immutable and beyond the ADA's reach. Under either approach, judges must begin by determining whether an individual is entitled to an ADA accommodation, which requires judges to assess whether the individual can perform the job's "essential functions." This is because disabled individuals who require modification of an essential job function are not considered "qualified individuals" and are therefore outside of the ADA's protected class. Identifying a job's "essential functions" is the point at which the two possible approaches first diverge.

Under the transformative approach, judges would identify a job's required tasks and distinguish them from the malleable organization of when, where, and how the tasks get performed. In other words, judges would recognize that job "functions" do not include the bundle of conditions imposed by the full-time face-time norm, but only include the underlying tasks that the worker is required to accomplish. Under this approach, an employer would be required to restructure any aspect of the full-time face-time norm that excludes a disabled individual from workplace participation. The individual's need to change the exclusionary default structure would be characterized as a proper accommodation request—a request for a workplace modification that would allow the employee to perform the *actual* essential functions of the job—which

91. The statute prohibits discrimination against "a qualified individual with a disability," 42 U.S.C. § 12112(a) (2000), which is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." *Id.* § 12111(8).

92. *See id.* §§ 12111(8), 12111(9), 12112(a), 12112(b) (defining "qualified individual" and "reasonable accommodation" and construing "discrimination" to include the failure to reasonably accommodate qualified disabled workers).

93. *See id.* § 12112(b)(5)(A) (providing an exception to the reasonable accommodation obligation).

94. *See id.* § 12111(10) (defining "undue hardship" and listing factors to consider in assessing this defense).

would render the employee a "qualified individual" who is covered by the ADA. If modifying the default structure had any negative impact on the employer, which often it would not, judges would analyze that impact under the employer's undue hardship defense. That would force employers to demonstrate a business justification in order to resist workplace restructuring and to retain an exclusionary workplace norm.

As Part IV will demonstrate, this transformative approach has significant support in the ADA's statutory language, legislative intent, and interpretive regulations. Nevertheless, only a few courts have interpreted the ADA to advance its transformative goals.[95] In the same way that workplace essentialism has allowed employers to retain the full-time face-time norm despite significant countervailing social and economic forces, workplace essentialism has allowed most courts to ignore the ADA's transformative potential, thereby further retrenching the workplace status quo.

The majority of judges who have interpreted the ADA through the lens of workplace essentialism diverge from the transformative approach by failing to distinguish actual job tasks from the default organizational norms regarding when, where, and how the actual tasks get performed. These judges assume that jobs are defined by their existing default structures, including the full-time face-time norm, and they therefore equate the traditional ways of organizing work performance with the underlying work tasks themselves. Based on this assumption, these judges characterize default workplace structures *as* "essential job functions," which places these exclusionary norms beyond the reach of antidiscrimination law. If an individual with a disability needs to modify something that is characterized as an "essential job function," the worker does not meet the ADA's definition of a "qualified individual." Accordingly, whenever an employee's disability precludes performance under the full-time face-time norm, that employee falls outside of the ADA's protected class, and courts can dismiss the employee's accommodation claim for failure to state a prima facie case. Employers, in turn, are never required to defend their exclusionary default structures by demonstrating that a modification or alternative would create an undue hardship. As a result, the essentialized workplace not only remains intact regardless of business need, but the courts themselves are relegitimating the existing workplace in the process.

Courts have made this error in accommodation claims challenging the entire array of structures that make up the full-time face-time norm. The

95. *See infra* notes 272–86 and accompanying text (discussing the "ultimately inadequate" steps that some courts have made towards achieving the ADA's transformative goals).

Seventh Circuit illustrated this approach in *DeVito v. Chicago Park District*[96] when it affirmed a verdict for the employer on Nicholas DeVito's ADA claim.[97] The employer fired DeVito from an office receptionist position after DeVito requested a long-term, part-time schedule to accommodate a back injury.[98] The Seventh Circuit began by noting correctly that the ADA "provides relief only to persons who are capable, with or without an accommodation, . . . to perform the essential functions of their job."[99] The court, however, did not analyze DeVito's ability to perform a receptionist's required job functions, such as taking messages and answering questions. Instead, the court characterized the default organization of those functions into a single, full-time position as itself an essential function of the job.[100]

Because DeVito could not perform the "essential function" of working full-time, the court held that he was unqualified and "therefore was not within the Act's protections."[101] By defining DeVito out of the ADA's protected class, the court allowed the employer to retain its exclusionary default structure without ever having to demonstrate that dividing the receptionist job into several part-time positions would cause an undue hardship. Moreover, by characterizing the employer's preference for full-time schedules as an "essential job function," rather than as one particular way to organize when and how the actual job functions get done, the Seventh Circuit effectively shielded all full-time job requirements from ADA review.

This shield has protected a wide range of jobs from legal scrutiny, including positions for which there is no business need for a full-time job design. In *Terrell v. USAir*,[102] for example, the Eleventh Circuit affirmed summary judgment for an employer that fired Peggy Terrell because her carpal tunnel syndrome made her unable to work for more than four hours per day.[103] Terrell alleged that she could perform all of the actual job duties of a

96. DeVito v. Chi. Park Dist., 270 F.3d 532 (7th Cir. 2001) (Posner, J.).

97. *Id.* at 534.

98. *Id.* The employer fired DeVito after only temporarily allowing him to work part-time. *Id.*

99. *Id.*

100. *See id.* (holding that the ability of disabled individuals to perform the essential job functions "in the case of a full-time job requires that they be capable of working full-time"); *see also* Caroselli v. Allstate Ins. Co., 15 Am. Disabilities Cas. (BNA) 596, 600 (N.D. Ill. 2004) (citing *DeVito* and holding that "[a] full-time schedule can be an essential job function").

101. *DeVito*, 270 F.3d at 534; *see also Caroselli*, 15 Am. Disabilities Cas. (BNA) at 599–600 (holding that a plaintiff with fibromayalgia failed to establish a prima facie ADA case because her inability to work full-time rendered her unqualified for a channel manager position).

102. Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998).

103. *Id.* at 623.

reservations sales agent, and she argued that any impact on the employer from having to split her position into two part-time positions rather than one full-time position should be assessed under the undue hardship defense.[104] The employer could not prove undue hardship, given that the employer had, without difficulty, provided part-time work for the plaintiff in the past and for other workers after the plaintiff's termination.[105] Nevertheless, the court treated the employer's full-time default structure as itself an essential function, rendering the plaintiff unqualified and unprotected by the ADA.[106]

As the hour expectations for many jobs increase, the legal protection of default hour requirements is likely to have an increasingly exclusionary effect. One data point is provided by *Davis v. Microsoft Corp.*,[107] in which Thomas Davis challenged a default sixty to eighty hour workweek for systems engineers.[108] Davis alleged that the employer failed to accommodate his hepatitis C infection by refusing to allow him to work a forty hour workweek with eight hour days.[109] The Washington Supreme Court set aside a jury verdict for Davis and dismissed his accommodation claim.[110] The court shielded the company's workweek requirement from legal scrutiny by broadly defining the "essential functions of the job." The court held that "[t]he term 'functions' (or 'job duties') cannot be construed simply as 'tasks,'" nor can the phrase "essential functions" refer only to "the tasks and activities that are indispensable to the job."[111] Instead, the court construed "essential job functions" to encompass all types of "'conduct' and 'service' required of the employee," including being able to work sixty to eighty hours per week.[112]

By defining the employer's default scheduling requirement as an "essential job function," rather than as one particular way to organize when and how the

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104. *See id.* at 624–27 (summarizing the plaintiff's argument that part-time work is a per se reasonable accommodation and that the burden shifts to the employer to show undue hardship).

105. *See id.* (finding that part-time positions existed temporarily prior to the plaintiff's leave and that the plaintiff and others were later recalled for part-time positions).

106. *See id.* at 625–26 (holding that USAir was not required to create a part-time position for the plaintiff because none existed at the time).

107. Davis v. Microsoft Corp., 70 P.3d 126 (Wash. 2003).

108. *See id.* at 128–31 (describing the job's unstructured schedule that allegedly required sixty to eighty hours of work per week). Davis sued under the Washington Law Against Discrimination (WLAD). *Id.* at 128. However, the WLAD's accommodation requirement is similar to the ADA's, and the court relied on ADA case law to decide Davis's WLAD claim. *Id.* at 128, 132–34.

109. *Id.* at 128–29.

110. *Id.* at 133.

111. *Id.* at 132 (citations omitted).

112. *Id.* (citations omitted).

actual job functions are performed, the court removed Davis from the law's protected class. Davis's inability to perform an essential job function rendered him unqualified and therefore unable to state a prima facie case.[113] As a result, Microsoft never had to demonstrate whether modifying the sixty to eighty hour workweek for some systems engineers—perhaps by dividing some of the positions into several part-time positions—would create an undue hardship. Although unique customer demands or functional engineering requirements indeed may make it impossible for any systems engineer to have a regularly scheduled, forty hour workweek, the court could have required Microsoft to prove that fact under the undue hardship defense in order to retain an hour requirement that excludes a disabled individual.[114] Instead, the court effectively insulated *all* exclusionary full-time job structures from legal review.[115]

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113. *Id.* at 133–34; *see also* Arnow-Richman, *supra* note 11, at 364 (using *Davis* to illustrate how "courts have accepted the existing structure of work as a baseline in delineating the extent of accommodation required under the ADA").

114. The court did note that systems engineers "worked a varying number of hours per day due to unpredictable customer demands, that frequent out-of-state travel was necessary to serve their customers and advance the company's selling objectives, and that consequently they worked on average well more than 40 hours per week." Davis v. Microsoft Corp., 70 P.3d 126, 133 (Wash. 2003). However, the court never decided whether changing the resulting workweeks of some engineers would impose an undue hardship. Such scrutiny became unnecessary after the court decided to treat the long workweek as an "essential function" that the plaintiff had to be able to perform in order to state a prima facie case, rather than limiting the prima facie inquiry solely to Davis's ability to perform the discrete, underlying job tasks. It is one thing for the court to note that all prior systems engineers had worked long and unpredictable workweeks in response to customer demands and quite another for Microsoft to bear the burden of proving that restructuring some of the systems engineering positions—for example, by hiring multiple part-time engineers—would impose an undue hardship. *Cf.* Arnow-Richman, *supra* note 11, at 364–66 (criticizing *Davis* because the court "in no way considered the wisdom of the employer's work expectation or considered the norms that underlie an eighty-hour work week, a requirement that would systematically exclude employees with any number of disabilities").

115. Other cases have taken the same approach. *See, e.g.*, Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 50–53, 56–57 (4th Cir. 2002) (unpublished) (holding that "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA" and affirming summary judgment for the employer that denied an account development specialist's request for a part-time schedule to accommodate his depression); Pickens v. Soo Line R.R. Co., 264 F.3d 773, 776–79 (8th Cir. 2001) (affirming judgment for the employer on the employee's ADA claim because his disability interfered with the essential function of "regular, reliable attendance" and "full-time" work); Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1045–48 (8th Cir. 1999) (dismissing an ADA claim by a data entry clerk who requested a four hour workday to accommodate her cubital tunnel syndrome, and holding that she was not a qualified individual because "she made no showing that the essential functions of her full-time job could be performed in four hours"); Querry v. Messar, 14 F. Supp. 2d 437, 443–45 (S.D.N.Y. 1998) (granting the employer summary judgment on an ADA claim by a police officer who requested four hour shifts to accommodate a back condition, and holding that she was not qualified "because she could not perform one of

The Eleventh Circuit reached a similar conclusion in *Davis v. Florida Power & Light Co.*[116] Marvin Davis had a back injury that limited his ability to perform electrical work more than eight hours a day.[117] Davis asked for an accommodation from the employer's mandatory overtime policy, by allowing him either to work a regular schedule without overtime or to volunteer for overtime when his back condition would permit it.[118] The court could have assessed Davis's ability to perform the tasks involved in reconnecting customers' electrical power service and then assessed whether deviating from the mandatory overtime rule would impose an undue hardship on the company. Instead, the court assumed that mandatory overtime was itself an essential job function—rather than a malleable policy for determining when and how the actual job functions get performed—based largely on the employer's assertion that all employees had been working substantial overtime.[119] Having characterized mandatory overtime as an essential function, the court was able to characterize Davis as unqualified and beyond the ADA's reach, thereby justifying summary judgment for the employer.[120] Because the court never reached the undue hardship defense, the employer never had to explain why splitting the job into several positions with different hour requirements, or having others volunteer for additional overtime, would not have served the employer's interests just as well.

The same issue also has arisen in ADA cases involving accommodation requests to telecommute or work from home. These cases challenge the default

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the essential functions of her job—regularly attending work"); Burnett v. W. Res., Inc., 929 F. Supp. 1349, 1356–59 (D. Kan. 1996) (holding that organizing meter reader jobs into full-time shifts was an essential function and that the plaintiff was therefore unqualified because his knee injury made him unable to work more than four hour shifts, which justified summary judgment for the employer).

116. Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305–06 (11th Cir. 2000) (finding that mandatory overtime work was an essential function of a power company's "Connect and Disconnect" position).

117. *Id.* at 1304.

118. *Id.*

119. *Id.* at 1305–06.

120. *See id.* at 1302, 1305–06 (finding that the plaintiff's requested accommodations were unreasonable as a matter of law); *see also* Sanders v. FirstEnergy Corp., 813 N.E.2d 932, 933 (Ohio Ct. App. 2004) (holding that overtime is an essential function of a power plant attendant's job, and affirming summary judgment for an employer that fired the plaintiff because his sleep apnea made him unable to work overtime); Simmerman v. Hardee's Food Sys., Inc., No. CIV. A. 94-9606, 1996 WL 131948, at *1, *3–8 (E.D. Pa. Mar. 22, 1996) (granting summary judgment to an employer that fired a plaintiff from a general manager position after seeking a forty hour workweek on the day shift to accommodate his clinical depression, and holding that the plaintiff was not qualified under the ADA because working at least a fifty hour workweek and one night a week were essential job functions).

assumption that work must be performed at a central work location. The Seventh Circuit embraced this default work structure in *Vande Zande v. Wisconsin Department of Administration*.[121] Lori Vande Zande was partially paralyzed, which caused her to develop pressure ulcers that periodically made it impossible to come to the office.[122] To accommodate her disability, Vande Zande asked for a desktop computer to work full time at home without losing accumulated sick leave.[123] The employer refused and docked her sick leave hours.[124] The Seventh Circuit sided with the employer and affirmed the dismissal of Vande Zande's accommodation claim.[125]

To assess Vande Zande's accommodation claim, the court could have begun by identifying the actual job tasks of a program assistant, including "preparing public information materials, planning meetings, interpreting regulations, typing, mailing, filing, and copying."[126] The court then could have determined whether Vande Zande would be able to perform those functions with the proposed accommodation of working at home with a desktop computer. Instead, the court relied on unsupported assumptions about the importance of the default full-time face-time requirement. "Most jobs," assumed the court, "involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."[127] Although this assumption is at odds with significant data showing that telecommuting typically increases employee productivity and that employers underestimate the number of telecommutable jobs,[128] the court nevertheless indicated that working on-site was itself an essential job function, rather than one particular way to organize where employees perform the actual functions of their jobs.[129]

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121. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (holding that the ADA did not require the employer to allow the plaintiff to work at home).

122. *Id.* at 543.

123. *Id.* at 544.

124. *Id.*

125. *Id.* at 545.

126. *Id.* at 544.

127. *Id.* at 544–45.

128. *See* Travis, *The Virtual Workplace*, *supra* note 16, at 364–65 (collecting data demonstrating the possible productivity gains and underuse of telecommuting).

129. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543–45 (7th Cir. 1995) (assuming that "productivity inevitably would be greatly reduced" by telecommuting). The district court made the same mistake in *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996), by dismissing the plaintiff's ADA claim asking to work from home to accommodate a multiple chemical sensitivity. *Whillock*, 926 F.

Although the *Vande Zande* court left room for the "extraordinary case" in which on-site work performance would not be essential, the court established a general presumption that "an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home."[130] By treating on-site work performance as a presumed essential function of most jobs, the court relieved employers of having to demonstrate when and how telecommuting would impose an undue hardship on the company. Of course, some jobs really are location-dependent, such as construction work or janitorial positions, but employers easily would be able to demonstrate that telecommuting would create an undue hardship in those situations.[131] The problem is that the court's characterization of on-site work as

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Supp. at 1557–61, 1567. The court held that on-site work was an essential function of a sales agent's job, based on the employer's unsupported assertions that "in-person interaction is necessary," that "[s]upervisors could not properly monitor and evaluate the performance of an off-site sales agent," and that "[t]eamwork, or even work requiring supervision, cannot be performed at home without a substantial reduction in the quality and productivity of the employee's performance." *Id.* at 1564. Although these assumptions are belied by empirical data, the court simply assumed that employers "have the right to define the essential functions of a job." *Id.* at 1563; *see also* Travis, *The Virtual Workplace*, *supra* note 16, at 364–65 (collecting data showing that telecommuting may increase productivity).

130. *Vande Zande*, 44 F.3d at 544.

131. The Seventh Circuit's later opinion in *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894 (7th Cir. 2000), is one example of a location-specific job where the court's similar dismissal may have been the right outcome, but for the wrong reason. Dan Jovanovic argued that his employer violated the ADA by failing to accommodate his need for periodic absences from his job as a tool and die maker because of asthma and "Barrett's esophagus." *Id.* at 895. To determine if Jovanovic was a "qualified individual" who could perform the "essential functions" of his job, the court could have focused on the specific tool and die tasks that were required, which Jovanovic could perform whenever he was at the plant. *See id.* at 895 n.1 (noting that Jovanovic's medical conditions "in no way impaired his ability to perform tool and die work when he was present" at work). The court then could have assessed whether accommodating his need for periodic absences would have created an undue hardship. If the requested accommodation was to work from home, the court likely would have found an undue hardship and ruled for the employer because Jovanovic's maintenance and production tasks only could be done in the factory. *Id.* at 900. The court *did* rule for the employer, but on more problematic grounds. The court treated the employer's default hour and attendance requirements as themselves essential functions. *See id.* at 899–900 (stating that "[c]ommon sense dictates that regular attendance is usually an essential function in most every employment setting," particularly in "factory positions"). Because Jovanovic could not meet these requirements, the court deemed him "unqualified" and outside of the ADA's protected class. *Id.* at 895, 899–900.

Even though dismissing Jovanovic's case might have been warranted under the undue hardship defense, other employers now can use the court's holding that "attendance is an essential function" to remove disabled individuals from the ADA's protected class, even for location-independent jobs, when the employer would suffer no hardship by allowing employees to work from home. Moreover, even in *Jovanovic*, the court's dismissal was correct only if the requested accommodation was to telecommute. If Jovanovic had sought a part-time schedule to

an implied essential function means that the inquiry will never reach the undue hardship stage. The court's holding shields the on-site work requirements of virtually *all* employers—even for location-*independent* jobs—by rendering the plaintiffs "unqualified" and therefore outside of the ADA's protected class.[132]

Vande Zande's characterization of full-time face-time as a presumed essential function is already undermining the transformative potential of the ADA, as many district courts are relying on *Vande Zande* to dismiss accommodation claims. One typical case is *Wojciechowski v. Emergency Technical Services Corp.*[133] Julie Wojciechowski claimed that her employer violated the ADA by denying her request to perform her sales representative job from home to accommodate her cancer.[134] The employer argued that she "was not a qualified individual as she was unable to perform an essential function of her position, being present at the office on a full-time basis."[135] Wojciechowski urged the court to focus on a sales representative's *actual* core work tasks, which may have been technologically portable.[136] Instead, the court adopted *Vande Zande*'s unsupported assumption that "'productivity inevitably would be greatly reduced'" whenever an employee works from home.[137]

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accommodate his disability, the employer may not have been able to prove that dividing up a tool and die maker position into two part-time jobs would impose an undue hardship. However, because the court characterized Jovanovic as "unqualified," the employer never had to consider alternative accommodations or defend its default structure.

132. *See, e.g.*, Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1119–25 (10th Cir. 2004) (affirming summary judgment for the employer on a service coordinator's ADA claim asking to work at home to accommodate her post-traumatic stress disorder); Rauen v. U.S. Tobacco Mfg. Ltd. P'ship, 319 F.3d 891, 892–97 (7th Cir. 2003) (affirming summary judgment for the employer on a software engineer's ADA claim requesting a home office to accommodate her cancer); Spielman v. Blue Cross & Blue Shield of Kan., 33 Fed. Appx. 439, 440–44 (10th Cir. 2002) (unpublished) (affirming summary judgment for the employer on a nurse consultant's ADA claim asking to perform some work from home to accommodate her scleroderma); Kvorjak v. Maine, 259 F.3d 48, 54–58 (1st Cir. 2001) (affirming summary judgment for the employer on a claims adjuster's ADA claim asking to work at home to accommodate his partial paralysis); *Whillock*, 926 F. Supp. at 1557–61 (dismissing a reservations sales agent's request to work from home to accommodate her multiple chemical sensitivity); *see also* Misek-Falkoff v. IBM Corp. 854 F. Supp. 215, 226–28 (S.D.N.Y. 1994) (dismissing plaintiff's Rehabilitation Act claim alleging that the employer had a duty to accommodate a nervous system disorder by allowing her to work at home), *aff'd*, 60 F.3d 811 (2d Cir.), *cert. denied*, 517 U.S. 1111 (1995).

133. Wojciechowski v. Emergency Technical Servs. Corp., No. 95 C 3076, 1997 WL 164004 (N.D. Ill. March 27, 1997).

134. *Id.* at *1.

135. *Id.* at *2.

136. *See id.* at *2–3 (suggesting that the primary job tasks could be accomplished from home with a computer that was compatible with the employer's computer and that marginal tasks such as backup phone duties could be shifted to other workers).

137. *Id.* at *3 (quoting Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir.

Therefore, the court accepted the employer's characterization of on-site work as an essential function of the job.[138] As a result, the court defined Wojciechowski out of the ADA's protected class. Although she allegedly could perform the primary tasks of a sales representative at home, the court deemed her "unqualified" and granted the employer summary judgment.[139] The employer was allowed to retain its exclusionary on-site work requirement without ever demonstrating that telecommuting would pose an undue hardship on the company—a showing that the employer may not have been able to make with Wojciechowski's potentially location-independent job.

Many other courts have dismissed similar accommodation claims on pre-trial motions. Whenever the employee's disability makes it difficult for the employee to meet a default hour or attendance requirement, courts give nearly talismatic effect to the phrase "attendance is an essential function," even when the employee can perform all of the underlying jobs tasks.[140] This allows courts to characterize employees as unqualified, which avoids the need to assess whether the employers' rules about office presence are really necessary.[141] By

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1995)).

138. *See Wojciechowski*, 1997 WL 164004, at *3–4 (noting that the plaintiff did not "present any evidence that her position was one of the uncommon positions wherein attendance is not essential").

139. *Id.*

140. *See, e.g.*, Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 211, 213–14 (4th Cir. 1994) (affirming summary judgment for the employer on an ADA claim by a medical instructor whose lupus created attendance problems, even though she could perform her teaching tasks well, because attendance was an essential function that rendered her unqualified for ADA protection); Jackson v. Veterans Admin., 22 F.3d 277, 278–80 (11th Cir. 1994) (deciding that even though a housekeeping aid who was periodically absent due to rheumatoid arthritis could perform the required tasks of emptying trash cans and cleaning floors and bathrooms, the plaintiff "failed to prove he is an otherwise qualified individual because he failed to satisfy the presence requirement of the job," allowing the court to affirm summary judgment for the employer), *cert. denied*, 513 U.S. 1052 (1994); Amato v. St. Luke's Episcopal Hosp., 987 F. Supp. 523, 526–31 (S.D. Tex. 1997) (granting the employer summary judgment on a claim by a nursing care assistant whose disability caused absenteeism, but who could perform the job tasks of cleaning, making deliveries, and transporting patients, because "regular attendance is an essential function," so the plaintiff "cannot be viewed as an otherwise qualified individual"). *See generally* Stephen M. Crow, *Excessive Absenteeism and the Disabilities Act*, 48 ARB. J. 65 (1993) (summarizing case law on the treatment of absenteeism in ADA accommodation claims); James A. Passamano, *Employee Leave Under the Americans with Disabilities Act and the Family and Medical Leave Act*, 38 S. TEX. L. REV. 861 (1997) (describing cases addressing whether or not regular and predictable attendance is an essential function under the ADA); Laura Hartman, Note, *The Disabled Employee and Reasonable Accommodation Under the Minnesota Human Rights Act: Where Does Absenteeism Attributable to the Disability Fit Into the Law?*, 19 WM. MITCHELL L. REV. 905 (1993) (analyzing the treatment of absenteeism in state law accommodation claims).

141. *See, e.g.*, Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 50–53, 56–57 (4th Cir. 2002)

placing these individuals beyond the ADA's reach, the courts implicitly are placing their stamp of approval on a whole array of exclusionary workplace structures without any inquiry into the viability of less exclusionary alternatives.

This also has been the case for rules regarding strict start and stop times[142] or rigid shift requirements.[143] In *Earl v. Mervyn's, Inc.*,[144] for example, the

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(unpublished) (stating that "[a] regular and reliable level of attendance is an essential function of one's job," and affirming summary judgment on an ADA claim by an account development specialist whose depression required him to work part-time); Buckles v. First Data Res., Inc., 176 F.3d 1098, 1099–1102 (8th Cir. 1999) (dismissing an ADA claim by an authorizations agent whose rhinosinusitis caused attendance problems, and his inability to meet the attendance requirements rendered him unqualified for ADA protection); Corder v. Lucent Techs., Inc., 162 F.3d 924, 925–28 (7th Cir. 1998) (finding that because the plaintiff was unable to meet the "implied essential function" of "regular attendance," she "stands outside the protective reach of the ADA," therefore warranting summary judgment for the employer that fired her as an account support representative after being absent due to recurrent severe depression and anxiety); Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445–46 (8th Cir. 1998) (finding that an employee whose Crohn's disease caused periodic absences was unqualified and outside the ADA's protected class because regular attendance was an essential job function, and therefore affirming summary judgment for the employer); Carr v. Reno, 23 F.3d 525, 527–30 (D.C. Cir. 1994) (deciding that an employee whose ear condition caused periodic absences was not a qualified individual subject to the Rehabilitation Act's protection because "an essential function of any government job is an ability to appear for work" and affirming summary judgment for the employer); Kinnaman v. Ford Motor Co., 79 F. Supp. 2d 1096, 1098, 1100–03 (E.D. Mo. 2000) (granting summary judgment to an employer that fired a plaintiff for absenteeism because the inability to perform the essential function of "regular and predictable attendance" destroyed the plaintiff's prima facie ADA case by rendering her an unqualified individual); Warren v. Aetna Ins. Co., No. 22663-4-II, 1999 WL 615095, at *2 (N.D. Tex. Aug. 13, 1999) (granting the employer summary judgment because the plaintiff's lupus rendered her unqualified for ADA protection by preventing her from performing the "essential function" of "regular attendance"); Robinson-Scott v. Delta Air Lines, Inc., 4 F. Supp. 2d 1183, 1184, 1187–88 (N.D. Ga. 1998) (granting summary judgment to an employer that fired the plaintiff for absenteeism caused by fibrositis, and holding that the plaintiff was not qualified for ADA protection because "consistent attendance is an essential function" of a flight attendant job); Vorhies v. Pioneer Mfg. Co., 906 F. Supp. 578, 581 (D. Colo. 1995) (finding that a plaintiff fired for absences due to a back injury was not a qualified individual covered by the ADA because he could not perform the "essential function" of "attendance," thereby entitling the employer to summary judgment); Hendry v. GTE N., Inc., 896 F. Supp. 816, 825 & n.12 (N.D. Ind. 1995) (finding that a plaintiff whose migraine headaches affected her attendance was not a qualified individual under the ADA because "regular attendance at work is an essential function of virtually all jobs" and granting the employer summary judgment).

142. *See, e.g.*, Salmon v. Dade County Sch. Bd., 4 F. Supp. 2d 1157, 1160–63 (S.D. Fla. 1998) (holding that a plaintiff whose back condition caused her to arrive at her guidance counselor job after her scheduled start time was not a qualified individual because "arriving to work on time is an essential element" of the job, and therefore granting summary judgment to the employer on the plaintiff's ADA claim).

143. *See* Laurin v. Providence Hosp., 150 F.3d 52, 54–61 (1st Cir. 1998) (affirming summary judgment for an employer that fired a nurse who sought a nonrotating shift to accommodate her seizure disorder, and holding that she was not a qualified individual covered

employer fired Debra Earl from her position as a store area coordinator for failing to meet strict scheduling start-times.[145] Earl had asked the employer to accommodate her obsessive compulsive disorder by allowing her to clock-in when she arrived and to make up the time at the end of her shift.[146] Earl argued that the court should focus on "the specific aspects of her position" to determine if she was qualified and then assess the impact of a modified start-time under the undue hardship defense.[147] Because there was no evidence that Earl "was unable to complete the duties of her job because of lateness," nor was there "any evidence of lost sales, lost profits, disruption of store operations, or increased theft because of her lateness," the requested accommodation likely imposed no undue hardship on the employer.[148] Nevertheless, the Eleventh Circuit affirmed summary judgment for the employer.[149] The court concluded that "punctuality is an essential function," thereby rendering Earl unqualified for ADA protection.[150] The court reached this conclusion because the employer "placed a high priority on punctuality." The employer mentioned punctuality in its written handbook and job description and imposed severe consequences for lateness.[151] In other words, if the employer acted as if a rigid start-time was important, that was enough to make it so, despite the lack of evidence of any business need for the job requirement.

This "presence is an essential function myth"[152] also has doomed accommodation cases challenging the default requirement of uninterrupted daily presence. The Seventh Circuit's en banc opinion in *EEOC v. Yellow Freight System, Inc.*[153] is representative. Michael Nicosia alleged that his

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by the ADA because she could not perform the essential function of working a rotating shift).

144. Earl v. Mervyn's, Inc., 207 F.3d 1361 (11th Cir. 2000).

145. *Id.* at 1364–65.

146. *Id.* at 1364.

147. *Id.* at 1366.

148. *Id.* Even if the court's bare conclusion was correct that "the tasks of [her] job as store area coordinator by their very nature must be performed daily at a specific time," that should have been analyzed as part of the employer's burden to prove undue hardship, rather than as part of the plaintiff's burden to prove that she was a qualified individual. *Id.*

149. *Id.* at 1364.

150. *Id.* at 1366.

151. *Id.*

152. This phrase comes from Audrey E. Smith, Note, *The "Presence is an Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163, 164, 181 (1995) (arguing that the characterization of workplace presence as an essential function "is a myth," because "it erroneously assumes that most jobs can be performed only at the worksite").

153. EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943 (7th Cir. 2001) (en banc).

employer failed to accommodate his HIV/AIDS and related cancer by modifying its daily attendance policy for dockworkers.[154] The court could have focused on Nicosia's ability to perform his actual job tasks while at work, including loading and unloading freight, counting freight pieces, and weighing shipments.[155] Then the court could have analyzed whether modifying the employer's strict daily attendance policy—by having temporary workers fill in on occasion, allowing other workers to volunteer for overtime, or allowing Nicosia to make up hours on different days—would have imposed an undue hardship on the employer. Instead, the court held that regular daily attendance at the employer's job site was itself an essential function of the job, thereby avoiding the undue hardship issue altogether.[156] The court reached this conclusion by assuming that rigid, daily attendance was essential for "most jobs" and because the employer designated the dockworker position as "full-time" in its job description.[157] The court noted that "[t]he ADA protects an important, but finite, universe of people"[158] and held that the universe does not include workers whose disabilities prevent them from meeting an employer's "assigned, definite, and specific work schedule."[159] Under this reasoning, any worker with disability-based absences may be deemed unqualified and outside of the ADA's protected class.[160] This allows employers to retain their rigid scheduling rules, even when there is no business justification for the default schedule design because the employer never is required to defend its design under the undue hardship defense.

The Eighth Circuit reached a similar conclusion in *Maziarka v. Mills Fleet Farm, Inc.*[161] when it dismissed Michael Maziarka's ADA claim alleging that his employer failed to accommodate his severe irritable bowl syndrome by allowing him to take brief, unscheduled, unpaid leaves from his receiving clerk job and make up the missed hours on other days.[162] A receiving clerk's job tasks included receiving and recording shipments, inspecting freight bills, obtaining driver acknowledgments of order discrepancies, checking in and

154. *Id.* at 947.

155. *See id.* at 945 (listing a dockworker's tasks).

156. *Id.* at 948–50.

157. *Id.* at 948–49.

158. *Id.* at 952 (quoting Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999)).

159. *Id.* at 949.

160. *See id.* at 948–52 (citing *Waggoner*, 169 F.3d at 484–85, for the proposition that "in most instances the ADA does not protect people who have erratic, unexplained absences, even when these absences are a result of a disability").

161. Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001).

162. *Id.* at 677, 681.

scanning merchandise, and following up on damaged goods and other shipment problems.[163] Maziarka alleged that he could perform these tasks with short, periodic leaves.[164] The workload was very sporadic, so receiving clerks had many periods without any work to perform, and shipments did not need to be recorded immediately because the merchandise was received long before it was needed on store shelves.[165]

Once again, the court confused the actual work tasks of a receiving clerk with the employer's malleable practice designating when the tasks are to be performed. The court held that the employer's default requirement of regular, uninterrupted attendance was itself an "essential job function" because the employer had included it in its job description and imposed serious consequences on employees for violations.[166] Because Maziarka could not perform the "essential function" of uninterrupted daily attendance, the court deemed him unqualified and unprotected by the ADA, thus requiring summary judgment for the employer.[167] Therefore, the employer was allowed to retain its daily attendance practice—despite its exclusionary effect on disabled individuals—without showing why or how periodic unpaid leaves would cause an undue hardship on the firm.

A final context in which courts have made this error is in cases involving the default requirement of an entirely uninterrupted worklife, which is challenged by disabled individuals who seek leaves of absence from their jobs.[168] In these cases, courts could determine whether the individuals can

163. *Id.* at 677.

164. *Id.* at 681.

165. *Id.*

166. *See id.* at 680–81 (noting that the written job description said that clerks receive merchandise "when it arrives," and Maziarka had "numerous warnings, meetings, and discussions" because of his absences).

167. *Id.* at 677, 680–81.

168. *See, e.g.*, Nowak v. St. Rita High Sch., 142 F.3d 999, 1002–04 (7th Cir. 1998) (holding that a teacher who took lengthy disability leave was not a qualified individual subject to ADA protection because at the time of his dismissal he was "unable to perform an essential function—regular attendance"—and therefore affirming summary judgment for the employer); Halperin v. Abacus Tech. Corp., 128 F.3d 191, 194–95, 197–98 (4th Cir. 1997) (affirming summary judgment for an employer that fired a computer consultant after taking a leave for a back injury, even though he could perform all job tasks when not on leave, because the ability "to come to work on a regular basis" was an essential job function that rendered the employee unqualified under the ADA); Davis v. Pitney Bowes, No. 95 Civ. 4765 (LAP), 1997 WL 655935, at *15–16 (S.D.N.Y. Oct. 20, 1997) (finding it "axiomatic that an employee who cannot show up for work cannot perform an 'essential function' of her job" and granting summary judgment to an employer that fired an employee who was on leave for a back injury and who was therefore unqualified and outside of the ADA's protected class); Kennedy v. Applause, Inc., CV 94-5344 SVW (GHKx), 1994 WL 740765, at *1–3 (C.D. Cal. Dec. 6, 1994)

perform the actual job tasks both before and after their leaves of absence, and if so, whether providing a leave creates an undue hardship on the employer. Under that approach, courts would uphold an employer's decision to fire a disabled individual who needs a leave of absence only when the default assumption of an uninterrupted worklife really is too difficult to alter. Instead, courts are characterizing the demand for an uninterrupted worklife as itself an essential job function, which allows courts to deem all of these employees unqualified and outside of the ADA's protected category. This allows courts to dismiss these cases on summary judgment without ever assessing whether job-sharing arrangements, the hiring of temporary workers, or the creation of other alternative work structures could serve the employer's needs.

As a recent article aptly described, individuals with disabilities really do represent "the incredible shrinking protected class,"[169] in part because of the way that workplace essentialism has infiltrated judges' interpretation of the ADA. This essentialist approach illustrates the process of "capture through construal."[170] Although the ADA's accommodation mandate has the potential to transform default organizational structures such as the full-time face-time norm, that norm itself has captured judges' statutory interpretation. By treating default structures as taken-for-granted background rules[171] when assessing who falls within the protected class, courts end up retrenching and reifying the very same conventional workplace structures that the ADA was intended to subvert.

B. Identifying "Particular Employment Practices" Under Title VII

The ADA is not the only employment discrimination law that is at risk because of workplace essentialism. Courts also have been undermining the transformative potential of Title VII's disparate impact model, particularly in sex discrimination claims. Although the specific doctrinal path in Title VII disparate impact cases is different from the doctrinal path in ADA

(granting summary judgment to an employer that fired a plaintiff for taking leaves for chronic fatigue syndrome, and holding that the plaintiff's failure to "maintain a regular and reliable level of attendance" rendered her unqualified and beyond the ADA's coverage), *aff'd*, 90 F.3d 1477 (9th Cir. 1996).

169. *See* Smith, *supra* note 152, at 184 (arguing that "the 'presence is an essential function' myth precludes ADA coverage for an entire class of disabled individuals"). *See generally* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under The Americans With Disabilities Act*, 68 U. COLO. L. REV. 107 (1997).

170. *See* Krieger, *supra* note 9, at 486 (defining "capture through construal").

171. *Id.*

accommodation claims, the underlying analytic error and resulting "capture" from workplace essentialism are analogous.[172]

Title VII's disparate impact theory prohibits employers from using facially neutral practices that disproportionately affect the employment opportunities of protected class members.[173] Because this model focuses on inequitable *results* and does not require discriminatory intent by the employer,[174] this model holds great potential for addressing aspects of women's inequality that stem from workplace organizational norms that create, retrench, or magnify women's disproportionate conflicts between work and family.[175]

To state a prima facie disparate impact case, a plaintiff must demonstrate that a facially neutral "particular" employment practice causes women to experience substantially different opportunities or employment status than

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172. Under the ADA, plaintiffs are not limited to the accommodation theory of discrimination, but may use the disparate impact theory as well. *See* 42 U.S.C. §§ 12112(b)(1), 12112(b)(3), 12112(b)(6), 12113(a) (2000) (defining discrimination to include classifications that have an adverse effect, or tend to screen out individuals with disabilities). However, "almost no ADA disability disparate impact cases exist." Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1240 & n.101 (2003). Future plaintiffs may begin framing their ADA cases as disparate impact cases instead of, or in addition to, accommodation cases now that the United States Supreme Court explicitly has endorsed this approach. *See High Court Endorses Disparate-Impact Theory*, [Issue 1356, No. 866, Pt. 2] Lab. L. Rep. (CCH) 1, at 1–2, 4 (Feb. 24, 2004) (discussing Raytheon Co. v. Hernandez, 540 U.S. 44 (2003)); *High Court Endorses Disparate-Impact Theory*, [No. 148] Accommodating Disabilities (CCH) 4, at 4–5 (Mar. 30, 2004) (explaining the *Raytheon* decision).

173. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e-2(a) (2000) (listing the elements of a disparate impact claim).

174. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

175. Many scholars have argued that the disparate impact model could be applied to a variety of exclusionary or marginalizing workplace norms. *See, e.g.*, WILLIAMS, *supra* note 16, at 104–07 (discussing part-time work and the design of the promotion track); Abrams, *supra* note 10, at 1223–24, 1227 (noting "the protracted evaluation period (often six to ten years) that precedes promotion decisions," and "[h]erculean time commitments, frequent travel, and stringent limits on absenteeism"); Nancy E. Dowd, *Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 734 (1986) (describing "no-leave or inadequate leave policies"); Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE. L. REV. 771, 780, 782–83, 796–97 (1995) (discussing the model's treatment of part-time work); Herma Hill Kay, *Equality & Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 32 (1985) (examining no-leave or inadequate leave policies for pregnancy); Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding, and Childcare*, 44 VILL. L. REV. 355, 356 (1999) (noting inadequate leaves for pregnancy, breastfeeding, and childcare); Travis, *The Virtual Workplace*, *supra* note 16, at 341–74 (discussing telecommuting arrangements); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940–45 (1985) (considering inflexible job descriptions and inadequate leave policies).

men.[176] Although plaintiffs often meet this burden through statistical evidence, the Supreme Court has rejected the use of strict mathematical formulas.[177] The disparity need only be "sufficiently substantial" to raise "an inference of causation."[178] If the plaintiff states a prima facie case, then the employer may assert an affirmative defense by proving that the practice is "job related" and "consistent with business necessity."[179] Even if the employer meets that burden, the plaintiff still may succeed by demonstrating that a less discriminatory alternative employment practice serves the employer's business needs.[180] Although this model is not as explicit as the ADA's accommodation model regarding the goal of workplace redesign, the remedy available in a disparate impact claim may have even more widespread transformative potential. If a plaintiff succeeds in a disparate impact case, a court may require the employer to eliminate the exclusionary workplace practice for *all* workers,[181] rather than just requiring an employer to modify an existing practice for an individual employee as is done in an ADA accommodation case.

When an employer's default organizational structures exclude women with childcare responsibilities from the workplace, courts have two possible approaches to interpreting Title VII's disparate impact model. Just like in the ADA accommodation context, judges can take a transformative approach that would require employers to restructure the existing workplace design, or they can take an essentialist approach that treats the existing design as immutable and beyond the reach of Title VII. Under either approach, judges must begin by determining whether a facially neutral particular employment practice exists

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176. *See* 42 U.S.C. § 2000e-2(k) (2000) (stating that a disparate impact claim requires a demonstration that a particular employment practice causes a disparate impact on protected class members); Lye, *supra* note 11, at 343 ("A plaintiff seeking to establish a prima facie case of disparate impact must demonstrate disparity, identify a specific employment practice which allegedly cause the disparity, and prove causation.").

177. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988).

178. *Id.* at 995; *see also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (stating that a disparate impact plaintiff only needs to show a "significantly discriminatory pattern").

179. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

180. *Id.* §§ 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C).

181. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that "[i]f an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited"); *see also* Schwab & Willborn, *supra* note 172, at 1238 ("The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everyone, not just the protected group."); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1481 (1996) (stating that the remedy in a disparate impact claim is to enjoin the employer from using the challenged practice); Travis, *The Virtual Workplace*, *supra* note 16, at 329–30 (comparing the remedies in disparate impact and accommodation claims).

that disproportionately excludes women, who are required to have a specific target for their disparate impact claim. Identifying a job's "particular employment practices" is the point at which the two possible approaches first diverge.

Under the transformative approach, judges would distinguish a job's actual required tasks from the malleable organizational norms governing the when, where, and how of task performance, and they would treat the latter as particular practices *regarding* the former. When women challenge an exclusionary default structure, such as the full-time face-time norm, this approach would characterize the default workplace structure as a proper subject for disparate impact review. The employer would be required to eliminate the organizational structure and replace it with a less discriminatory alternative workplace design unless the employer could defend the conventional design as "job related" and "consistent with business necessity" (which often will not be possible). This approach would force employers to demonstrate a business justification in order to resist workplace restructuring and retain an exclusionary workplace norm.

As Part IV will demonstrate, this transformative approach has significant support in Title VII's language and implementing regulations and in the Supreme Court's disparate impact jurisprudence. Nevertheless, only a few courts have interpreted Title VII to advance its transformative goals.[182] Just as workplace essentialism has allowed employers to retain the full-time face-time norm despite significant countervailing forces, so workplace essentialism has allowed most courts to ignore Title VII's transformative potential and further retrench the workplace status quo.

The majority of judges who have interpreted Title VII's disparate impact model through the lens of workplace essentialism diverge from the transformative approach by failing to distinguish between actual job tasks and the default organizational norms regarding when, where, and how the actual tasks get performed. Just like in the ADA context, these judges assume that jobs are defined at least in part by their existing default structures. Thus, these judges characterize the elements of the full-time face-time norm as part of the work itself, rather than as a choice of practice for organizing work performance. Under this approach, a woman who experiences disproportionate conflicts between work and family as a result of a default workplace structure will have no cognizable target for her disparate impact claim, which requires the plaintiff to challenge a particular employment practice.[183] This allows courts to dismiss

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182. *See infra* notes 428–58 and accompanying text (collecting relevant cases).

183. *See* Dowd, *supra* note 15, at 141–42 (arguing that Title VII cannot restructure the

such cases before trial for failure to state a prima facie case, without ever reaching the employer's "job related" and "consistent with business necessity" defense. Employers, in turn, are never required to demonstrate a business need for their organizational norms, which ends up shielding an entire set of exclusionary workplace structures from Title VII antidiscrimination review. Once again, the result is that even *unnecessary* aspects of the essentialized workplace remain intact, and courts further relegitimate the existing workplace structures in the process.

As in the ADA accommodation context, courts have made this error frequently in Title VII disparate impact claims challenging the disproportionately negative effect that the entire array of full-time face-time requirements has on women workers. Cases challenging rigid daily work schedules are one common example. In *Dormeyer v. Comerica Bank-Illinois*,[184] for instance, Jennifer Dormeyer alleged that the bank's rigid attendance policies disparately impacted pregnant women who may be unable to work traditional hours at a central worksite because of morning sickness or other complications.[185] The Seventh Circuit affirmed the dismissal of Dormeyer's claim on summary judgment.[186] Rather than characterizing the bank's absenteeism policies as "practices" that are subject to disparate impact review, the court characterized them as "legitimate requirements" of the job.[187] The court defined employment practices narrowly to include only discrete "eligibility requirements," such as "requiring that applicants for a job as a dishwasher have a high school education."[188] The court failed to recognize that although default structures involve basic issues of when and where work is

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workplace to ameliorate work and family conflicts because of its "inability to reach cases in which an employer has failed to adopt *any* policy"); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 413–15 (2001) (arguing that Title VII's disparate impact theory has limited ability to restructure the workplace to address work and family conflicts because courts have not characterized the absence of an affirmative policy as employer conduct); Travis, *The Virtual Workplace*, *supra* note 16, at 355–56 (describing cases in which courts have held that default organizational structures represent the absence of any policy subject to disparate impact challenge).

184. Dormeyer v. Comerica Bank-Ill., 223 F.3d 579 (7th Cir. 2000) (Posner, J.).

185. *Id.* at 583–84. The bank fired Dormeyer from her job as a bank teller after nine absences that she attributed to "severe morning sickness." *Id.* at 581. She sued under the Pregnancy Discrimination Act, which amended Title VII's definition of "sex" to include "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (2000); *Dormeyer*, 223 F.3d at 581, 583.

186. *Dormeyer*, 223 F.3d at 581, 585.

187. *Id.* at 583–84.

188. *Id.* at 583.

performed, they still represent choices about how to organize work tasks, rather than the underlying tasks themselves.

By characterizing the bank's attendance policies as the "work for which she had been hired,"[189] rather than as particular employment practices governing the performance of Dormeyer's work, the Seventh Circuit effectively placed default hour requirements beyond Title VII's reach. By defining the aspect of the workplace that disproportionately excluded women as the work itself, Dormeyer was left without any particular practice against which to lodge her disparate impact challenge. The court was able to dismiss her claim for failure to state a prima facie case without ever requiring the bank to defend the business necessity of its rules governing periodic absences. Of course, some employers' rigid attendance rules indeed are imperative because of customer interaction or other core job demands. The court, however, could have required the bank to prove that its particular attendance policies were among those that actually are linked to business needs. Instead, the Seventh Circuit insulated *all* such exclusionary default hour requirements—both the necessary and the unnecessary—from antidiscrimination review. The court also eliminated Dormeyer's opportunity to demonstrate an alternative method for addressing periodic absences that may have a less disparate impact on women, thereby entrenching the exclusionary norm.

The Fifth Circuit took a similar approach in *Stout v. Baxter Healthcare Corp.*[190] when it affirmed the dismissal of Wilma Stout's disparate impact claim on summary judgment.[191] Stout was fired after having a miscarriage that caused her to be absent from her job as a material handler.[192] She alleged that the employer's policy of firing employees with more than three absences during a ninety-day probationary period disproportionately affected pregnant women.[193] Rather than characterizing the employer's strict probationary attendance requirement as a particular employment practice subject to disparate impact review, the Fifth Circuit seemed to characterize the requirement as the *lack* of a medical leave or vacation policy.[194] As a result, Stout was unable to establish the first element of her prima facie case, which requires the plaintiff to

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189. *Id.* at 584.

190. Stout v. Baxter Healthcare Corp., 282 F.3d 856 (5th Cir. 2002).

191. *Id.* at 858.

192. *Id.* at 858–59.

193. *Id.* at 859.

194. *See id.* at 859–62 (translating the employer's "strict attendance policy" into the employer's lack of "vacation time or medical leave" and focusing on the latter, rather than the former, when assessing the plaintiff's disparate impact claim).

"identify the employment practice that has the allegedly disproportionate impact."[195]

In reaching this conclusion, the Fifth Circuit assumed that the employer's default attendance requirements were "actual, legitimate requirements of the job,"[196] thereby confusing the malleable design of when work is performed with the underlying tasks of Stout's position. While it is possible that business necessity does demand rigid attendance during the first three months of a material handler's job, the court never required the employer to demonstrate such need, nor did the court allow Stout to propose an alternative probationary attendance policy with a less exclusionary effect on pregnant women. By characterizing the employer's rules as the *absence* of a particular leave policy, rather than as the existence of an attendance practice that disproportionately excluded pregnant women, the court never had to look beyond the prima facie case.[197]

Courts have used this same illusory distinction between acts and omissions when upholding employers' reliance on the "word-of-mouth" of incumbent employees for recruiting new workers—a process that tends to perpetuate any existing workplace imbalance. In *EEOC v. Chicago Miniature Lamp Works*,[198] the Seventh Circuit rejected the plaintiffs' claim that word-of-mouth hiring at a nondiverse workplace disparately impacted racial minorities.[199] The court held that "passive reliance on employee word-of-mouth recruiting" did not constitute

195. *Id.* at 860. The court also ruled that Stout failed to establish disparate effects, which is another element of the prima facie case. *Id.* at 860–62.

196. *Id.* at 862.

197. Courts have used this line between employment practices and the "lack" thereof to dismiss similar disparate impact claims challenging other default work structures. *See* Kessler, *supra* note 183, at 412–15 (discussing the limits of the disparate impact theory); Travis, *The Virtual Workplace*, *supra* note 16, at 355–56 (collecting cases dismissing disparate impact claims). For example, in *Beard v. Whitley County REMC*, 656 F. Supp. 1461 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988), a class of female clerical and office workers sued for sex discrimination after their employer refused them an annual wage and benefit increase, while granting trades and craft workers a six percent increase. *Id.* at 1465–67. The women alleged that they were disparately impacted by the employer's requirement that the predominantly female group of clerical and office workers bargain separately from the predominantly male group of trades and craft workers, and by the employer's use of market wage surveys in wage negotiations. *Id.* at 1468–70. The district court found that setting wages and benefits was a "single decision," which was "not a policy or practice for disparate impact purposes," and therefore, the court granted the employer summary judgment. *Id.* The court concluded that employers that set wages according to market forces are passive "price-takers," rather than active wage-setters, and therefore are "not following a policy in any meaningful sense." *Id.* at 1469.

198. EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).

199. *Id.* at 304–05.

"a particular employment practice,"[200] which left the plaintiffs without a hook to hang their disparate impact claim. Although recruiting through incumbent employees' word-of-mouth is as much a hiring practice as recruiting through any other method, the court held that "for purposes of disparate impact, a more affirmative act by the employer must be shown."[201] While this case involved race rather than sex, it illustrates the scope of courts' preference for allowing traditional workplace structures to avoid scrutiny under antidiscrimination law.

Courts have used a similar approach when dismissing disparate impact claims challenging employers' default preference for full-time over part-time positions. The Seventh Circuit illustrated this approach in *Ilhardt v. Sara Lee Corp.*[202] when it affirmed the dismissal of Lora Ilhardt's claim on summary judgment.[203] Ilhardt was laid-off from her part-time in-house counsel position, and she alleged that her employer's use of part-time status as a selection criteria for the reduction-in-force "constitute[d] an employment policy that has a disparate impact on women," who make up the majority of the part-time workforce.[204] The court held that Ilhardt failed to show "that Sara Lee's decision to eliminate her job was a particular employment practice within the meaning of Title VII."[205] Because this left Ilhardt without a specific target for her prima facie case, the court granted the employer's summary judgment motion without ever requiring the employer to demonstrate that using the exclusionary lay-off criteria was consistent with business needs. In addition, Ilhardt never had the opportunity to demonstrate whether less discriminatory alternative lay-off criteria existed.

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200. *Id.* at 305.

201. *Id.*; *see also* Krieger, *supra* note 9, at 494 (explaining that courts have been upholding word-of-mouth recruiting "with increasing frequency" because judges view such a practice "not as part of the problem, but simply as part of 'the common nature of things'").

202. Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997).

203. *Id.* at 1152.

204. *Id.* at 1152, 1157.

205. *Id.* at 1156 (holding that "[t]he [reduction-in-force] was an isolated incident, not a regular occurrence, and a one-time decision to lay off a part-time attorney can hardly be called an employment practice"); *see also* Gleklen v. Democratic Cong. Campaign Comm., Inc., 38 F. Supp. 2d 18, 19–21 (D.D.C. 1999) (dismissing a pregnant plaintiff's sex discrimination claim challenging her employer's demand that she move from part-time to full-time by characterizing the case as a losing disparate treatment claim, rather than analyzing the disparate impact that a full-time demand may have on women workers); Schallop v. N.Y. State Dep't of Law, 20 F. Supp. 2d 384, 388–403 (N.D.N.Y. 1998) (dismissing plaintiff's claim that firing her because she worked part-time constituted sex discrimination and not addressing whether the preference for full-time workers is a practice that disparately impacts women who are the majority of the part-time workforce).

Another context in which courts have assumed the fixed nature of the workplace is in disparate impact cases challenging the default requirement of an entirely uninterrupted worklife. In particular, courts have rejected claims alleging that inadequate leave provisions disproportionately impact women due to pregnancy and childcare responsibilities. In *Wallace v. Pyro Mining Co.*,[206] for example, the Sixth Circuit affirmed the dismissal of Martha Wallace's disparate impact claim.[207] Wallace's employer had fired her after she requested a six-week leave of absence because she was unable to wean her child from breastfeeding.[208] Wallace alleged that the inadequate leave policy disparately impacted women.[209] The district court declined to characterize the relevant employment practice to include all aspects of the employer's leave policy. Instead, the district court defined the practice to include only those situations for which the employer had agreed to allow personal leaves.[210] By characterizing Wallace's challenge as an attack on the *exclusion* of a particular situation from the employer's existing leave practice, rather than as part of the particular employment practice at issue, the district court defined away the very basis for Wallace's disparate impact claim. The court found no violation of Title VII because the employer treated women and men equally with respect to the specific types of leaves that the employer actually granted.[211] Under that reasoning, it became entirely irrelevant that the excluded situation at issue, breastfeeding, is an attribute unique to women.[212]

By starting with the premise that the default requirement of an uninterrupted worklife is a *non*-practice, courts are able to characterize disparate impact challenges to related workplace structures as requests for preferential treatment. If the district court in *Wallace* had recognized that excluding breastfeeding from permissible leave situations really *is* a practice designed to favor the worklives of men, then the court properly would have seen Wallace's disparate impact claim as a demand for equal opportunity. Instead, the *Wallace* court defined the default workplace structure as the gender-neutral absence of a particular leave policy, which allowed the court to

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206. Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991).

207. *Id.* at 868.

208. *Id.*

209. *Id.*

210. *See id.* at 869–70 (looking solely at "those circumstances for which [the employer] will grant personal leave," rather than analyzing the employer's decision to "exclud[e] breastfeeding" from its leave provision).

211. *Id.*

212. *Id.*

characterize Wallace's claim as a request for special benefits that are not available to men.[213]

The Seventh Circuit illustrated this faulty logic even more explicitly in *Troupe v. May Department Stores Co.*[214] when it affirmed the dismissal of Kimberly Hern Troupe's disparate impact claim.[215] One day before a planned maternity leave, Troupe was fired for tardiness caused by severe morning sickness.[216] She claimed that the employer's rigid attendance rules and inadequate leave policy disproportionately affected pregnant women.[217] The Seventh Circuit implicitly characterized the default requirement of a full-time, uninterrupted worklife as a neutral given, rather than as a particular practice designed around the life patterns of men. This allowed the court to characterize Troupe's challenge to the employer's default structure as a "warrant for favoritism," rather than as a "means for dealing with the residues of past discrimination."[218] By viewing the lack of leave policies as the gender-neutral absence of any particular employment practice, the court concluded that Title VII does not "require employers to offer maternity leave or to take other steps to make it easier to work," nor does it require employers "to make it as easy" for pregnant women "as it is for their spouses to continue working."[219]

The Fifth Circuit reached a similar conclusion in *Stout v. Baxter Healthcare Corp.*[220] when it dismissed a claim alleging that an inadequate leave provision for probationary employees disparately impacted pregnant women.[221] By viewing the employer's rigid hour and attendance rules as the gender-neutral absence of a particular employment practice, rather than as a specific policy favoring the worklives of male workers who are unaffected by pregnancy, the court was able to characterize Stout's disparate impact claim as a demand for "preferential treatment of pregnant employees."[222] The Third Circuit agrees, having held that Title VII "does not require an employer to grant

213. *See id.* at 868–70 (stating that "[n]othing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers").

214. Troupe v. May Dep't Stores Corp., 20 F.3d 734 (7th Cir. 1994) (Posner, J.).

215. *Id.* at 738.

216. *Id.* at 735–36.

217. *Id.* at 737.

218. *Id.* at 738.

219. *Id.*

220. Stout v. Baxter Healthcare Corp., 282 F.3d 856 (5th Cir. 2002).

221. *Id.* at 859–62.

222. *Id.* at 861 (holding that Title VII, as amended by the Pregnancy Discrimination Act, "does not require employers to treat pregnancy related absences more leniently than other absences").

maternity leave or to reinstate an employee after maternity leave."[223] In reaching that conclusion, the Third Circuit severely blunted Title VII's transformative potential by stating, in sweeping terms, that Title VII may be used only as a "shield against discrimination," and not as a "sword."[224]

Once again, the process of "capture through construal" is in action.[225] While Title VII's disparate impact model has the potential to substitute less exclusionary alternatives for default organizational structures related to the full-time face-time norm, that norm itself has captured judges' statutory interpretation. Moreover, by essentializing the existing workplace and treating default structures as the unassailable background, rather than as foreground practices that are subject to disparate impact review, courts effectively are relegitimating and further retrenching the existing exclusionary design.

IV. A Plan for Recapture

Revealing the doctrinal methods by which workplace essentialism is allowing courts to undermine the transformative potential of the ADA and Title VII is the first step toward recapturing that untapped potential. This Part takes a step further. For both statutes, this Part demonstrates the ways in which the doctrinal use of workplace essentialism is inconsistent with the statutory language, objectives, and regulatory guidance. In doing so, this Part defends an alternative approach to interpreting the ADA and Title VII in cases challenging default organizational structures—an approach that would allow antidiscrimination law more effectively to redesign the entrenched aspects of the full-time face-time norm.

A. Removing Barriers with the ADA

When an employer's default organizational structures exclude individuals with disabilities, courts interpreting the ADA are not limited to the essentialist approach, described above, in which judges equate the full-time face-time norm with actual work tasks that are treated as "essential functions of the job." There is an alternative approach that is more consistent with the ADA's transformative objectives because it does not begin with any assumptions about

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223. Rhett v. Carnegie Ctr. Assocs., 129 F.3d 290, 296–97 (3d Cir. 1997) (ignoring the disparate impact theory).

224. *Id.*

225. *See* Krieger, *supra* note 9, at 486 (defining "capture through construal").

the inherent nature of the existing workplace design. Under this alternative approach, judges would begin by distinguishing actual job tasks from malleable organizational norms regarding the when, where, and how of task performance. While the former are indeed "functions" that may or may not be "essential," the latter are not "functions" in the first place. With the lens of workplace essentialism thus removed, a disabled individual's need to modify a default workplace structure would not render the individual "unqualified" for ADA protection due to the inability to perform an essential function of the job. Instead, courts would treat the individual's need as a proper accommodation request—a request for a workplace modification that would allow the employee to perform the *actual* underlying essential job functions. The business impact, if any, from modifying the full-time face-time norm would be analyzed under the employer's undue hardship defense. This would force employers finally to confront their own reliance on workplace essentialism. Employers would need to demonstrate a business justification in order to retain an exclusionary workplace norm, rather than courts shielding both necessary and *un*necessary default structures from antidiscrimination review.

This alternative approach shows greater respect for the ADA's primary objectives of achieving "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[226] The ADA addresses employment as only one component of a broad strategy for integrating disabled individuals into all aspects of civic life, including "housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[227] To achieve these broad objectives of overcoming isolation and segregation, the ADA is explicit about the need to tackle all of the multifaceted sources of discrimination, which extend beyond "outright intentional exclusion" and include such things as "architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to

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226. 42 U.S.C. § 12101(a)(8) (2000); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (ADA), ¶ I(A)(1) (Feb. 12, 1997) [hereinafter EEOC GUIDANCE ON QUALIFIED INDIVIDUALS] (explaining that "Congress passed the ADA to enable individuals with disabilities to participate fully in all aspects of society, particularly employment").

227. 42 U.S.C. § 12101(a)(3) (2000); *see also* EEOC GUIDANCE ON QUALIFIED INDIVIDUALS, *supra* note 226, ¶ I ("The primary purposes underlying the ADA are the elimination of barriers that prevent individuals with disabilities from participating in 'the economic and social mainstream of American life' and the provision of equal employment and other opportunities for persons with disabilities.") (footnote omitted); Lipman, *supra* note 15, at 409 (explaining that the ADA's "underlying foundation" is "integrationism").

existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, and other opportunities."[228] As the Equal Employment Opportunities Commission (EEOC) has explained, the ADA's employment provisions, including the definition of a "qualified individual," have been "tailored to the broad remedial purposes of the Act" and must be interpreted "[c]onsistent with these goals."[229] These goals are undermined when courts treat default workplace structures and organizational norms as fixed and essential job characteristics, thereby disqualifying many disabled individuals from ADA protection and shielding the exclusionary structures from legal review.

Such an approach also ignores the emphasis on workplace redesign in the ADA's accommodation mandate. The ADA defines "discriminate" to include "not making reasonable accommodations" and denying job opportunities because an accommodation is needed.[230] The essence of the accommodation duty is "job restructuring."[231] According to the EEOC's regulations, "[t]he reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."[232] The barriers that are the intended targets of the ADA's accommodation mandate are defined very broadly and come in "many different kinds."[233] According to the EEOC, these barriers are not limited to "physical or structural obstacles that inhibit or prevent the access of an individual with a disability,"[234] but also encompass any exclusionary aspect of the "work environment,"[235] including "policies,"[236] "practice[s],"[237] "inflexible

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228. 42 U.S.C. § 12101(a)(5) (2000).

229. EEOC GUIDANCE ON QUALIFIED INDIVIDUALS, *supra* note 226, ¶ I.

230. 42 U.S.C. § 12112(b)(5) (2000).

231. *See id.* § 12111(9)(B) (defining accommodation to include "job restructuring"); *see also* 29 C.F.R. § 1630.2(o)(2)(ii) (2004) (noting that reasonable accommodation may include job restructuring); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, ¶ "Reasonable Accommodation" (Oct. 17, 2002) [hereinafter EEOC GUIDANCE ON REASONABLE ACCOMMODATION] (including job restructuring under possible reasonable accommodations); U.S. EQUAL EMP. OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at I-5 (1992) [hereinafter EEOC MANUAL] (noting job restructuring as a reasonable accommodation).

232. 29 C.F.R. pt. 1630, app. § 1630.9 (2004).

233. EEOC MANUAL, *supra* note 231, at III-2.

234. 29 C.F.R. pt. 1630, app. § 1630.9 (2004).

235. EEOC MANUAL, *supra* note 231, at I-1, III-1, III-3; *see* 29 C.F.R. pt. 1630, app. background (2004) (stating that employers may need to adjust the work environment to

job procedures,"[238] "organizational structures,"[239] the "when or how" of job performance,[240] "the manner or circumstances in which the job customarily is performed,"[241] or simply, "the way things usually are done."[242] Because all of these types of barriers are described as appropriate targets for the ADA's accommodation mandate, courts should not be treating default organizational structures as essential functions that are immunized from the accommodation demand.

In addition, such an approach ignores the ADA's requirement of an individualized, case-by-case inquiry into each employee's qualified status[243] and into each specific accommodation request,[244] which the United States Supreme Court has recognized as a statutory obligation.[245] This case-by-case approach is necessitated by the ADA's "focus on individual rather than group characteristics,"[246] and is "essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of

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accommodate a disabled individual); *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ "Reasonable Accommodation" (listing "'modifications or adjustments to the work environment . . . that enable a qualified individual with a disability to perform the essential functions of that position'" as a category of accommodation) (footnote omitted).

236. 29 C.F.R. § 1630.2(o)(2)(ii) (2004); EEOC MANUAL, *supra* note 231, at III-2, III-5.

237. EEOC MANUAL, *supra* note 231, at III-1.

238. 29 C.F.R. pt. 1630, app. § 1630.9 (2004).

239. 29 C.F.R. § 1630.4(d) (2004).

240. EEOC MANUAL, *supra* note 231, at III-5; *see* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ "Reasonable Accommodation" (stating that accommodation requires changing workplace barriers, including an employer's procedures as to when or how work is performed); *id.* ¶ "Job Restructuring" (stating that job restructuring can include altering when or how work is performed).

241. EEOC MANUAL, *supra* note 231, at III-2; *see* 29 C.F.R § 1630.2(o)(1)(ii) (2004) (defining accommodation to include modifying the customary manner or circumstances of work performance); 29 C.F.R. pt. 1630, app. background (2004) (same); EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ "Reasonable Accommodation" (same).

242. EEOC MANUAL, *supra* note 231, at I-1, III-2.

243. *See* 29 C.F.R. pt. 1630, app. background (2004) (requiring a case-by-case determination of a worker's capabilities); *id.* pt. 1630, app. § 1630.5 (same); EEOC GUIDANCE ON QUALIFIED INDIVIDUALS, *supra* note 226, ¶¶ I(A)(2), I(C)(1) (same); EEOC MANUAL, *supra* note 231, at II-1 (same).

244. EEOC MANUAL, *supra* note 231, at III-6 (noting that "every reasonable accommodation must be determined on an individual basis" and providing a step-by-step process); *see also* 29 C.F.R. pt. 1630, app. § 1630.9 (2004) (describing the individualized process for identifying a reasonable accommodation).

245. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

246. EEOC GUIDANCE ON QUALIFIED INDIVIDUALS, *supra* note 226, ¶ I(A)(1).

jobs."[247] The regulations explain that the individualized process requires an assessment of both the specific job at issue and the particular limitations of the worker who is requesting an accommodation.[248] With regard to the job at issue, an individualized assessment means "analyzing the actual job duties and determining the true purpose or object of the job."[249] Courts are failing to undertake this case-by-case assessment whenever they assume that a default organizational structure is an immutable and therefore essential job function.

The Sixth Circuit has criticized such an essentialist approach, particularly when courts have "*presumed* that regular and predictable attendance is [a] job requirement," which "naturally leads to the conclusion that an individual who must occasionally request medical leave is unqualified."[250] According to the Sixth Circuit, this presumption "eviscerates the individualized attention that the Supreme Court has deemed 'essential' in each disability claim."[251] "If we were to presume that uninterrupted attendance in all instances is a mandatory job requirement," explained the court, "then the policies and needs of both the individual employer and employee would never be considered."[252] For that reason, the Sixth Circuit has concluded that "no presumption should exist that uninterrupted attendance is an essential job requirement" and that a leave of absence "can constitute a reasonable accommodation under appropriate circumstances."[253]

Most courts, however, have not been as careful as the Sixth Circuit in interpreting the ADA consistent with the individualized inquiry requirement or the ADA's broad integrative and transformative objectives. Courts that unquestioningly have treated the default work structures related to the full-time face-time norm as essential job functions instead have focused exclusively on a single, narrow provision in the statute. That provision states that "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

247. 29 C.F.R. pt. 1630, app. background (2004).

248. *Id.* pt. 1630, app. § 1630.9.

249. *Id.* (explaining that "[s]uch an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform").

250. Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998).

251. *Id.* at 782 (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987)); *see also* Smith, *supra* note 152, at 163, 172 (arguing that a judicially-created "blanket rule" that treats uninterrupted presence as an essential function of most jobs is "in contravention of the case-by-case approach mandated by the ADA").

252. *Cehrs*, 155 F.3d at 782.

253. *Id.* at 783.

advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[254]

Although this provision is not framed in absolute terms, it has become the ipse dixit trump card for employers, allowing them to essentialize default organizational norms based on nothing more than the historic tenacity of these employment structures.[255] When an employer plays this trump card, courts have been willing to treat default employment structures as essential job functions based simply on the fact that the employer always has required employees to perform the job in that particular manner,[256] or the fact that the employer has included the default structure in its own job description or employment policy,[257] or the fact that the employer has imposed severe

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254. 42 U.S.C. § 12111(8) (2000).

255. This phrase comes from *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318 (3d Cir. 2003), in which the court took the unusual step of requiring an employer to produce more than just its "own *ipse dixit*" to show that a rigid start-time was an essential function of the job. *Id.* at 329. In contrast, most courts hold that judges should not "second guess an employer's judgment in describing the essential functions of the job." Caroselli v. Allstate Ins. Co., 15 A.D. Cases (BNA) 596, 600 (N.D. Ill. 2004).

256. *See, e.g.*, Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1120 (10th Cir. 2004) (holding that full-time presence at a central administrative center was an essential function of a service coordinator's job in part because "all of its service coordinators work their entire shift at the administration centers," and the employer "has never permitted a service coordinator to work anywhere other than an administrative center"); Lamb v. Qualex, Inc., 33 Fed. Appx. 49, 57 (4th Cir. 2002) (unpublished) (holding that a full-time job schedule was an essential function of an account development specialist's job in part because the employer had never employed anyone on a part-time basis in the past); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305–06 (11th Cir. 2000) (holding that mandatory overtime was an essential function of the job based on the employer's assertion that all of the workers in that position had worked substantial overtime in the past); Laurin v. Providence Hosp., 150 F.3d 52, 59 (1st Cir. 1998) (holding that a rotating shift was an essential function of a particular nursing position in part because "the Hospital has *always* required *all* non-senior staff nurses to rotate shifts, and it has *never* made an exception"); *Caroselli*, 15 A.D. Cases at 600 (holding that a full-time schedule was an essential function of a channel manager job in part because "all of the Channel Managers . . . work a full-time schedule"); Simmerman v. Hardee's Food Sys., Inc., No. CIV. A. 94-9606, 1996 WL 131948, at *3–8 (E.D. Pa. Mar. 22, 1996) (holding that a fifty-hour workweek and working one night a week were essential functions of a general manager position in part because the employer characterized them as a "normal requirement" that the employer had always demanded); *see also* Arnow-Richman, *supra* note 11, at 364 (noting that "courts generally accept employer assertions about the hours required to complete the job, treating existing practices as a justification for the norm").

257. *See, e.g.*, EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 949 (7th Cir. 2001) (en banc) (holding that uninterrupted daily attendance was an essential function of a dockworker job because the employer described the position as "full-time" in its job description); Earl v. Mervyn's, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000) (holding that "punctuality is an essential function" of a store area coordinator's job in part because the employer referenced punctuality in a written handbook and job description); Buckles v. First Data Res., Inc., 176 F.3d 1098, 1100–01 (8th Cir. 1999) (using the fact that the employer had detailed attendance policies and

consequences for deviations from the norm,[258] or merely based on the employer's own unsubstantiated characterization.[259] In other words, the more rigidly exclusionary the employer has been in the past, the more likely the court is to allow the employer to be rigidly exclusionary in the future, regardless of any demonstrated business need for the practice in question.

Nothing in this statutory provision on employer deference, however, requires courts so automatically to equate evidence that "it has always been" with the conclusion that "it must be so." The regulations properly interpret the statutory phrase "consideration shall be given" to mean that deference to an employer's characterization is neither absolute nor exclusive in nature. The regulations provide a noninclusive list of factors that courts should consider when determining whether a job function is essential,[260] and the EEOC's

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procedures as a reason for treating attendance as an essential function of an authorizations agent's job); Kinnaman v. Ford Motor Co., 79 F. Supp. 2d 1096, 1102 (E.D. Mo. 2000) (holding that "regular and predictable attendance" was an essential function of an assembler's job in part because the employer had "detailed attendance policies"); Robinson-Scott v. Delta Air Lines, Inc., 4 F. Supp. 2d 1183, 1188 (N.D. Ga. 1998) (concluding that "consistent attendance is an essential function" because an employee handbook mentioned the need for punctuality); Simmerman v. Hardee's Food Sys., Inc., No. CIV. A. 94-9606, 1996 WL 131948, at *3–8 (E.D. Pa. Mar. 22, 1996) (holding that a fifty-hour workweek and working one night a week were essential functions of a general manager position in part because the policies were noted in the company's job description); Barfield v. Bell S. Telecomm., Inc., 886 F. Supp. 1321, 1326 n.8, 1327 (S.D. Miss. 1995) (using the existence of a company policy stressing the importance of regular attendance as a basis for concluding that "regular and predictable attendance is an essential function" of a service representative job).

258. *See, e.g.*, Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 681 (8th Cir. 2001) (holding that uninterrupted attendance was an essential function of the job in part because of the "numerous warnings, meetings, and discussions" that the employer conducted due to the plaintiff's absences); Earl v. Mervyn's, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000) (holding that "punctuality is an essential function" of a store area coordinator's job in part because the employer imposed severe consequences for tardiness); Kinnaman v. Ford Motor Co., 79 F. Supp. 2d 1096, 1102 (E.D. Mo. 2000) (holding that "regular and predictable attendance" was an essential function of an assembler's job in part because the employer "did not take abuse of the attendance policies lightly"); Hendry v. GTE N., Inc., 896 F. Supp. 816, 825 & n.12 (N.D. Ind. 1995) (using the fact that the plaintiff's supervisor "was a stickler" about attendance as a reason for concluding that regular attendance was an essential function of the job).

259. *See, e.g.*, *Caroselli*, 15 A.D. Cases at 600 (declining to "second guess an employer's judgment in describing the essential functions of the job"); Tate v. Farmland Indus., Inc., 268 F.3d 989, 993 (10th Cir. 2001) (refusing to question an employer's assessment of the essential job functions); Aquinas v. Fed. Express Corp., 940 F. Supp. 73, 78 (S.D.N.Y. 1996) (concluding that regular attendance was an essential function because the employer had "informed its employees repeatedly and unambiguously that daily attendance is imperative to the success of its operations") (internal quotation omitted).

260. 29 C.F.R. § 1630.2(n)(3) (2004). According to the regulations:

> Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job

Interpretive Guidance explains that "all relevant evidence should be considered."[261] As noted by the EEOC, the legislative history indicates that Congress did not intend for the employer's judgment about which job functions are essential to be the "only evidence," or even the "prevailing evidence."[262] In fact, the "more relevant evidence" should come from "a review of the actual work performed."[263]

A few courts have started to recognize that the ADA's provision on employer deference is being overworked at the expense of the ADA's broader objectives. In *Echazabal v. Chevron USA, Inc.*,[264] for example, the employer argued that Mario Echazabal's hepatitis C infection made him unqualified to work at an oil refinery because the chemicals could damage his liver.[265] The employer claimed that the physical ability to tolerate the chemical environment was an essential function of the job because the employer's written job description said so.[266] Most courts would have cited the ADA's provision on employer deference and accepted the employer's characterization of physical tolerance as an essential job function. The Ninth Circuit, in contrast, was among the first to see the absurdity of such an approach. "According to [the employer]," the Ninth Circuit explained, "the 'requirement' of the job description that an employee not be susceptible to harm from the chemicals is an 'essential function' of the job simply because [the employer] has chosen to describe it as such."[267] "[A]n employer may not turn every condition of

> descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

Id.

261. *See* 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004) (stating that "the list is not exhaustive," that "other relevant evidence may also be presented," and that "[g]reater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed"); *see also* EEOC MANUAL, *supra* note 231, at II-14 (explaining that the list of factors for determining whether a function is essential in the ADA regulations "is not all-inclusive, and factors not on the list may be equally important as evidence").

262. EEOC MANUAL, *supra* note 231, at II-14 (explaining that the employer's assessment was intended only as "a factor to be considered along with other relevant evidence").

263. *Id.* at II-15.

264. Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000), *rev'd on other grounds*, 536 U.S. 73, 76 n.1 (2002).

265. *Id.* at 1065.

266. *Id.* at 1070–71.

267. *Id.*

employment which it elects to adopt into a job function, let alone an essential function," held the court, "merely by including it in a job description."[268]

The significance of this holding is the court's implicit recognition that the essential nature of a job has an objective existence independent from an employer's definition. "Job functions," held the court, "are those acts or actions that constitute a part of the performance of the job."[269] In the job of "plant helper" in an oil refinery, which was at issue in the case, the job functions were the specific actions that the worker must take "to keep the coker unit running."[270] "Were we to ignore the limits of the actual functions of the job at issue and permit [the employer] to add to those functions any condition it chooses to impose in its written job description, the term 'essential function' would be rendered meaningless," concluded the court.[271]

Unfortunately, of the few courts that have made this important recognition, most have responded only by taking one of two small, and ultimately inadequate, steps toward achieving the ADA's transformative goals. The first step has been to recharacterize the essential function determination as a question of fact, rather than a question of law, thus allowing a jury to decide whether a disputed function is really necessary or not, rather than simply taking an employer's word for it. The dissent in *Davis v. Microsoft Corp.*[272] recommended this position when critiquing the majority's dismissal of Thomas Davis's request to accommodate his hepatitis C infection by modifying the sixty- to eighty-hour workweek for systems engineers.[273] "The majority has confused 'work load' with 'essential function,'" the dissent explained, taking

268. *Id.* at 1071; *see also* Conneen v. MBNA Am. Bank, N.A., 334 F.3d 318, 329 (3d Cir. 2003) (holding that an employer must produce more than its "own *ipse dixit*" to establish the essential nature of a disputed job function, and concluding that "desire that a manager set a good example" was insufficient to support a rigid start-time as an essential function of a manager's job); Ragusa v. Teachers Ins. & Annuity Ass'n—Coll. Ret. Equities Fund, Inc., No. 96 Civ. 3127 (JSM), 1998 WL 483461, at *3 (S.D.N.Y. Aug. 17, 1998) (rejecting the employer's assertion that uninterrupted attendance was an essential function of a service representative's job based solely on a handbook statement that absenteeism may result in termination, and requiring the employer to provide affidavits or other evidence that a certain number of days at work is essential).

269. *Echazabal*, 226 F.3d at 1071.

270. *Id.*

271. *Id.* The Supreme Court ultimately reversed the Ninth Circuit's decision on other grounds, holding that the case should be decided under 42 U.S.C. § 12113(b) (2000), which allows employers to require "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," and which could be extended to require that an individual's disability not pose a threat to that individual's own personal health. Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 78–79 (2002).

272. Davis v. Microsoft Corp., 70 F.3d 126 (Wash. 2003).

273. *Id.* at 140 (Chambers, J., dissenting).

issue with the majority's unquestioning acceptance of an employer's own characterization of the essential job functions.[274] "To allow employers as a matter of law to define such heavy work loads to be an 'essential function' of the job," said the dissent, "would eviscerate our statutory protection of disabled employees."[275]

Although this dissent correctly identified that a "structural requirement" is distinguishable from a "task," the dissent failed to see the full import of this distinction by recognizing that structural requirements are not functions at all, which would force these cases to reach the undue hardship stage.[276] Like the majority, the dissent assumed that default employment structures are indeed functions to begin with,[277] rather than malleable choices about how to organize the actual functions of the job. The dissent disagreed only with *whom should decide* whether these so-called functions are essential or not. While the majority would accept the employer's characterization of structural requirements as essential job functions, the dissent argued that "whether a 60 to 80 hour work week is an essential function of this job is a question of fact, best left to the jury."[278]

The dissent's view is more consistent with the statute's integrative goals than the majority's view, and it certainly would be a step forward by allowing more ADA cases to receive a trial on the merits. Unlike the majority, the dissent recognized that default organizational structures are malleable rather than given, are therefore open to question, and thus require some demonstrable defense above and beyond the mere fact of tradition. "[A]n employer's 'culture' of requiring long hours of employment, standing alone, is never an essential element of a job," explained the dissent; "[t]he long hours must be related to specific requirements of the work performed, not the other way around."[279] Accordingly, the dissent's position at least would require a trier of fact to assess the employer's particular need for the default employment structure. In the case of Microsoft engineers, for example, the trier of fact would have to assess "whether the employer is merely asking its employee to do

274. *Id.* (Chambers, J., dissenting).

275. *Id.* (Chambers, J., dissenting); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004) ("Whether a particular function is essential is a factual determination that must be made on a case by case basis.").

276. *See Davis*, 70 P.3d at 140, 142 (Chambers, J., dissenting) (distinguishing "a structural requirement, like a regular workweek of 60 to 80 hours" from "a task," but concluding that the two categories just need a different test to decide when they are essential functions, rather than concluding that only tasks are functions).

277. *Id.* at 141 & n.2 (Chambers, J., dissenting).

278. *Id.* at 140–41 (Chambers, J., dissenting).

279. *Id.* at 141 (Chambers, J., dissenting).

the work of two people or whether factors such as fluctuations in work load, travel, the need for on call availability, and other similar factors require consistent long hours."[280]

While this approach makes sense when job tasks are at issue, it does not fulfill the ADA's objectives when structural requirements—*non*-functions—are involved. The fact-based inquiry of courts that have adopted the approach of the *Davis* dissent still houses the debate over default work structures within the plaintiff's prima facie case as part of determining whether the plaintiff falls within the ADA's protected class. That undermines the ADA's goal of integrating individuals with disabilities into the mainstream labor market by forcing the "qualified individual" concept to do too much work: by requiring employees to demonstrate not only their ability to perform the required job tasks, but also to perform those tasks in precisely the manner that the employer desires, before they can seek out the statute's substantive protections. This approach is at odds with the central purpose of the reasonable accommodation mandate, which is to re-examine the conventional manner in which work has been done in order to enable individuals with disabilities to perform, based on an individualized, case-by-case assessment of abilities and legitimate job demands.

The second small but imperfect step forward that some courts have taken is to shift the burden of proof for what constitutes an essential job function from the employee to the employer whenever a function's necessity is in dispute.[281] Traditionally, courts have held that because the employee must prove that he or she is a "qualified individual," which is defined as someone

280. *Id.* (Chambers, J., dissenting). Recharacterizing the essential function determination as a question of fact also helped the plaintiff get to trial in *EEOC v. AIC Sec. Investigation, Ltd.*, 820 F. Supp. 1060, 1060–64 (N.D. Ill. 1993), *rev'd in part on other grounds*, 55 F.3d 1276 (7th Cir. 1995), when the case otherwise would have been dismissed. Rather than accepting the employer's contention that "regular, predictable, full-time attendance was an essential function" of an executive director's job, which would have rendered the plaintiff unqualified due to cancer-related absences, the court held that the need for regular attendance was "a fact intensive determination," and the court allowed the case to go to trial. *Id.* at 1063–64; *see also* Labrecque v. Sodexho USA, Inc., No. CIV.A.02-30020-MAP, 2003 WL 22389813, at *8 (D. Mass. Oct. 17, 2003) (denying an employer's summary judgment motion on the plaintiff's claim for failure to accommodate her fibromyalgia by allowing her to perform her supervisor/cashier position in regular eight hour shifts because there was "no indication that such lengthy shifts were essential functions of the job"); James v. Trs. of Colum. Univ., 15 AD Cases (BNA) 186, 189–90 (S.D.N.Y. 2003) (holding that determining essential functions is a factual inquiry and denying summary judgment to the employer on the plaintiff's claim for failure to accommodate her lupus by modifying the daily schedule for a departmental administrator).

281. *See* Shestak v. SSA, 84 M.S.P.R. 307, 311 (1999) (noting that courts have split on whether the employee or the employer has the burden of proving what constitutes an essential function of a job).

who can perform the essential functions of the job with or without a reasonable accommodation, the employee bears the burden of proving that a particular function is nonessential if the employee is unable to perform it.[282] Some courts have moved away from this traditional view and instead require the employer to prove the essential nature of a job function when an employee challenges whether the function really is required.[283] The Sixth Circuit, for example, has held that "if a disabled individual is challenging a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary."[284]

While this shift appropriately recognizes that the essential nature of a job function is not a given and that the employer is in the better position to identify evidence of the need for a particular function,[285] this shift is unlikely to advance the ADA's transformative goals in a meaningful way. Most of these courts have set the employer's evidentiary hurdle extremely low by allowing the employer to meet its burden with self-serving job descriptions or simply with evidence that both current and past employees have performed the work in a similar fashion.[286] More importantly, merely changing who has the burden of

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282. *See, e.g.*, Soto-Ocasio v. Fed. Express Corp., 150 F.3d 14, 18 (1st Cir. 1998) (applying the traditional burden approach); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 137–38 (2d Cir. 1995) (same); Hernandez v. City of Hartford, 959 F. Supp. 125, 131 n.6 (D. Conn. 1997) (same).

283. *See, e.g.*, Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 712 (8th Cir. 2003) ("[I]f the employer disputes that the employee can perform the essential functions of the job, then the burden shifts to the employer to put on some evidence of those essential functions.") (internal quotation omitted); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 34–37 (1st Cir. 2000) (placing the burden on the employer to show that an inflexible work schedule was an essential function of a data entry assistant job); Hamlin v. Charter Township of Flint, 165 F.3d 426, 429 (6th Cir. 1999) (holding that "[i]f the employee challenges a purported job criterion as not essential and seeks its elimination, the burden then shifts to the employer" to prove that the function is really required); Sprague v. United Airlines, Inc., No. CIV.A.97-12102-GAO, 2002 WL 1803733, at *1 (D. Mass. Aug. 7, 2002) (holding that the employer "bears the burden of proving that any given job function is essential").

284. Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1182 n.8, 1184 (6th Cir. 1996).

285. *See Fenney*, 327 F.3d at 712 (justifying the burden shift because "much of the information which determines those essential functions lies uniquely with the employer") (internal quotation omitted); *Ward*, 209 F.3d at 35 (holding that the employer "has better access to the relevant evidence" and therefore should bear the burden of proving that a job function is essential); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995) (justifying a burden shift because the employer has unique access to the relevant information); *Sprague*, 2002 WL 1803733, at *1 (holding that the employer "bears the burden of proving that any given job function is essential" because the employer "has better access to the relevant evidence").

286. *See, e.g.*, Dropinski v. Douglas County, Neb., 298 F.3d 704, 707 (8th Cir. 2002) (placing the burden on the employer to show that a disputed function is essential, but allowing this burden to be met based on "the employer's judgment as to which functions are essential," "written job descriptions prepared before advertising or interviewing applicants for the job," and

proving that a particular function is essential fails to recognize that many of the exclusionary default elements of the full-time face-time norm are not really functions at all. A burden-shifting approach on the essential functions assessment is thus inappropriate because it continues to accept the existing framework that analyzes challenges to default employment structures as part of the prima facie determination of a plaintiff's protected status.

Transforming the workplace by eliminating unnecessary default structures requires a more profound shift that recognizes these structures as malleable ways to organize the *actual* job functions and assesses the viability of alternative organizational schemes as part of the employer's undue hardship defense. Statutory constructions that merely tinker with who gets to decide or who has the burden of proof on the essential or nonessential nature of a particular job function are insufficient. Though they help address the problem of courts giving employers absolute deference in determining which functions are and are not essential, they do not address the more fundamental problem of allowing employers absolute deference in transforming organizational norms into functions in the first place. Placing the burden on the employer to show why modifying a default structure would be too difficult would align the statutory structure with the ADA's integrative goal. If the employee can perform the specific, required job tasks, the employee should be deemed qualified, triggering a presumption that the workplace can be restructured to allow the employee to perform, unless the employer provides a compelling reason otherwise. Under this alternative approach, integration becomes the default unless proven otherwise by the employer, rather than the other way around.

This alternative approach finds support not only in the ADA's general transformative objectives but also in the statutory text and administrative guidance. Although the statute supports some deference to the employer when assessing which job functions are or are not essential, the statute does not extend that deference when assessing the threshold question of whether an organizational norm is or is not a function. The statute does not define what aspects of a job constitute functions, but the statute authorizes the EEOC to

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"the current work experience of incumbents in similar jobs"); Heaser v. Toro Co., 247 F.3d 826, 831 (8th Cir. 2001) (same); Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 680–81 (8th Cir. 2001) (same). *But see Sprague*, 2002 WL 1803733, at *2 (shifting the burden to the employer to show that a disputed function is essential and holding that "the employer's good faith judgment as to what job functions are essential is not dispositive when other factors do not support that judgment," in order to "ensure that an employer's asserted requirements are solidly anchored in the realities of the workplace, not constructed out of whole cloth") (internal quotations omitted).

issue implementing regulations,[287] which the EEOC has provided, along with interpretive guidance, a technical assistance manual, and several enforcement guides. These sources indicate that job functions refer to discrete tasks, rather than to conditions of employment regarding when, where, and how discrete tasks are performed.[288] Accordingly, such default organizational structures should not be used to disqualify disabled individuals from ADA protection.

This position is illustrated in the many examples of job functions that the EEOC provides. These examples include such things as typing,[289] proofreading documents,[290] operating a cash register,[291] receiving money and making change,[292] putting items into bags and giving the bags to customers,[293] carrying a person out of a burning building,[294] landing a plane,[295] inspecting identification cards,[296] answering the telephone,[297] filing and retrieving written materials,[298] developing programs,[299] reading temperature and pressure gauges and adjusting machine controls,[300] accessing, inputting, and retrieving information from a computer,[301] and communicating fluently in Japanese.[302] All of these examples indicate that default organizational structures regarding the full-time face-time norm should not be treated as essential functions that

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287. 42 U.S.C. § 12116 (2000).

288. *See, e.g.*, 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004) (using the word "task" when discussing what constitutes a job function); *see also* Smith, *supra* note 152, at 169 (arguing that the ADA's essential function concept "contemplates *tasks*, not the ethereal concept of 'presence'").

289. 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004); *see also* EEOC MANUAL, *supra* note 231, at II-13 (describing the job functions of a secretary or receptionist).

290. 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004); *see also* EEOC MANUAL, *supra* note 231, at II-13 (describing the job functions of a secretary or receptionist).

291. 29 C.F.R. pt 1630, app. § 1630.2(n) (2004).

292. EEOC MANUAL, *supra* note 231, at II-18 (describing the job functions of a grocery store clerk).

293. *Id.* at II-18 to II-19 (describing the job functions of a grocery store bagger).

294. 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004) (describing the job functions of a firefighter); *see also* EEOC MANUAL, *supra* note 231, at II-17 (same).

295. EEOC MANUAL, *supra* note 231, at II-17 (describing the job functions of a pilot).

296. 29 C.F.R. pt. 1630, app. § 1630.2(o) (2004) (describing the job functions of a security guard).

297. EEOC MANUAL, *supra* note 231, at II-14 (describing the job functions of a file clerk); *id.* at II-17 (describing the job functions of a clerical worker).

298. *Id.* at II-14 (describing the job functions of a file clerk).

299. *Id.* at II-21 (describing the job functions of a computer programmer).

300. *Id.* at II-16.

301. *Id.*

302. *Id.*

disqualify disabled individuals from ADA coverage.[303] Default organizational structures simply do not meet the threshold definition of a function, essential or otherwise.[304]

Additional support for this view is found in the EEOC's Technical Assistance Manual, which illustrates the process of breaking down a secretarial job into its constituent "functions," to assist courts and employers in this endeavor.[305] According to the EEOC's Manual, the job functions of a secretary might include:

> (1) transcribing dictation and written drafts from the supervisor and other staff into final written documents; (2) proof-reading documents for accuracy; (3) developing and maintaining files; (4) scheduling and making arrangements for meetings and conferences; (5) logging documents and correspondence in and out; (6) placing, answering, and referring telephone calls; (7) distributing documents to appropriate staff members; (8) reproducing documents on copying machines; and (9) occasional travel to perform clerical tasks at out of town conferences.[306]

Conspicuously absent from this list of job functions are requirements regarding the when, where, or how of everyday job performance.

The EEOC's interpretive materials are quite explicit on this point with respect to at least one aspect of the full-time face-time norm: an employer's demand for rigid daily attendance. The EEOC's guidance notes that "[c]ertain courts have characterized attendance as an 'essential function,'" but the EEOC concludes that such a characterization is "inconsistent" with the ADA's

303. *Cf.* Smith, *supra* note 152, at 181 (noting that the ADA's legislative history "does not mention attendance in its discussions of job qualifications," but instead focuses on "necessary technical skills, such as typing speed," and arguing that courts should focus on such skills "when determining whether a plaintiff is a 'qualified individual'") (citing H.R. REP. NO. 485, 101ST CONG., 2D SESS., pt. 2, 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 348).

304. The EEOC's guidance on how to determine whether a particular function is essential also implies that the term "function" refers only to discrete tasks and skills. The EEOC explains that a function may be deemed "essential," rather than "marginal," if: (1) "the reason the position exists is to perform that function," (2) there are a "limited number of employees available among whom the performance of that job function can be distributed," or (3) the function is "highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function." 29 C.F.R. § 1630.2(n) (2004). The EEOC further states that assessing whether a function is essential should focus on the function's "importance" in achieving the job's purpose, which requires "consideration of the frequency with which a function is performed, the amount of time spent on the function, and the consequences if the function is not performed." EEOC MANUAL, *supra* note 231, at II-20. These tests for deciding whether a function is essential or marginal would not make sense for default organizational structures regarding the full-time face-time norm.

305. EEOC MANUAL, *supra* note 231, at V-12, V-13.

306. *Id.*

regulations.[307] According to the EEOC, "[a]ttendance . . . is not an essential function as defined by the ADA" because essential functions refer only to "duties to be performed."[308] If a modified work schedule has any negative effect on the employer, the EEOC instructs courts to assess that effect under the employer's undue hardship defense rather than treating the default schedule as an essential function that disqualifies all disabled individuals who request scheduling flexibility.[309]

The EEOC took the same position with regard to overtime requirements in an amicus brief to the Eleventh Circuit in *Davis v. Florida Power & Light Co.*[310] In *Davis*, the EEOC supported the employee's request to accommodate his back injury by modifying the employer's mandatory overtime policy.[311] The EEOC argued that a job "function" should be interpreted as a job "task," and that the employee was a qualified individual because he could perform all of the job's required tasks with the reasonable accommodation of limiting mandatory overtime.[312] The EEOC concluded that because "overtime is not a task to be performed," working overtime could never be deemed an essential function of a job.[313] Under this view, any negative impact on the employer

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307. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 n.65 (superceding EEOC Guidance issued Mar. 1, 1999) (citing Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994), and Jackson v. Dep't of Veterans Admin., 22 F.3d 277, 278–79 (11th Cir. 1994)).

308. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 n.65 (citing 29 C.F.R. § 1630.2(n) (1997)); *see also* Passamano, *supra* note 140, at 868–71 (arguing that the presumption that regular and predictable attendance is an essential job function is contrary to the ADA, its legislative history, and the EEOC regulations). The EEOC took a similar position in its 1999 Enforcement Guidance, which was superceded by the 2002 version quoted herein. *See generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, ¶ 16 n.61 (Mar. 1, 1999).

309. *See* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 n.65 ("[I]f the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship."). *But see* EEOC MANUAL, *supra* note 231, at II-13 (indicating that "the ability to work at any time of day" would be considered an essential function for a "'floating' supervisor" who is hired to substitute when supervisors on the day, night, or graveyard shifts are absent, rather than concluding that any modification to the "work at any time of day" requirement would constitute an undue hardship for the employer).

310. Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1306 & n.7 (11th Cir. 2000) (citing but rejecting the EEOC's amicus argument).

311. *See id.* (noting the EEOC's assertion that overtime "can never be an 'essential function' of a job").

312. *See id.* (describing the EEOC's position); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(n) (2004) (using the word "task" to describe a job function).

313. *See Davis*, 205 F.3d at 1306 & n.7 (citing but rejecting the EEOC's amicus

from modifying its overtime policy would be assessed under the employer's undue hardship defense, instead of being used to disqualify the employee from ADA protection.

Treating default organizational structures as *non*-functions finds further support in the way that both the statute and the administrative materials define the ADA's reasonable accommodation obligation. The concepts of "essential functions" and "reasonable accommodations" are intertwined. The ADA's accommodation duty only applies when a disabled employee is a "qualified individual," which is defined to require the employee to be able to perform all of the essential job functions, "with or without a reasonable accommodation." In other words, a workplace modification only constitutes a reasonable accommodation if it allows an employee to perform the job's essential functions. If a workplace modification eliminates an essential function, then it does not meet the definition of a reasonable accommodation.[314] What is significant about both the statute and the administrative materials is that they both define "reasonable accommodations" to include a wide variety of modifications to default organizational structures regarding when, where, and how work is performed. Those default organizational structures cannot, therefore, constitute essential functions of a job. If default organizational structures regarding the full-time face-time norm constituted essential job functions, then modifications to those default structures would not be used as examples of reasonable accommodations by Congress or the EEOC.

One of the most compelling examples of this point is the fact that the statute, the regulations, and the EEOC's guidance documents all define reasonable accommodations to include "part-time or modified work schedules" and "other similar accommodations."[315] According to the EEOC, the workplace barriers that the accommodation mandate is intended to alleviate include, among other things, "rigid work schedules that permit no flexibility as

argument).

314. *See* 29 C.F.R. pt. 1630, app. § 1630.2(o) (2004) (explaining that an employer "is not required to reallocate essential functions," which are "by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position").

315. 42 U.S.C. § 12111(9)(B) (2000); 29 C.F.R. pt. 1630, app. § 1630.2(o)(2)(ii) (2004); *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶¶ 22–23 (suggesting a modified or part-time schedule as a reasonable accommodation); EEOC MANUAL, *supra* note 231, at III-5 (same); EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, ¶¶ 23, 25 (Mar. 25, 1997) [hereinafter EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES] (same); EEOC GUIDANCE ON QUALIFIED INDIVIDUALS, *supra* note 226, ¶¶ I(A)(2), I(B)(3) (same).

to when work is performed or when breaks may be taken."[316] Thus, the EEOC interprets the statute's accommodation definition to encompass a wide variety of flexible timing arrangements, such as "adjusting arrival or departure times,"[317] "providing periodic breaks,"[318] "altering when certain functions are performed,"[319] and allowing "flexibility in work hours or the work week, or part-time work."[320] If either Congress or the EEOC had intended full-time

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316. 29 C.F.R. pt 1630, app. § 1630.9 (2004); *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ "Reasonable Accommodation" (noting that accommodations "remove workplace barriers," including "procedures or rules (such as rules concerning when work is performed [or] when breaks are taken)").

317. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 (explaining that an employer would be required to accommodate a day care worker's disability by allowing her "to change her hours from 7:00 a.m.–3:00 p.m. to 10:00 a.m.–6:00 p.m.," as long as there would still be sufficient morning coverage); *see also* EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 23 (noting that "[s]ome medications taken for psychiatric disabilities cause extreme grogginess and lack of concentration in the morning," and that a reasonable accommodation would be to allow the individual "to change his/her regularly scheduled working hours, for example, to work 10 AM to 6 PM rather than 9 AM to 5 PM"); *id.* ¶ 31 (explaining that if "[a]n employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning," then a reasonable accommodation "would be to modify his schedule so that he is not required to report for work until 10:00 AM"); EEOC MANUAL, *supra* note 231, at III-23 (noting that "[p]eople whose disabilities may need modified work schedules include . . . people with mobility and other impairments who find it difficult to use public transportation during peak hours, or who must depend upon special para-transit schedules").

318. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22; *see also* EEOC MANUAL, *supra* note 231, at III-23 (noting that "[p]eople whose disabilities may need modified work schedules include . . . people who need rest periods (including some people who have multiple sclerosis, cancer, diabetes, respiratory conditions, or mental illness)").

319. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22; *see also* 29 C.F.R. pt. 1630, app. § 1630.2(o) (2004) (noting that "an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour"); EEOC MANUAL, *supra* note 231, at III-22 (explaining that "[a]n essential function that is usually performed in the early morning might be rescheduled to be performed later in the day," if a person's disability "makes it impossible to perform this function in the morning").

320. EEOC MANUAL, *supra* note 231, at III-22. The EEOC notes that "[p]eople whose disabilities may need modified work schedules include those who require special medical treatment for their disability (such as cancer patients, people who have AIDS, or people with mental illness)" and "people whose disabilities (such as diabetes) are affected by eating or sleeping schedules." *Id.* The EEOC explains that accommodations for such individuals could include modifications to "a standard 9–5 work day, or a standard Monday to Friday work week," or to other regular schedules. *Id.* The EEOC provides several specific examples. *Id.* For an individual with a mental disability, the EEOC suggests that accommodation could include providing "two hours off, twice weekly, for sessions with a psychiatrist," by permitting the employee "to take longer lunch breaks and to make up the time by working later on those days." *Id.* For an individual with diabetes, the EEOC suggests that accommodation could include assigning the employee to "one shift on a permanent basis," rather than to "normal shift

work or rigid daily schedules to constitute "essential job functions," then they would not have listed these forms of "part-time or modified work schedules" as reasonable accommodations, which, by definition, may not eliminate an essential function of the job.[321]

Of course, both Congress and the EEOC recognized that modifying full-time or daily work schedules sometimes may affect workplace operations. That fact, however, does not transform a default scheduling requirement into a function, much less an "essential" one. Instead, the EEOC advises that any such impact be assessed under the employer's undue hardship defense.[322] Specifically, the EEOC suggests that "[e]mployers should carefully assess whether modifying the hours could significantly disrupt their operations—*that is, cause undue hardship*—or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs."[323]

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rotations," which interfere with the employee's strict eating and insulin needs. *Id.* And for an individual who needs kidney dialysis two weekdays per week, the EEOC suggests that one accommodation would be "for him to work Saturday and Sunday in place of the two weekdays, to perform work assignments at home on the weekend, or to work three days a week as [a] part-time employee." *Id.*

321. *See* Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 36 (1st Cir. 2000) (explaining that an inflexible work schedule was not an essential function of a data entry assistant position in part because the ADA lists "part-time or modified work schedules" as an example of a reasonable accommodation).

322. *See* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 23 ("Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship."); *see also id.* ¶ 22 (explaining that an employer must "allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship"); *id.* ¶ 43 (explaining that an employer need not modify a disabled individual's work hours "if doing so would prevent other employees from performing their jobs," *not* because the rigid work schedule is an essential function, but because the disruption is "an undue hardship"); EEOC MANUAL, *supra* note 231, at III-22 ("An employer should consider modification of a regular work schedule as a reasonable accommodation unless this would cause an undue hardship."); *id.* at III-21 (explaining that an employer would be required to reschedule the timing of various tasks to accommodate a disability, if the rescheduling "would not cause an undue hardship"); EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 25 (noting that "an adjusted work schedule" would constitute a reasonable accommodation as long as it did not create an undue hardship); *id.* ¶ 23 (explaining that, "barring undue hardship," an employer must accommodate psychiatric disabilities in which medication affects morning performance by giving the employee "a later schedule"); *id.* ¶ 31 (explaining that, "barring undue hardship," an employer must provide a later start-time for "[a]n employee with major depression who is often late to work because of medication side-effects").

323. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 (emphasis added).

The EEOC illustrates this point using an example of a disabled employee who operates a printing press for a morning newspaper from ten o'clock p.m. to three o'clock a.m.[324] The EEOC concludes that the employee would not receive a modified schedule as an accommodation.[325] According to the EEOC, this result is *not* because the existing schedule constitutes an essential function of the job; rather, it is because a modified schedule would impose an "undue hardship" on the employer.[326] Under the former approach, the employee's inability to perform an essential function would render her unqualified and outside of the ADA's protected class. Under the latter approach, in contrast, the employee would be deemed "qualified," and the employer would have to consider other possible accommodations, such as reassignment to an alternative vacant position.[327]

A second example that supports the view that default organizational structures do not constitute "essential functions" involves the default preference for an uninterrupted worklife. All of the administrative materials interpreting the statutory definition of "reasonable accommodations" include leaves of absence as an example.[328] According to the EEOC, this type of accommodation may take many forms, such as "allowing an employee to use accrued paid leave,"[329] "providing additional unpaid leave,"[330] permitting "advanced leave,"[331] allowing "occasional leave (*e.g.*, a few hours at a time),"[332] or otherwise "modifying leave or attendance procedures or policies."[333] If the

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324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* ¶ 21.

329. *Id.* ¶ 22; *see also* 29 C.F.R. pt. 1630, app. § 1630.2(o) (2004) (describing the use of accrued leave as an accommodation); EEOC MANUAL, *supra* note 231, at III-6, III-23 (same); EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 23 (same).

330. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶¶ 17, 22; *see also* 29 C.F.R. pt. 1630, app. § 1630.2(o) (2004) (identifying unpaid leave as an accommodation); EEOC MANUAL, *supra* note 231, at VII-10 (same); EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 23 (same); Smith, *supra* note 152, at 181 (arguing that the use of unpaid leave to illustrate the accommodation concept in the ADA's legislative history is evidence that workplace presence should not be treated as an essential job function) (citing H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345)).

331. EEOC MANUAL, *supra* note 231, at III-23.

332. EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 23.

333. *Id.* ¶ 25; *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 17 ("Modifying workplace policies, including leave policies, is a form of reasonable accommodation."); EEOC MANUAL, *supra* note 231, at III-23 ("Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off

demand for an uninterrupted worklife constituted an essential job function, then none of these types of leaves would have been listed as reasonable accommodations, which cannot include workplace changes that eliminate essential functions of a job.

As with part-time work, the EEOC recognizes that leaves of absence sometimes may have a detrimental effect on the employer's operations. Yet even in those instances, an employer cannot transform its demand for an uninterrupted worklife into a job function—much less an "essential" one—that could be used to disqualify *all* employees who require a temporary leave from the ADA's protection. Again, the EEOC explains that any such effect should be taken into account when assessing the employer's undue hardship defense.[334]

A third example of the EEOC's view that default organizational structures do not constitute "essential functions" involves the default preference for full-time presence at a central office. The EEOC has taken the position that accommodations may include allowing an employee to telecommute or perform some work from home.[335] This means that full-time office presence cannot

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from work because of their disability."); *id.* at III-30 (explaining that "modifications to existing leave policies ... may be required as accommodations"); *id.* at III-10 (listing "modification" of an "uniformly applied leave policy" as an example of an accommodation); EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 25 (explaining that "it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance," if a disabled worker "needed to use accrued vacation time on an unscheduled basis").

334. *See* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 43 (explaining that an employer would not be required to grant a leave to accommodate a disability if the leave would "prevent other employees from doing their jobs," *not* because the demand for uninterrupted presence constitutes an essential job function, but because the disruption "constitutes an undue hardship"); EEOC MANUAL, *supra* note 231, at III-23 (explaining that an employer "should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause an undue hardship"); *id.* at III-10 (noting that an employer must provide a "modification" of a "uniformly applied leave policy" as a reasonable accommodation, "unless it would impose an undue hardship"); EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 315, ¶ 23 ("Permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability is a reasonable accommodation, unless (or until) the employee's absence imposes an undue hardship."); *id.* ¶ 25 (explaining that "barring undue hardship," reasonable accommodation will include modifying workplace leave policies or providing additional unpaid leave).

335. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 34; *see also* EEOC MANUAL, *supra* note 231, at III-23 (explaining that one accommodation for an employee who needs kidney dialysis on two weekdays per week would be to allow the employee "to perform work assignments at home on the weekend"); EEOC, *Work at Home/Telework as a Reasonable Accommodation*, *at* http://www.eeoc.gov/facts/telework.html (last modified Feb. 3, 2003) (stating that telecommuting may be a reasonable accommodation "even if the employer does not allow other employees to telework") (on file with the Washington and Lee Law Review).

constitute an essential function of the job that automatically disqualifies all disabled workers who require some locational flexibility. The EEOC recognizes that telecommuting only will be an effective accommodation when it allows an employee to continue performing the *actual* essential job functions, which is likely to occur in such jobs as telemarketing and proofreading, but not for food servers, store cashiers, or other similar positions.[336] Again, the EEOC instructs that any impact on the employer from allowing a disabled worker to perform tasks from home should be assessed under the employer's undue hardship defense.[337]

The statutory language and regulations defining undue hardship are similarly inconsistent with treating default organizational structures as essential functions of a job. The undue hardship defense is the portion of the statute that directs courts to assess the impact that job modifications will have on an employer. The statute and regulations list several factors to consider, including the nature and cost of the accommodation, its impact on business operations, and the employer's size, structure, and financial resources.[338] Undue hardship is not limited to financial difficulty, but also applies to an accommodation that is "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[339] When courts assume that default organizational structures are essential to the job, courts implicitly are making unsubstantiated judgments about the impact that modifying these structures might have on the employer. According to the statute, such judgments should be made explicitly, and only if the employer proves by a preponderance of the evidence that an alternative structure would cause "significant difficulty or expense."[340]

It may be surprising that so many courts have continued to view the ADA through the lens of workplace essentialism even in the face of such strong authority to the contrary. The Supreme Court likely has made it easier for

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336. *See* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 34 (giving examples of jobs in which telecommuting would not be a viable accommodation).

337. *Id.*

338. 42 U.S.C. § 12111(10)(A) (2000); 29 C.F.R. pt. 1630, app. §§ 1630.2(p)(1) & (2) (2004); *see also* EEOC MANUAL, *supra* note 231, at III-12, III-16 (listing factors for assessing undue hardship); EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ "Undue Hardship" (same).

339. 29 C.F.R. pt. 1630, app. § 1630.2(p) (2004); *see also id.* pt. 1630, app. § 1630.15(d) (explaining the undue hardship defense); EEOC MANUAL, *supra* note 231, at III-12 (same).

340. 42 U.S.C. § 12111(10)(A) (2000). The regulations explain, for example, that the ADA would require an employer to make an exception to a "no-leave policy" and grant a leave of absence to accommodate a disability, "unless the provision of leave would impose an undue hardship." 29 C.F.R. §§ 1630.15(b) & (c) (2004).

judges to resist recognizing and questioning their own assumptions about the nature of the existing workplace design, in part by remaining deliberately ambiguous over the level of deference commanded by various portions of the ADA's regulations and interpretative guidance,[341] and in part by being willing to interpret the ADA at odds with the EEOC's position in other contexts.[342] Nevertheless, a few courts have analyzed accommodation claims challenging the full-time face-time norm consistent with the statute's transformative vision, and those opinions should become models for interpreting the ADA.

In *Humphrey v. Memorial Hospitals Ass'n*,[343] for example, the Ninth Circuit reversed summary judgment for the employer and held that Carolyn Humphrey had stated an ADA claim.[344] Humphrey had asked her employer to accommodate her obsessive compulsive disorder by allowing her to perform her medical transcriptionist job from home because she was unable to arrive at the central work site at a specified time.[345] The employer argued that Humphrey's

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341. The ADA contains a set of generally applicable sections, in addition to five separate titles governing different aspects of civic life, such as employment, transportation, and public accommodations. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (discussing the ADA's structure). In *Sutton*, the Court accurately observed that the ADA split the authority to issue regulations for the various titles among three agencies, with the EEOC having authority to implement the employment provisions in Title I. *Id.* at 478–79. Over Justice Breyer's dissent, *id.* at 513–14 (Breyer, J., dissenting), the Court concluded that the ADA technically had not authorized any of the agencies to issue regulations implementing the ADA's generally applicable provisions, which include the definition of who constitutes a disabled individual. *Id.* at 479. While implying that an agency's regulations regarding the generally applicable definition sections were not subject to *Chevron* deference, the Court found no need to decide what level of reduced deference, if any, was due. *Id.* at 480; *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) (observing that because "no agency has been given authority to issue regulations interpreting the term 'disability' in the ADA," the "persuasive authority" of the EEOC definitional regulations is unclear, but finding "no occasion to decide what level of deference, if any, they are due"); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999) (explaining that because "the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definition section," the Court had "no occasion to decide what level of deference, if any, they are due"); *cf.* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 84 (2002) (indicating that the EEOC's regulations on the "direct threat" defense would be subject to *Chevron* deference). The *Sutton* Court also declined to decide what deference, if any, was due to the EEOC's other materials, such as the Interpretive Guidance appended to the EEOC's formal regulations. *Sutton*, 527 U.S. at 480.

342. *See, e.g.*, *id.* at 481–82 (holding that an individual's disability status should be assessed by considering how the individual functions with all mitigating or corrective measures that the individual has adopted, which was at odds with the EEOC's position in 29 C.F.R. pt. 1630, app. § 1630.2(j) that disability status should be assessed in an individual's unmitigated state).

343. Humphrey v. Mem'l Hosps. Ass'n., 239 F.3d 1128 (9th Cir. 2001).

344. *Id.* at 1140.

345. *Id.* at 1130–33. The employer had fired the plaintiff for tardiness and absenteeism allegedly caused by her disability after the employer's use of a flexible start-time was

disability "render[ed] her not otherwise qualified under the ADA because regular and predictable attendance is an essential function of the position."[346] The Ninth Circuit rejected the employer's argument and held that "physical attendance at the [employer's] offices is not an essential job duty."[347] The court instead focused on Humphrey's ability to perform the actual tasks of a medical transcriptionist, including typing quickly and accurately, understanding and transcribing comments from doctors with a variety of accents, and meeting necessary deadlines.[348] Because there was evidence that Humphrey could perform all of these tasks from home, the court concluded that her request "to become a 'home-based transcriptionist'" was a viable accommodation, rather than an impermissible request to eliminate an essential function of the job.[349]

The Ninth Circuit also concluded correctly that any potential impact on the employer from modifying the default full-time face-time requirement should be assessed under the employer's undue hardship defense.[350] The court noted that the defense would fail because the employer had made no showing of difficulty from allowing a medical transcriptionist to work from home.[351] That finding illustrates the significance of using the correct analysis for default organizational structures. If the court had used the more typical analysis that unquestioningly accepts the employer's characterization of office presence as an essential function of the job, Humphrey would have been excluded from the ADA's protected class altogether. Her request to work from home would have been characterized as a demand to eliminate an essential function—an impermissible form of accommodation—which means that she would have been considered unqualified for the job. The court would have dismissed her claim for failure to state a prima facie case, and the employer could have retained its default job structure even though there was no justification for the exclusionary workplace design in such a location-independent job.

The D.C. Circuit demonstrated similar clarity when it reversed a grant of summary judgment for the employer in *Langon v. Department of Health and*

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unsuccessful. *Id.* at 1131–33.

346. *Id.* at 1135.

347. *Id.* at 1136–37; *see also id.* at 1135 n.11 (explaining that "regular and predictable attendance is not per se an essential function of all jobs").

348. *Id.* at 1132–37.

349. *See id.* at 1135–37 (finding a triable issue on the plaintiff's ADA accommodation claim); *see also* Anzalone v. Allstate Ins. Co., Civ. A. No. 93-2248, 1995 WL 21672, at *3–4 (E.D. La. Jan. 19, 1995) (denying an employer's summary judgment motion on the plaintiff's claim for failure to accommodate his back injury by allowing him to perform his claims adjuster job from home).

350. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1126, 1136 & n.14 (9th Cir. 2001).

351. *Id.*

Human Services.[352] The employer had denied Patricia Langon's request to perform her computer programmer job from home to accommodate her multiple sclerosis.[353] The district court had accepted the employer's unsubstantiated contention that the position did not "lend itself to working at home," which meant that Langon was not a "qualified individual" because she could not perform an essential function of the job.[354] The D.C. Circuit took the lower court to task for focusing on the plaintiff's protected status, rather than on the employer's undue hardship defense.[355] Because at most the record indicated that telecommuting "would create some difficulty for the [employer], not that it would impose . . . an 'undue hardship,'" the D.C. Circuit appropriately allowed the case to go to trial.[356] Once again, the practical difference between the typical analysis by the district court and the correct analysis by the appellate court is clear. Under the district court's characterization of full-time office presence as an essential job function, the plaintiff is defined out of the ADA's protected class and the employer is allowed to retain its default exclusionary structure, even when changing that structure would have a negligible effect on the employer.

There are isolated instances of the correct analysis in cases involving other aspects of the full-time face-time norm as well, including the default preference for an uninterrupted worklife.[357] In *Cehrs v. Northeast Ohio Alzheimer's Research Center*,[358] the Sixth Circuit reversed a grant of summary judgment to the employer that fired Katherine Cehrs from her nursing job after she

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352. Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1061 (D.C. Cir. 1992) (ruling under the ADA's predecessor statute, the Rehabilitation Act).

353. *Id.* at 1055–56.

354. *Id.* at 1060–61.

355. *See id.* (explaining the proper analysis for the undue hardship defense).

356. *Id.*

357. *See, e.g.*, Criado v. IBM Corp., 145 F.3d 437, 439–41, 443 (1st Cir. 1998) (upholding a jury verdict on the plaintiff's ADA claim for failure to extend a leave of absence to accommodate her anxiety disorder and depression because the jury could have deemed her qualified based on her ability to perform the job tasks of her marketing position before and after the leave); Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 599–602 (7th Cir. 1998) (upholding a jury verdict on plaintiff's ADA claim alleging that the plaintiff was "qualified" to be the Vice President of Finance and finding that a jury could conclude that taking a leave of absence to recover from lupus would not pose an undue hardship for the employer); Kimbro v. Atl. Richfield Co. 889 F.2d 869, 878–79 (9th Cir. 1989) (reversing judgment for the employer on a state law claim alleging that the employer failed to reasonably accommodate the plaintiff's migraines by providing a leave of absence, which the employer did not prove would pose an undue hardship); *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 n.65 (citing *Haschmann* favorably on this point); Passamano, *supra* note 140, at 883–86 (summarizing cases that correctly treated leaves of absence as accommodations under the ADA).

358. Cehrs v. N.E. Oh. Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998).

requested a leave of absence to accommodate her psoriasis.[359] The court refused to characterize an uninterrupted worklife as an essential job function and held that reasonable accommodations can include leaves of absence.[360] Because the ADA's ultimate goal is to redesign the workplace to integrate individuals with disabilities into the mainstream labor market, the Sixth Circuit correctly rejected other courts' presumption of the essential nature of regular attendance.[361] "The presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden-shifting analysis," explained the court, because the employer "never bears the burden of proving that the accommodation proposed by an employee is unreasonable and imposes an undue burden upon it."[362] "If an employer cannot show that an accommodation unduly burdens it," held the court, "then there is no reason to deny the employee the accommodation."[363]

The same reasoning applies equally well to the default preference for rigid full-time work, which several courts have started to recognize in cases involving requests for part-time work[364] or flexible work schedules.[365] In *Ward v. Massachusetts Health Research Institute, Inc.*,[366] the First Circuit correctly used the undue hardship defense to analyze the business impact of an

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359. *Id.* at 777–78.

360. *See id.* at 781–83 (rejecting the argument that regular attendance is per se essential).

361. *Id.* at 783; *see also* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 22 n.65 (citing *Cehrs* favorably on this point).

362. *Cehrs*, 155 F.3d at 782.

363. *Id.*; *see also* Smith, *supra* note 152, at 171, 178 (arguing that courts should require employers to "show how accommodating a plaintiff's illness and its resultant attendance problems would impose an undue hardship," rather than holding that absences invalidate the prima facie case).

364. *See, e.g.*, Ralph v. Lucent Techs., Inc., 135 F.3d 166, 170 (1st Cir. 1998) (affirming a preliminary injunction against an employer on the plaintiff's claim that denying a part-time schedule to accommodate a psychological condition violated the ADA); Valentine v. Am. Home Shield Corp., 939 F. Supp. 1376, 1400 (N.D. Iowa 1996) (denying the employer summary judgment on the plaintiff's ADA claim by finding a triable issue on whether a part-time schedule would be a reasonable accommodation for asthma).

365. *See, e.g.*, Heise v. Genuine Parts Co., 900 F. Supp. 1137, 1142–44, 1151–54 (D. Minn. 1995) (finding a triable case against an employer that refused to accommodate the plaintiff by allowing him to use accrued vacation time or flex-time for illness-related absences and assessing the impact of a modified work schedule under the undue hardship defense); *see also* Jackson v. Veterans Admin., 22 F.3d 277, 283–84 (11th Cir. 1994) (Birch, J., dissenting) (explaining that the essential functions of a housekeeping aide do not include "actual presence" at designated times and arguing that the plaintiff had a triable claim against his employer for failing to accommodate absences from rheumatoid arthritis by shifting the timing of performance).

366. Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29 (1st Cir. 2000).

employee's request for a flexible daily work schedule.[367] Rather than concluding that the employee's need for a flexible schedule rendered her unqualified, the court required the employer to prove "that an open-ended schedule would be a hardship, financial or otherwise," in order for the employer to retain its default scheduling design.[368]

The district court in *Dutton v. Johnson County Board of County Commissioners*[369] took the same approach when it held that William Dutton had a triable discrimination claim after his employer fired him from his equipment operator job and refused to accommodate his migraine-related absences by allowing him to use vacation time after his sick leave was exhausted.[370] The court did not assume that regular, uninterrupted presence was an essential function of the job, which would have rendered Dutton unqualified.[371] The court instead focused on whether Dutton could perform the actual job duties of an equipment operator "*when he is present*" on the job.[372] Because Dutton could operate all of the heavy equipment to maintain roads satisfactorily while he was at work, the court held that he was a qualified individual within the protected class.[373] That allowed the court to reach the undue hardship stage of analysis, which forced the employer to defend its exclusionary attendance practice by demonstrating a significant impact from its modification.[374] Because the employer could not establish that allowing Dutton to use unscheduled vacation time to cover disability-related absences would be "unduly disruptive," the court refused to dismiss the case.[375]

The district court in *Carlson v. InaCom Corp.*[376] similarly held that Debra Carlson was qualified for her executive secretary job despite periodic absences due to migraine headaches.[377] The court rejected the employer's argument that "regular, predictable attendance is an essential requirement of the executive

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367. *Id.* at 33, 35–37.

368. *Id.* at 37.

369. Dutton v. Bd. of County Comm'rs, 859 F. Supp. 498 (D. Kan. 1994).

370. *Id.* at 501–05 (ruling on both ADA and Rehabilitation Act claims).

371. *See id.* at 507–08 (recognizing implicitly that attendance is not a job function when noting that "[i]f defendant were willing to accept plaintiff's use of unscheduled leave by allowing him to use his vacation time, then plaintiff would be able to successfully perform the essential functions of his job").

372. *Id.* at 506 (emphasis added).

373. *Id.*

374. *See id.* at 506–08 (explaining the shifting burdens of an ADA claim).

375. *Id.* at 508–09 (quoting 29 C.F.R. pt 1630, app. § 1630.2(p) (2004)).

376. Carlson v. InaCom Corp., 885 F. Supp. 1314 (D. Neb. 1995).

377. *Id.* at 1315–19, 1322. The court, however, entered judgment for the employer because the plaintiff failed to prove a different element of her case. *Id.*

secretary position," which would have placed Carlson outside of the ADA's protected class.[378] Instead, the court focused on the actual, underlying job tasks, including "answering the phone, typing, handling mail, making travel arrangements, processing paperwork, product applications, financial reports, updating addresses and authorization numbers, . . . monitoring the timely completion of franchise tax returns," and "programming phones for employees," all of which Carlson could perform satisfactorily "*when she was at work.*"[379] This allowed the court to reach the undue hardship issue, thus forcing the employer to defend its exclusionary demand for uninterrupted daily presence by demonstrating that an alteration would be "unduly disruptive," which the employer was unable to do.[380]

In all of these cases, the courts correctly placed the burden on the employer to demonstrate why the conventional workplace could not be altered, rather than placing the burden on the employee to demonstrate performance within the conventional design. This is consistent with the ADA's characterization of "undue hardship" as an affirmative defense,[381] and it removes the analysis of an accommodation's impact from the threshold determination of which workers are within the ADA's protected class. Instead, the full-time face-time norm is brought within the reach of antidiscrimination review, and employers are required to justify the exclusionary aspects of this norm in order to retain their conventional design.

The result of this new scrutiny is likely to reveal three different sets of cases. First, there will be cases in which an employee's accommodation request to alter the full-time face-time norm would not have any negative impact on the employer, or even may produce positive economic results. These are cases in which an employer's reliance on workplace essentialism has led to a rationalization of the existing workplace structure, even at the expense of strictly "rational" economic behavior. Researchers have documented many employment situations in which financial gains result when an employer implements modified work schedules, job sharing or reduced hour options, telecommuting arrangements, or other flexible work designs. These benefits include reduced absenteeism and turnover, reduced rehiring and retraining costs, reduced overhead expenses, increased worker productivity, and enhanced

378. *Id.* at 1320–21 ("declin[ing] to find that attendance is an essential element").

379. *Id.* at 1316, 1320 (emphasis added).

380. *See id.* at 1321 (noting the lack of evidence that the employee's migraine-related absences "resulted in essential business not being completed in a timely and efficient manner" or caused any "threatened or actual lost business or profits").

381. 42 U.S.C. § 12112(b)(5)(A) (2000).

recruiting.[382] In these cases, the employee will be able to state a valid ADA accommodation claim, and the employer will not be able to raise an undue hardship defense. Unlike under the essentialist approach that would treat the plaintiffs in these cases as unqualified for ADA protection, the transformative approach would require the employer to modify the full-time face-time norm. In this set of cases, the law would be an impetus for the employer to confront its reliance on workplace essentialism and move in a more economically rational direction.

Second, there will be cases in which an employee's accommodation request to alter the full-time face-time norm would impose on the employer some negative impact, financial or otherwise, at least in the short-term. As long as this impact does not rise to the level of "undue hardship," the employer would be required to modify the default workplace design under the transformative interpretation of the ADA, whereas courts using the essentialist approach would have defined the employees out of the ADA's protected class and imposed no such obligation on the employer. While the transformative approach therefore could impose additional costs on employers in this second set of cases, the ADA endorses the fact that employers often must bear significant expense to achieve workplace equality for individuals with disabilities.[383] Moreover, there are reasons to believe that these expenses may be less than anticipated. Nothing in this approach changes the fact that

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382. *See* WILLIAMS, *supra* note 16, at 65, 84–85, 88–93 (providing examples of companies where modified work schedules yielded beneficial results); Arnow-Richman, *supra* note 11, at 382 (explaining that accommodations "can improve worker productivity and future commitment, particularly in situations involving reductions in work time"); Travis, *The Virtual Workplace*, *supra* note 16, at 364–68, 373 (describing the benefits of telecommuting); *see also* Richard Federico, *Quantifying the Impacts of Work/Life Programs* (June 2002), *at* http://www.cupahr.org/newsroom/cupahrnews_archives/vol02-6-02/work-life-programs.html (explaining that researchers have developed methodologies for quantifying the economic impact of flexible work initiatives, such as measuring the employer's return on investment through the increased retention rate of new mothers who are allowed to telecommute) (on file with the Washington and Lee Law Review); *Lotte Bailyn's Prescription for Business: Linking Personal Life and Work Can Revitalize Companies*, *at* http://web.archive.org/web/20000310035335/http://mitsloan.mit.edu/roi/summer97/life_work.html (last updated June 19, 1997) (describing a multi-year study at Xerox where financial gains resulted from reorganizing worksites to integrate work and family) (on file with the Washington and Lee Law Review). There is also a growing industry of consulting firms that promise to design cost-effective flexible work arrangements. *See* WILLIAMS, *supra* note 16, at 85 (naming work/family consulting groups); Travis, *The Virtual Workplace*, *supra* note 16, at 373 (detailing companies that offer family-friendly workplace consulting).

383. *See* 29 U.S.C. § 12111(10)(A) (2000) (requiring employers to provide accommodations if they pose anything less than "significant" expense); *see also* Schwab & Willborn, *supra* note 172, at 1200, 1204, 1211–12, 1228 (explaining the costs imposed by the ADA's accommodation obligation).

employers only need to respond to individuals with known disabilities[384] and only need to alter organizational structures for *those* individuals, not for all members of their workforce.[385] Additionally, as long as the employer demonstrates good faith efforts to accommodate, the employer will not face punitive damages if a court decides that the employer's conclusion regarding undue hardship was incorrect and orders the employer to modify the workplace.[386] More importantly, even if employers do incur short-term expenses from redesigning the full-time face-time norm, the ADA's drafters had the foresight to realize that those expenses are viewed more accurately as investments, which often will yield a long-term return from the full integration and self-sufficiency of the individuals with disabilities who currently are excluded from workplace participation.[387]

There also may exist a third set of cases in which the employee's request to modify the full-time face-time norm really does impose "significant difficulty or expense," thereby rising to the level of undue hardship. In these cases, the employer could keep its exclusionary workplace design. In situations where the timing or location of performance really is integral to business operations, however, employees may not bother bringing such cases in the first place.[388] When such cases are litigated, the ultimate result will be the same under the transformative approach as it is under the current essentialist approach. Under the former approach, the employer would raise a successful undue hardship defense, while under the latter approach, the employee would fail to state a prima facie case. Either way, the ADA would impose no obligation on the employer to modify the full-time face-time norm.

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384. *See* 29 C.F.R. pt. 1630, app. § 1630.9 (2004) (explaining that "an employer would not be expected to accommodate disabilities of which it is unaware," and that "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed").

385. EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 24 ("[R]easonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees."); *see also* Travis, *The Virtual Workplace*, *supra* note 16, at 329–30 (explaining the difference between the remedies available in an accommodation claim and a disparate impact claim).

386. 42 U.S.C. § 1981a(a)(3) (2000).

387. *Cf.* Arnow-Richman, *supra* note 11, at 383 (describing accommodations as an "investment" for which "[t]he employer incurs a possible loss at the point of accommodation but reaps the benefit in the future").

388. *See* EEOC GUIDANCE ON REASONABLE ACCOMMODATION, *supra* note 231, ¶ 2 n.65 ("[I]f the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.").

This similarity in outcome under either approach in this third set of cases mitigates any concern raised by the fact that the transformative approach will need to confront some situations in which the line between a job "function" and an "organizational practice *regarding* a function" indeed may be debatable. While these two categories are largely discrete and typically easy to identify, they may not be completely dichotomous. In some circumstances, an aspect of the full-time face-time norm may be so central to performing the job's core objective that an employer plausibly could characterize it as a "function." For example, a television network might hire someone to be a "seat-filler" at the Oscars, with the expectation that the person would be available to become a "seat ornament[]" whenever a movie star takes a trip to the restroom while the awards show is being televised.[389] In this unusual situation, there is a plausible argument either that accommodating the person by changing the time or location of performance would be an undue hardship or that the inflexible face-time requirement is indeed an essential function of the job. The result of either argument, however, would be to allow the employer to retain its rigid face-time rule. Under the former characterization, the employer would succeed on an affirmative defense, although under the latter characterization, the employee would fail to state a prima facie case. Thus the existence of difficult line-drawing cases should not undermine the importance of shifting from the essentialist to the transformative approach to interpreting the ADA. Situations where the line is difficult to discern between a "function" and an "organizational practice *regarding* a function" will be, by definition, the situations most likely to fall into the third set of cases in which the employer will have the easiest time stating an undue hardship defense, meaning that the ultimate outcome would be the same under either interpretive approach. Moreover, the number of difficult line drawing cases will be small to begin with, relative to the number of cases in which "functions" are easily distinguishable from "organizational practices." Any difficulty in dealing with difficult line-drawing issues is therefore outweighed by the benefits of shifting from the essentialist to the transformative approach to interpreting the ADA. A primary benefit of the transformative approach is that it will reveal the very existence of the first two sets of cases, in which the essentialist approach has shielded from antidiscrimination review an entire array of exclusionary workplace structures for which there is no legitimate business need.

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389. *See* Jocelyn S. Weiss, *The Almost Glamorous Life of a 'Seat-Filler'*, *at* http://www.cnn.com/SHOWBIZ/Movies/9903/18/oscar.seatfiller.ew/ (last visited Oct. 18, 2004) (describing the responsibilities of a "seat-filler" at the Academy Awards ceremony) (on file with the Washington and Lee Law Review). Thanks to Sean Driscoll for first identifying this example.

B. Redirecting Headwinds with Title VII

When an employer's default organizational structures disproportionately exclude women with caregiving responsibilities, courts interpreting Title VII have two possible approaches analogous to the two approaches to ADA accommodation claims. Courts are not limited to the essentialist approach, described above, in which judges treat the full-time face-time norm as part of the work itself rather than as a "particular employment practice" for organizing work performance, thereby defining away any cognizable target for a disparate impact claim. The alternative approach would tap into Title VII's unrealized transformative potential by rejecting any assumptions about the inherent nature of the existing workplace design. Under this alternative approach, judges would begin by distinguishing actual job tasks from malleable organizational norms, and they would treat the latter as a particular choice of practice regarding the former, rather than equating the two. As a result, a woman's identification of an exclusionary organizational norm would be deemed a proper challenge to a particular employment practice that is subject to disparate impact review. The employer would be required to eliminate the exclusionary workplace structure and replace it with a less discriminatory alternative, unless the employer could defend the existing design as "job related" and "consistent with business necessity."[390] Rather than shielding both necessary and *un*necessary default structures from antidiscrimination review, this approach would require employers to confront their own use of workplace essentialism and identify a business need in order to retain an exclusionary workplace norm.

This transformative approach is consistent with Title VII's overarching objectives. Just as Congress enacted the ADA's employment provisions as one part of a broad-based scheme for achieving economic self-sufficiency and integrating disabled individuals into all aspects of civic life, Congress also enacted Title VII as one part of the broad, reconstructionist, and integrationist objectives of the Civil Rights Act of 1964. Title VII's antidiscrimination mandate reflects this broader project by making it unlawful to "limit" employees "in *any* way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the individual's] status as an employee."[391]

Although the original version of Title VII did not say anything explicit about the disparate impact theory of discrimination, the United States Supreme

390. *See supra* note 179 and accompanying text (discussing the employer's affirmative defense to a disparate impact claim).

391. 42 U.S.C. § 2000e-2(a)(2) (2000) (emphasis added).

Court recognized in *Griggs v. Duke Power Co.*[392] that the disparate impact theory was implicit in this statutory provision.[393] The Court held that an employer's use of aptitude tests and a high school diploma requirement for particular job applicants violated Title VII because it disproportionately excluded members of minority groups from the workplace.[394] The Court held that Title VII's antidiscrimination mandate and Congress's goal of equal opportunity demanded the removal of all "artificial, arbitrary, and unnecessary barriers to employment," whenever those barriers have a discriminatory effect on an historically disadvantaged group.[395] Although the Court was addressing discrete tests and hiring criteria, the Court's language was not nearly so limited. The Court spoke of removing all workplace "barriers" and "built-in headwinds,"[396] and the Court stated that the disparate impact theory would apply not only to "tests," but to "procedures" and "practices" as well.[397]

Some scholars have questioned whether this broad language in *Griggs* really did represent a transformative agenda, given the opinion's historic context.[398] The Supreme Court decided *Griggs* in 1971 when employers were experimenting with strategies to avoid the full effects of the new antidiscrimination rules imposed by Title VII of the Civil Rights Act of 1964. Those strategies included the use of seniority systems and the adoption of educational degree requirements and entrance exams.[399] Arguably, the *Griggs* opinion was intended only as a response to these specific strategies, rather than as an endorsement of a broadly transformative vision of Title VII.[400] Certainly, the Supreme Court's original intent to use the disparate impact model as a tool

392. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

393. *Id.* at 431.

394. *Id.* at 436.

395. *Id.* at 431; *see also id.* at 426 n.1, 429–30 (stating that the disparate impact model should "remove barriers that have operated in the past to favor" one group over another).

396. *Id.* at 429–30, 432; *see also* Johnson v. Transp. Agency, 480 U.S. 616, 628 (1987) (reiterating that Title VII's basic promise was to "break down old patterns of segregation and hierarchy"); Abrams, *supra* note 10, at 1196 (noting that the Court's mandate to use Title VII to address the "'built-in headwinds' facing minority workers . . . encouraged advocates to pursue and to eradicate a variety of more subtle, and often more intransigent, forms of discrimination" (quoting *Griggs*, 401 U.S. at 432)).

397. *Griggs*, 401 U.S. at 430; *see also* Nashville Gas Co. v. Satty, 434 U.S. 136, 141, 143 (1977) (citing *Griggs* and applying the disparate impact model to an employer's "policy of depriving employees returning from pregnancy leave of their accumulated seniority" and to an employer's "policy of not awarding sick-leave pay to pregnant employees").

398. Michael Selmi, Was the Disparate Impact Theory a Mistake?, Remarks at the Law and Society Association 2004 Annual Meeting (May 28, 2004).

399. *Id.*

400. *Id.*

for redesigning basic workplace structures is less evident than Congress's transformative intent when enacting the ADA's accommodation mandate. However, although the *Griggs* Court only applied the disparate impact theory to the discrete hiring criteria at issue in the case, the Court chose not to articulate particular limits to its ruling, instead casting the disparate impact model as a tool for removing all types of "headwinds" and "barriers." At a minimum, this language created the *potential* for using the disparate impact theory for large-scale workplace restructuring, regardless of the Court's specific intent.[401]

Congress itself endorsed this potential in the Civil Rights Act of 1991 (the 1991 Act), which amended Title VII to codify explicitly the disparate impact model that the *Griggs* Court already had recognized as implicit in Title VII's more general provisions.[402] The specific provision that the 1991 Act added to Title VII defined discrimination to include situations in which an employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," if the employer fails to demonstrate that the practice is "job related" and "consistent with business necessity."[403] Congress directed courts to apply this new provision consistently with *Griggs*.[404] Thus courts are ignoring the transformative and integrationist potential that Congress implicitly endorsed when courts interpret the "particular employment practice" language to exclude structural and organizational aspects of the workplace that act as "barriers" and "built-in-headwinds" for women with caregiving responsibilities.[405]

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401. The Supreme Court's broad application of the disparate impact theory in *Watson v. Fort Worth Nat'l Bank & Trust*, 487 U.S. 977 (1988), provides further support for viewing *Griggs* as the endorsement of a deeply transformative tool, rather than as a narrow reaction to employers' attempts to evade Title VII. In *Watson*, the Court not only held that the disparate impact theory applies to "subjective or discretionary employment practices," but also allowed an employee to challenge an employer's conventional, unstructured, and informal process for making decisions. *Id.* at 982, 991. The *Watson* opinion thus reinforces at least the potential for using the disparate impact theory to scrutinize wide-ranging aspects of the conventional workplace design.

402. *See* Civil Rights Act of 1991, Pub. L. No. 101-166, § 3, 105 Stat. 1071, 1071 (1991) (codified at 42 U.S.C. § 1981 note) (stating that the purpose of the amendment was "to codify the concepts of 'business necessity' and 'job related' enunciated . . . in Griggs v. Duke Power Co.").

403. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

404. *See* Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 1981 note) ("No statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history . . . ."); Interpretative Memorandum, 137 CONG. REC. 28,680 (1991) (emphasizing the importance of reinstating *Griggs*); 137 CONG. REC. 28,878 (1991) (statement of Sen. Kennedy) (noting that the 1991 Amendment would "restore the law to its status under *Griggs*").

405. *See also* H.R. REP. NO. 102-40(I) (1990), *reprinted in* 1991 U.S.C.C.A.N. 549,

This conclusion follows despite the fact that *Griggs* did not use the 1991 Act's adjective "particular" when describing the practices that should be subject to disparate impact review. The 1991 Act did not codify the disparate impact theory using the phrase "particular employment practice" in order to limit the types of workplace structures that would be subject to disparate impact challenge under *Griggs*, nor to exclude default organizational norms. The 1991 Act used the term "particular" to resolve a specific and highly divisive issue in the 1989 Supreme Court opinion, *Wards Cove Packing Co. v. Atonio*,[406] the case that was the immediate catalyst for amending Title VII. The issue was whether an employee could state a prima facie disparate impact case solely by identifying a statistical disparity between the percentage of the employer's workforce that was made up of members of a protected category and the percentage of that category in the relevant labor pool: the so-called "bottom line" approach.[407] The *Wards Cove* opinion split five to four on this issue, which was one of several aspects of the case that prompted Congress's rapid response in the 1991 Act.

The five-person majority in *Wards Cove* held that a bottom-line statistical disparity in an employer's workforce, by itself, could not sustain a disparate impact claim because it did not establish the employer as a cause of the disparate effects.[408] The Court held that for an employer to be liable, "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."[409] The term "particular" was intended to exclude the use of bare statistical comparisons between the employer's workforce and the relevant labor pool, not to exclude certain workplace practices from disparate impact review. The majority emphasized that it was not changing the Supreme Court's analysis in prior disparate impact cases that had "always focused on" the effects of identifiable practices.[410] In other words, the Court was not using the adjective "particular"

572–76 (noting the wide variety of working conditions that constitute practices subject to disparate impact review); H.R. REP. NO. 102-40(II), *reprinted in* 1991 U.S.C.C.A.N. 694, 709 (defining "practices" broadly); *cf.* Green, *Workplace Dynamics*, *supra* note 16, at 137 (explaining that *Griggs* "opened the door for a structural approach to combating discrimination" by "recogniz[ing] the role that institutional choices . . . can play in perpetuating stratification in the workplace" and by "recognizing systems as legitimate subjects for legal regulation").

406. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

407. *Id.* at 656–58.

408. *See id.* at 675 (noting that there are "myriad innocent causes that may lead to statistical imbalances" in the workplace).

409. *Id.* at 657.

410. *Id.* at 656.

in an attempt to narrow the targets for disparate impact challenges post-*Griggs*, but instead it was focused on evidentiary concerns regarding causation.[411]

The four-person dissent in *Wards Cove* argued that a bottom-line statistical disparity in an employer's workforce should sustain a prima facie disparate impact case on its own.[412] Significantly, the dissent did not view the majority's use of the term "particular" as narrowing the types of employment practices that could be reviewed under the disparate impact model but rather as imposing an "additional proof requirement" on causation.[413] The dissent was concerned that employers often use "numerous questionable employment practices" that "'combine to produce a single ultimate selection decision.'"[414] The dissent feared that employers could shield themselves from disparate impact challenges under the majority's view simply by basing decisions on a combination of multiple factors, making it impossible for employees to identify the effects of each individual element.[415]

The 1991 Act used the phrase "particular employment practice" to resolve this dispute. This is evident when the phrase is read in the context of other provisions that the 1991 Act added to Title VII, including the following:

> (1)(A) An unlawful employment practice based on disparate impact is established . . . only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . .
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a

411. This is evident in the very broad range of so-called "particular" practices that the Court identified in the facts before it, including using nepotism, using separate hiring channels for different positions, providing rehire preferences, and using subjective decisionmaking to select for certain positions. *Id.* at 657.

412. There were two dissenting opinions in the case, one written by Justice Blackmun and joined by Justices Brennan and Marshall, and one written by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun. *Id.* at 661–62 (Blackmun, J., dissenting); *id.* at 662–79 (Stevens, J., dissenting).

413. *Id.* at 672 (Stevens, J., dissenting).

414. *Id.* at 672 n.19, 673 (quoting the Solicitor General's Brief for United States as *Amicus Curiae* at 22).

415. *See id.* at 673 (stating that the majority decision "tip[s] the scales" in favor of employers).

> respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.[416]

Subsection (B)(i) shows that Congress was grappling with how to resolve the dispute over bottom-line statistics in *Wards Cove* and that Congress used the term "particular" to clarify its resolution of that specific dispute. Moreover, Congress elsewhere directed courts to interpret the disparate impact provisions in accord with the Supreme Court's pre-*Wards Cove* decisions, including *Griggs*.[417] Accordingly, courts should not interpret the term "particular" to undermine the disparate impact model's transformative potential, which is still housed within the *Griggs* opinion.[418]

Courts in the European Union have been quicker than American courts to recognize that using the disparate impact model to dismantle aspects of the full-time face-time norm that fall disproportionately on women caregivers is a logical application of *Griggs*. In a series of cases in the 1980s, the Court of Justice of the European Communities (ECJ) held that treating part-time workers less favorably than full-time workers with respect to hourly wage rates, pensions, sick pay, and other benefits were practices subject to disparate impact review.[419] The ECJ held that marginalizing part-time work had a disparate impact on women, who made up the majority of the part-time workforce.[420] In

416. 42 U.S.C. § 2000e-2(k)(1) (2000).

417. *See supra* note 404 and accompanying text (explaining that Congress intended to codify *Griggs*).

418. *See also* Charles A. Sullivan, *Re-Reviving Disparate Impact* (forthcoming 2005) (arguing that the Supreme Court's decision in *Watson v. Fort Worth Nat'l Bank & Trust*, 487 U.S. 977 (1988), also supports a broad interpretation of the types of employment practices that may qualify for disparate impact scrutiny under the 1991 Act) (on file with the Washington and Lee Law Review).

419. *See* Jenkins v. Kingsgate (Clothing Prods.) Ltd. [1981] 2 C.M.L.R. 24 (E.C.J.) (considering the practice of paying part-time workers an hourly wage rate that was 10% lower than the rate for full-time workers); Bilka-Kaufhaus GmbH v. Weber Von Hartz & Co. [1986] 2 C.M.L.R. 701 (E.C.J.) (discussing the exclusion of part-time workers from a supplementary pension); Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH & Co. [1993] 2 C.M.L.R. 932, 945 (E.C.J.) (discussing the exclusion of part-time workers from sick pay). In the European Union, the disparate impact model is referred to as "indirect discrimination." Equal Opportunities Commission Website for Legal Advisors: Is there an Indirect Sex or Marital Discrimination Claim?, *at* http://www.eoc-law.org.uk/cseng/family_friendly_hours/1.is_there_an_indirect_sex _or_martial_discrimination_claim.asp (last updated July 26, 2004) [hereinafter EOC Website on Indirect Discrimination] (on file with the Washington and Lee Law Review).

420. *See Jenkins*, [1981] 2 C.M.L.R. at 42 (ruling that distinguishing between full-time and part-time workers may discriminate against women); *Bilka-Kaufhaus*, [1986] 2 C.M.L.R. at 722–23 (same); *Rinner-Kuhn*, [1993] 2 C.M.L.R. at 946 (same).

the two most influential of these cases, the Advocate General cited *Griggs* to support this position.[421]

Courts in the United Kingdom have taken this reasoning one step further by applying the disparate impact model to an employer's failure to provide part-time or other flexible work arrangements in the first place. The United Kingdom's Equal Opportunities Commission Website for Legal Advisors (EOC Website) cites the relevant case law and reports that "[a] refusal to allow a woman to do flexible working" may be the basis for a disparate impact claim.[422] The EOC Website explains that these claims may arise, for example, when a woman wants to return from maternity leave on a reduced or flexible hour schedule or when an employer advertises a job as full-time only.[423] According to the EOC, "the fact that it is mainly women who have primary responsibility for childcare makes it more difficult for them to work long hours, overtime, and irregular hours," which means that such practices will be deemed discriminatory "[u]nless such hours can be justified by the needs of the business."[424]

In reaching this conclusion, courts in the United Kingdom had no difficulty characterizing the full-time face-time norm as a practice that is subject to disparate impact review. The EOC Website explains that such practices include a wide range of default organizational structures, including "the refusal to allow flexible working to suit the employee's childcare, such as job-share, . . . teleworking, [or] compressed hours," "a provision that employees should be available to work their normal contractual hours without variation," "a requirement to work overtime," "a contractual obligation or a practice of undertaking long hours," "a refusal to allow a woman to work from home," or requirements "to work full-time, to work inflexible hours from 8:30 to 5:30 . . . or to work at the office every day."[425] As a result, courts cannot dismiss these types of disparate impact cases easily in the United Kingdom, and the central issue typically becomes whether or not the employer can prove a business justification for the default organizational norm.[426]

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421. *Jenkins*, [1981] 2 C.M.L.R. at 26, 35; *Bilka-Kaufhaus*, [1986] 2 C.M.L.R. at 703, 712.

422. EOC Website on Indirect Discrimination, *supra* note 419.

423. *Id.*

424. *Id.*

425. Equal Opportunities Commission Website for Legal Advisors: The Four Elements of Indirect Discrimination, *at* http://www.eoc-law.org.uk/cseng/family_friendly_hours/3.the_four_elements_of_indirect_discrimination.asp (last updated July 21, 2004) (interpreting the phrase "provision, criterion or practice" in U.K. law) (on file with the Washington and Lee Law Review).

426. *See id.* (discussing business justification).

Although many courts in the United States have failed to recognize that such default workplace structures are mutable organizational "practices," rather than fixed elements defining the job, that does not mean it is time to abandon the disparate impact theory in this country as a tool for transforming the workplace. Not only is there a renewed scholarly interest in developing disparate impact jurisprudence generally,[427] but there are also several case exemplars in this specific context in which a judge was both able and willing to reach some of Title VII's untapped potential. In particular, a few courts have taken Title VII's objectives seriously and recognized that the absence of an employment policy—which equates to the selection of a particular alternative—is indeed a "practice" subject to the disparate impact model. In *Maganuco v. Leyden Community High School*,[428] the Seventh Circuit addressed a claim alleging that a school's prohibition on the use of paid sick leave back-to-back with unpaid maternity leave, but not back-to-back with other types of leave, disparately impacted pregnant teachers.[429] Although the court affirmed summary judgment for the employer due to a lack of evidence of any disproportionate effect,[430] the court acknowledged that the employer's default preference for a worklife devoid of long interruptions was not necessarily a fixed, inevitable, and nonreviewable aspect of a job. "[A] policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy," stated the court, "[could be] vulnerable under a disparate-impact theory of liability under Title VII."[431] Perhaps this recognition was made easier by the fact that the case could be dismissed on other grounds, but it nevertheless lays the foundation for workplace transformation in the future.

The D.C. Circuit similarly laid such a foundation over two decades ago in *Abraham v. Graphic Arts International Union*[432] when the court refused to

427. *See, e.g.*, L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 KAN. L. REV. (forthcoming 2005) (conceptualizing some sexual harassment cases as disparate impact claims) (on file with the Washington and Lee Law Review); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) (arguing that "*Griggs* and the disparate impact theory of litigation remain largely untapped resources of enormous potential for plaintiffs"). *See generally* Sullivan, *supra* note 418 (compiling examples of the renewed scholarly interest in the disparate impact theory and arguing that the future of the antidiscrimination project should focus on reviving disparate impact claims).

428. Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440 (7th Cir. 1991).

429. *Id.* at 443–45.

430. *Id.* at 444.

431. *Id.* at 445 (citing favorably Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981), and Miller-Wohl v. Comm'r of Labor & Indus., 515 F. Supp. 1264 (D. Mont. 1981)).

432. *Abraham*, 660 F.2d at 811.

dismiss a claim alleging that a union's lack of disability leave disparately impacted women due to pregnancy.[433] Because the union's contract with the employer limited certain employees to ten days of sick leave and ten days of vacation, the employer fired Laurie Abraham from her job as an administrative assistant when she became pregnant and requested maternity leave.[434] The union defended the termination, arguing "that it had *no policy* allowing such employees any amount of additional leave for any purpose."[435] The D.C. Circuit rejected this argument, holding that it "clashes violently with the letter as well as the spirit of Title VII."[436] "An employer can incur a Title VII violation as much by *lack* of an adequate leave policy as by unequal application of a policy it does have," held the court, "and it takes little imagination to see that an *omission* may in particular circumstances be as invidious as positive action."[437]

Several lower courts have reached similar conclusions. In *EEOC v. Warshawsky & Co.*,[438] for example, the District Court for the Northern District of Illinois granted the plaintiff summary judgment on a claim alleging that an employer's failure to provide sick leave during the first year of employment was a practice that disparately impacted women due to pregnancy.[439] "[I]f an employer denies adequate disability leave across the board," held the court, "women will be disproportionately affected."[440] A state court in Montana similarly held in *Miller-Wohl Co. v. Commissioner of Labor and Industry*[441] that an employer's ban on leaves of absence for temporary disabilities during an employee's first year was a practice subject to disparate impact review.[442] Because the "no-leave policy subjected pregnant women to job termination risk

433. *Id.* at 813, 818–19.

434. *Id.* at 813, 819.

435. *Id.* at 818–19 (emphasis added).

436. *Id.* at 819.

437. *Id.* at 819 & n.66 (emphasis added) (citing 29 C.F.R. § 1604.10(c) (2004)); *see also* Rhett v. Carnegie Ctr. Assocs., 129 F.3d 290, 299, 306–08 (3d Cir. 1997) (McKee, J., dissenting) (criticizing the court's holding that Title VII does not require an employer to grant maternity leave or to reinstate an employee after maternity leave and suggesting that the disparate impact theory may apply because "[p]regnancy and absence are not . . . analytically distinct").

438. EEOC v. Warshawsky & Co., 768 F. Supp. 647 (N.D. Ill. 1991).

439. *Id.* at 651–55.

440. *Id.* at 654.

441. Miller-Wohl Co. v. Comm'r of Labor & Indus., 692 P.2d 1243 (Mont. 1984), *vacated*, 479 U.S. 1050 (1987), *reinstated*, 744 P.2d 871, 874 (Mont. 1987).

442. *Id.* at 1244.

on a basis not faced by men," the court held that it violated Title VII.[443] As in the ADA context, such a transformative interpretation of the statutory language is supported by the regulations, which suggest that aspects of the full-time face-time norm, including the preference for an uninterrupted worklife, should be treated as "practices" that are subject to disparate impact review. For example, the regulations state that "an employment policy under which insufficient or no leave is available" may violate the law by disproportionately excluding women, if such a policy is "not justified by business necessity."[444]

The full import of the *Maganuco, Abraham, Warshawsky*, and *Miller-Wohl* cases may have been overlooked because Congress enacted the Family and Medical Leave Act, which now provides some employees with up to twelve weeks of unpaid leave to care for a newborn child, although that statute only applies to employees after working for a year.[445] The disparate impact analysis in these cases, however, should still be a guide for current application of Title VII.

At least one district court has followed the path of these decisions even after the 1991 Act explicitly codified the disparate impact model into Title VII

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443. *Id.* at 1244, 1252; *see also* Marafino v. St. Louis County Cir. Ct., 537 F. Supp. 206, 213 (E.D. Mo. 1982) (suggesting that an employer's "policy of refusing to hire those who planned to take an early leave of absence" was a practice subject to disparate impact analysis, but holding that the plaintiff failed to show that the practice disproportionately affected women), *aff'd*, 707 F.2d 1005, 1006 n.2 (8th Cir. 1983).

444. 29 C.F.R. § 1604.10(c) (2004). The EEOC's regulations for the ADA arguably are inconsistent with the regulations on sex discrimination. In distinguishing the ADA's accommodation mandate from the disparate impact model, the EEOC states:

> [S]ome uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.

Id. pt. 1630, app. § 1630.1(b)&(c); *see also* EEOC MANUAL, *supra* note 231, at VII-10 (similarly distinguishing between the disparate impact and accommodation theories). It is unclear why the EEOC would endorse treating a no-leave policy as a particular employment practice that is subject to disparate impact review for sex-based effects under Title VII but not for disability-based effects under the ADA. The point of the EEOC's ADA materials simply may have been to highlight the fact that a disabled individual may bring an accommodation claim based solely on the fact that *such individual* was excluded from the workplace, whereas a disparate impact challenge would require evidence that disabled individuals *as a group* suffered substantially greater exclusion than nondisabled individuals.

445. 29 U.S.C. §§ 2611(2)(A)(i), 2612(a)(i) (2000); *see also* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 737–40 (2003) (concluding that the FMLA is enforceable for money damages against state employers and suggesting in dicta that Title VII could not be used to force employers to provide employees with family leave).

using the "particular employment practice" phrase. In *Roberts v. United States Postmaster General*,[446] the Eastern District of Texas held that Shelly Roberts stated a disparate impact claim challenging an employer's lack of sick leave to care for family members.[447] Roberts alleged that "the failure of the defendant to allow employees to take time off to care for children" had a disparate impact on women because they were "forced to resign more often than men because of their more frequent role as child-rearers."[448] The court characterized the employer's refusal to allow employees to use sick leave to care for family members as a "policy of denying parental leave," which was subject to disparate impact review.[449] "While an employer can violate Title VII by applying unequally a policy it does have," held the court, "an employer can also violate Title VII by failing to provide an adequate policy—a policy which on its face is neutral, but which has a disparate impact on women."[450]

In reaching this conclusion, the court distinguished between employee "benefits" and employee "burdens," the latter of which is the proper focus of a disparate impact claim. "Admittedly, [the] employees are provided with the same benefits," explained the court, but the problem arises because "the burdens of these benefits" are disparate.[451] Specifically, "women are forced to resign more often than men because of their more frequent role as child-rearers."[452] By refusing to essentialize the default requirement of an uninterrupted worklife, the court was able to conclude that such unequal burdens are "exactly th[e] type of harm that Title VII seeks to redress."[453]

Some courts have recognized this in other contexts as well,[454] including when an employer recruits via the word-of-mouth of incumbent employees. Though some courts have characterized word-of-mouth hiring as the *lack* of a particular practice, thereby shielding such an exclusionary hiring method from

446. Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282 (E.D. Tex. 1996).

447. *Id.* at 287–89.

448. *Id.* at 289.

449. *Id.* at 287–88.

450. *Id.* at 289 (citing Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981)).

451. *Roberts*, 947 F. Supp. at 289.

452. *Id.*

453. *Id.*

454. *See, e.g.*, DeClue v. Central Ill. Light Co., 223 F.3d 434, 436–37 (7th Cir. 2000) (indicating that an employer's lack of restrooms could be a practice that disparately affects women workers); Goicoechea v. Mountain States Tel. & Tel. Co., 700 F.2d 559, 560 (9th Cir. 1983) (assuming without deciding that an employer's requirement of extensive travel was a "policy" subject to disparate impact review, but affirming summary judgment for the employer on other grounds).

a disparate impact challenge, other courts have recognized that informal word-of-mouth hiring is just as much a particular practice as any formal hiring method. In *Thomas v. Washington County School Board*,[455] for example, the Fourth Circuit cited *Griggs* and held that a school board's use of word-of-mouth hiring was a practice that had a racially disparate impact in violation of Title VII.[456] The court ordered the employer to replace its word-of-mouth hiring practice with a practice of "publicly advertis[ing] vacancies," thereby undoing one type of workplace barrier and headwind.[457] In a similar case, the Fourth Circuit was even more explicit in translating Title VII's transformative objective into an affirmative obligation by holding that employers have a "duty of insuring removal of all vestiges of discrimination."[458]

One reason that courts may be hesitant to enforce this duty and apply the disparate impact model to default organizational structures is a concern about the financial or operational effects that this may have on employers. This is particularly true because the remedy for a disparate impact claim can include replacing the offending practice with a less discriminatory alternative practice for *all employees*, not just modifying or making an exception to the practice for *the plaintiff*, as occurs in an ADA accommodation case.[459]

However, Congress decided exactly how the effects on employers should be assessed when it provided employers with an affirmative defense. That defense allows an employer to retain an exclusionary practice when the employer proves that the practice is "job related" and "consistent with business necessity."[460] When a plaintiff challenges the disparate effects of some aspect of the full-time face-time norm, employers may use this defense to justify the default organizational structure. This approach correctly places the burden on the employer to demonstrate explicitly why the conventional workplace should not be altered, rather than having courts implicitly assume the essential nature of the workplace when deciding whether the plaintiff has stated a prima facie case.[461] Placing this burden on the employer will allow courts to distinguish

455. Thomas v. Wash. County Sch. Bd., 915 F.2d 922 (4th Cir. 1990).

456. *Id.* at 923–26 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

457. *Id.* at 926.

458. *See* Barnett v. Grant Co., 518 F.2d 543, 549, 550 (4th Cir. 1975) (concluding that recruitment of drivers from walk-in applicants or "word of mouth" of incumbent drivers was a practice subject to disparate impact review under Title VII).

459. *See supra* note 181 and accompanying text (distinguishing the remedies in disparate impact and accommodation claims).

460. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

461. *See* EEOC v. Warchawsky & Co., 768 F. Supp. 647, 655 (N.D. Ill. 1991) (stating that the "[m]ere recitation of a policy's necessity is not sufficient" to meet this burden).

jobs in which default organizational structures really are dictated by business needs from jobs in which mere convenience or historical tenacity are dictating the default scheme.[462]

In addition, as in the ADA context, the result of the expanded scrutiny under the transformative approach to Title VII is likely to reveal three different sets of cases, not all of which raise financial or operational concerns. First, there will be cases in which substituting a less exclusionary practice for the full-time face-time norm would not have any negative impact on the employer or may even produce positive economic results. The documented benefits that flexible work arrangements can have on recruiting, retention, absenteeism, and productivity[463] should be even greater when the workplace is redesigned generally, rather than just making exceptions to the conventional design as is done under the ADA. In this set of cases, the transformative approach would force employers to recognize their reliance on workplace essentialism, rather than reinforcing employers' essentialist vision by shielding default workplace structures from antidiscrimination review. Cost concerns are misplaced with respect to this set of cases, in which the transformative approach merely would be forcing employers to move away from rationalizing the existing workplace design toward designing a more rational alternative.

Second, there will be cases in which substituting a less exclusionary practice for the full-time face-time norm would impose on the employer some negative impact, financial or otherwise, at least in the short-term. If the employer cannot defend the exclusionary practice as "job related" and "consistent with business necessity," the employer would be required to redesign the workplace under the transformative interpretation of Title VII, whereas courts using the essentialist approach would impose no such obligation by treating default norms as untouchable *non*-practices. In some of these cases, cost concerns similarly are misplaced if the short-term costs are offset by long-term gains from restructuring to adapt to a larger labor pool.[464] If no such offset

462. *Compare id.* at 655 (granting the plaintiff summary judgment on a claim alleging that the employer's failure to provide sick leave during an employee's first year disparately impacted women and concluding that the employer failed to create a triable issue on the business necessity defense) *with* Marafino v. St. Louis County Cir. Ct., 537 F. Supp. 206, 214 (E.D. Mo. 1982) (dismissing a disparate impact case alleging that an employer's practice of refusing to hire employees who planned to take an early leave of absence disparately impacted women in part because the employer proved a business necessity for the particular attorney position at issue), *aff'd*, 707 F.2d 1005, 1006 n.2 (8th Cir. 1983).

463. *See supra* note 382 and accompanying text (compiling evidence of the cost-effectiveness of flexible work arrangements).

464. *See* Green, *Workplace Context*, *supra* note 16, at 672–73 (describing the long-term economic benefits of reducing workplace discrimination); Travis, *The Virtual Workplace*, *supra* note 16, at 362–63 (arguing that courts should consider long-term effects when assessing Title

exists, then the transformative approach could impose additional costs on employers in this second set of cases. However, Congress and the courts have rejected a simple cost defense to Title VII and have recognized that employers must bear some expense to create equal employment opportunities.[465] Moreover, other limits built in to the disparate impact model should mitigate cost concerns. Perhaps most significant is that an employer only will need to come forward with a business justification for a default structure if a plaintiff can prove disproportionate effects, which is not an easy burden. Employers need not search proactively for and experiment with alternative organizational norms but only need to respond to alternative practices proposed by employees. Additionally, employers do not face the threat of punitive damages in disparate impact claims.[466]

There also may exist a third set of cases in which the full-time face-time norm is so necessary to the business that the employer will be able to state an affirmative defense and keep its exclusionary workplace design. In these situations, employees may not bother bringing a claim, and even if they do, the ultimate result will be the same under the transformative approach to Title VII as it is under the current essentialist approach. Under the former approach, the employer would raise a successful defense that the norm is "job related" and "consistent with business necessity"; although under the latter approach, the employee would fail to state a prima facie case. Either way, Title VII would impose no obligation on the employer to modify the full-time face-time norm. As in the ADA context, this similarity in outcome in the third set of cases reduces any concern raised by the fact that the transformative approach will need to confront some situations in which the line between work tasks and organizational practices *regarding* work tasks may be debatable. By definition, those situations will fall in the third set of cases where the employer will have the easiest time stating a business necessity defense, which means that the employer correctly will win under either interpretive approach. The existence of this line-drawing issue therefore does not outweigh the benefit that shifting from the essentialist to the transformative approach will produce by bringing

VII claims); *see also* Arnow-Richman, *supra* note 11, at 374–84 (explaining how the "'Me, Inc.'" culture—"in which workers are increasingly independent, short-term employment relationships predominate, collective action is all but absent, and employer reliance on contingent labor had dramatically expanded"—makes it difficult "to invest in the long-term productivity of individual workers" through accommodations).

465. *See* Travis, *The Virtual Workplace*, *supra* note 16, at 370, 371 & n.454 (citing cases that interpret legislative intent to reject a cost-based defense to discrimination claims).

466. 42 U.S.C. § 1981a(a)(1) (2000).

the first two sets of cases within the reach of Title VII and forcing employers to redesign exclusionary workplace structures that are lacking in business need.

The fact that some courts have been willing to apply the disparate impact model to the full-time face-time norm despite cost concerns should encourage the continued pursuit of disparate impact claims as a tool for restructuring the workplace. Of course, this strategy may risk essentializing and thereby retrenching women's caregiving role because the success of the disparate impact theory depends on the fact that women perform the majority of carework.[467] However, this risk is tempered by the broad-based remedy that is available for disparate impact claims. When women successfully challenge an employment practice using the disparate impact model, the court may require the employer to modify or eliminate the offending practice altogether, which would allow male workers who have or want to have significant caregiving responsibilities to benefit from the workplace restructuring as well.[468] Thus, correcting courts' mischaracterization of default organizational structures as *non*-practices would be a significant step toward recapturing Title VII's full transformative potential.

V. Conclusion

Employment discrimination law will never be the complete answer to achieving workplace equality and economic self-sufficiency for women, individuals with disabilities, or others who fall outside of the majority norms around which the conventional workplace has been built. Nevertheless, employment discrimination law remains an important and evolving tool for this endeavor, in part because of the enduring resonance of its equal opportunity message.[469]

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467. *See* Travis, *The Virtual Workplace*, *supra* note 16, at 325, 330 (noting that although there may be a "short-term risk of reinforcing gender stereotypes by characterizing work/family conflicts as discrimination against women, the disparate impact theory provides the long-term potential for creating a workplace that facilitates a blurring of traditional gender roles").

468. *Id.* at 329–31.

469. *See id.* at 320–21 (noting that one benefit of antidiscrimination law is "the power with which equal opportunity rhetoric resonates with the American public"); Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. L. ISSUES 279, 316–17 (1998) (arguing that "equality rhetoric (and discrimination claims, which are really claims of equality withheld), are the strongest weapons Americans [sic] feminists have in a culture deeply committed to a self-image of equality"); *see also* Dowd, *supra* note 15, at 154–55 (noting that a benefit of using antidiscrimination law in the work/family context is that it "takes advantage of an existing set of ideas and legal categories that retain great power and persuasive capacity").

Lifting the lens of workplace essentialism would allow courts to go even further in achieving equal opportunity by allowing the ADA and Title VII to restructure the conventional design. With the lens of workplace essentialism removed, courts no longer will be able to treat exclusionary default structures as "essential job functions" that disqualify individuals with disabilities from the ADA's protected class. Courts no longer will be able to treat exclusionary aspects of the full-time face-time norm as *non*-practices that are shielded from disparate impact challenges under Title VII. And courts no longer will be able to dismiss challenges to exclusionary organizational norms at an early motion stage. Instead, courts will be forced to parse out the nonessential, malleable ways in which job tasks are organized from the actual tasks that comprise the essence of the job itself. As a result, employers will be pushed to confront their own reliance on workplace essentialism as they try to defend the conventional workplace design under the ADA's "undue hardship" or Title VII's "business necessity" defenses. When employers take on this justification burden, they may discover that the business need for the full-time face-time norm is, in many circumstances, less than they assumed under the inertia of an essentialist view.

Interpreting the ADA and Title VII consistently with their transformative objectives and potential is thus a necessary step to break the capture cycle under which courts allow entrenched social norms to constrain their interpretation of employment discrimination laws, and that interpretation, in turn, entrenches the social norms even deeper. As Harry Chapin's song recognizes with such simplicity, flowers are not just red, and green leaves are not just green. In painting the picture of the essential workplace, it is indeed "the time for art"—the time to see our workplaces in ways other than "the way they always have been seen."[470]

470. CHAPIN, *supra* note 1.