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Shifting the Burden: A Proposal for Practical Application of the Interactive Process Duty in Disability Accommodations

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I. INTRODUCTION

Existing laws prohibit intentional disability discrimination and require employers to provide reasonable accommodations to help disabled employees succeed in the workplace. Such laws are beneficial as far as they go, but they do not completely address the subtle biases and systemic failures that continue to adversely affect disabled workers. The Americans with Disabilities Act of 1990 ("ADA"),[1] the cornerstone of protection for workers with disabilities, enables victims of discrimination to seek compensation after the fact. The threat of liability under the ADA appears suited to deter obvious forms of discrimination, but the statute does not prospectively address the ignorance and miscommunication that continue to harm disabled employees.

To complement the ADA's basic tools, we need mechanisms to promote effective sharing of information. As Susan Sturm suggests, procedural safeguards can help minimize the influence that hidden biases have on minority employees, filling the gaps left by 'first generation' antidiscrimination laws.[2] An 'interactive process' between employer and employee to determine reasonable accommodations is one such safeguard to protect disabled workers from unintentional discrimination. An interactive process helps the employer and employee share information, ideas, and concerns about potential accommodations. Mutual exploration of possible accommodations can ensure that effective solutions are not overlooked. EEOC regulations and guidance documents emphasize the value of the interactive process, and many courts have affirmed its importance. This paper argues that the

[1] Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq (2006).
[2] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

employer's failure to engage in an interactive process should result in an evidentiary presumption that reasonable accommodation would have been possible without imposing undue hardship on the employer.

The proposed evidentiary presumption is necessary because the ADA does not explicitly require employers to engage in an interactive process, and imposes no specific penalty for the failure to do so. To date, jurists have struggled with questions of whether an interactive process is mandatory, and what the appropriate remedy should be for an employer's failure to engage. This analysis has been mired in confusion because the legal elements of an interactive process claim are inherently intertwined with the elements of a reasonable accommodation claim. The reasonable accommodation analysis was itself perplexing in the first place, and the jurisprudence deriving an interactive process requirement therefrom has been even more convoluted.

Despite recent mixed signals among the federal circuits on the issue, a growing majority appears to hold that there is no independent liability under the ADA for the failure to engage in an interactive process, separate from the related liability for failure to accommodate. And even if the ADA did explicitly require employers to engage disabled employees in an interactive process, such a mandate would be problematic. Independent damages for the failure to engage in the process, apart from damages for the failure to accommodate, would be difficult to apply in practice and could lead to undesirable results. What then, is the proper role of the interactive process duty under federal law?

As Sturm's analysis suggests, procedural mechanisms can enable us to promote the interactive process within the bounds of existing law, without assigning independent liability for the failure to engage. This paper argues that an evidentiary presumption should apply in cases where the employer failed to engage in an interactive process, shifting the burden to the employer to show that no reasonable accommodation was possible without undue hardship. This presumption would give employers a strong incentive to initiate an interactive process, while avoiding the pitfalls associated with an independent liability rule.

II. WHAT IS THE INTERACTIVE PROCESS, AND WHY DOES IT MATTER?

To comprehend the difficulty courts and litigants have faced in deciding how to treat the interactive process, we must first understand the related duty of reasonable accommodation, and the recent developments regarding its interpretation. The confusion surrounding the parties' relative burdens in accommodation cases provides a context that clarifies the value of the interactive process.

A. The Reasonable Accommodation Duty

The Americans with Disabilities Act (ADA) was enacted in 1990 to combat discrimination against people with disabilities. The ADA's statutory purpose includes the goal of providing "clear, strong, consistent, enforceable standards" to address disability discrimination.[3] Title I of the ADA governs disability discrimination and accommodation in the workplace.[4]

The ADA's primary mechanism to address disability discrimination in the employment context is the 'reasonable accommodation' requirement.[5] The ADA mandates that an employer must "mak[e] reasonable accommodations to the known physical or mental limitations of an . . . applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship" on the employer's business.[6] Reasonable accommodations under the ADA can take a variety of forms depending on the employee's disability and job duties.[7] Accommodations may include making existing facilities accessible, restructuring job duties or work schedules, reassigning the employee to a vacant position, acquiring specialized equipment, adapting the work area, or making

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3 42 U.S.C. § 12101(b)(2) (2006).
4 42 U.S.C. § 12111 *et seq* (2006).
5 42 U.S.C. § 12112(b)(5)(A) (2006).
6 *Id.*
7 The reasonable accommodation requirement applies to both current employees and applicants seeking employment. However, for the sake of simplicity I use the term 'employee' to refer to either an applicant or employee. The relevant analysis will be the same for members of either category.

other similar adjustments to suit the employee's capabilities.[8] The challenge is determining which, if any, potential accommodations will enable the employee to perform the necessary job duties, without imposing an 'undue hardship' on the employer.

The employee's unique personal knowledge of her own capabilities is obviously important to understanding what possible accommodations would enable her to perform the necessary functions of the job. Conversely, the employer's superior knowledge of its business operations is critical in determining whether a proposed accommodation would create an inordinate burden (i.e. undue hardship) on the employer's business. However, contrary to the statute's expressed purpose of promoting clarity and consistency, litigants and courts have had great difficulty interpreting the parties' relative burdens in accommodation cases, and this confusion has permeated the related interactive process jurisprudence as well.

B. The Supreme Court's Resolution of the Reasonable Accommodation Burden Issue Demonstrates the Need for the Interactive Process

In litigation where a plaintiff alleges an employer's failure to accommodate a disability, the parties' relative burdens regarding the reasonableness of a proposed accommodation under the plain language of the ADA are initially difficult to reconcile.[9] To prove a failure-to-accommodate claim under the ADA, a plaintiff must show (1) he has a disability, (2) he is otherwise qualified for his position, and (3) the defendant refused to make a reasonable accommodation.[10] (The first two elements of the claim, regarding the plaintiff's disability status and qualifications to work, pose interesting and challenging questions unrelated to the interactive process.) For present purposes, the key to an accommodation claim is the reasonableness of the requested accommodation.

The plaintiff in a failure to accommodate case can prevail by demonstrating that the employer

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8 42 U.S.C. § 12111(9) (2006).
9 *See* Reed v. Lepage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001).
10 Smith v. Ameritech, 129 F.3d 857, 866 (6th Cir. 1997).

denied a 'reasonable' request, unless the employer shows that the requested accommodation would have posed an 'undue hardship' on its business.[11] Some showing of cost-effectiveness seems inherent in both parties' burdens. Almost by definition, the plaintiff's burden to show reasonableness requires some demonstration that the requested accommodation is not exorbitantly expensive. "In short, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce."[12] And an accommodation that creates an inordinate financial burden on the employer will be considered to impose an 'undue hardship' on the business.[13] These burdens thus appear to be two sides of the same coin, requiring both parties to show whether a proposed accommodation is cost-effective.[14] For many years, litigants and judges in disability accommodation cases were left scratching their heads: which party must prove whether an accommodation is cost effective?

For more than a decade after the ADA's enactment, the courts of appeal failed to reach an agreement on the relative allocation of burdens between the parties in failure to accommodate cases.[15] In 2002, the Supreme Court finally addressed the matter in US Airways, Inc. v. Barnett, holding with regard to cost-effectiveness that a plaintiff need only show that the requested accommodation would not be inordinately expensive in the usual run of cases.[16] Once the plaintiff has met this standard, the burden then shifts to the defendant to show special circumstances demonstrating undue hardship in the particular case.[17]

The rule announced in Barnett thus establishes two moments of importance in any case involving a failure to accommodate claim. First, the employee/plaintiff must identify some facially feasible accommodation that would enable her to perform the essential functions of the position, and which is generally not far more costly than it is worth. Second, if the plaintiff meets the facially

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[11] 42 U.S.C. §12112(b)(5)(A) (2006).
[12] Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).
[13] Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993).
[14] Reed, 244 F.3d at 258.
[15] *Id.*
[16] 535 U.S. 391, 401 (2002).
[17] *Id.*

feasible standard, the burden shifts to the employer to show why, despite being cost-effective in the run of cases, the employee's requested accommodation would pose an undue hardship on the business under the particular circumstances of the case.

The employee will typically have adequate information about her own abilities to assess the reasonableness of her accommodation request. But she may not fully understand the requirements of the job or how a requested accommodation would function within the employer's overall business operation. And the employer may be aware of alternative possible accommodations that the employee did not imagine. For the employee to adequately comprehend these factors, some exchange of information must occur. Therein lies the importance of the interactive process.

C. What is the Interactive Process?

EEOC guidance documents describe the basic theory behind the interactive process. "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."[18]

The interactive process is a logical and practical step to identify possible accommodations, since both parties can offer information which the other may not have known, and thereby improve the efficiency of the accommodation process. "An employer should always consult the person with the disability as the first step in considering an accommodation. Often this person can suggest much simpler and less costly accommodations than the employer might have believed necessary."[19] EEOC's Compliance Manual offers a clear example of the value of the interactive process, involving a small

[18] 29 C.F.R. Pt. 1630, App. § 1630.9 (2006).

[19] EEOC COMPLIANCE MANUAL, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, Section 3.7: *How Does an Employer Determine What Is a Reasonable Accommodation?*, available at http://www.adaportal.org/Employment/Browse_TAM_I/Chapter_III_3-7.html

employer who believed it would be necessary to install a special lower drinking fountain for an employee who uses a wheelchair. However, the employee told the employer that he could use the existing fountain if paper cups were provided in a holder next to the fountain.[20]

While the drinking fountain example demonstrates that accommodations in some circumstances can be quite simple, in practice identifying appropriate accommodations can often be complicated. The attempt to find reasonable accommodations is more likely to be frustrating and fruitless if the process is opaque. Appropriate interaction can solve the problem.

Several facets of the interactive process are worthy of discussion; for example, questions remain regarding what actions by the employee will trigger the employer's duty to engage, and what steps would satisfy the employer's duty. However, such concerns are beyond the scope of this paper. For present purposes, the essential characteristic of the interactive process is the give-and-take between the employer and employee. If an employer believes a particular request is not feasible, it should suggest an alternative rather than ending the discussion; "if the employee has requested an appropriate accommodation, the employer may not simply reject it without offering other suggestions or at least expressing a willingness to continue discussing possible accommodations."[21]

D. Why is the Interactive Process Important?

The interactive accommodation process is valuable both in cases where reasonable accommodation is possible, and where no accommodation can be found. In either case, the process can help the parties avoid unnecessary litigation. In addition, the process may serve a therapeutic function for the disabled employee, providing a cooperative forum for discussion of accommodations, as an alternative to the combative and stressful litigation process.

The interactive process has obvious practical value in cases where reasonable accommodation is

[20] *Id.*
[21] EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 806 (7th Cir. 2005).

possible; the process serves as a forum for the parties to develop and implement an appropriate accommodation strategy. "Without the interactive process, many employees will be unable to identify effective reasonable accommodations."[22] Sharing information about the employee's abilities and the employer's operations allows the parties to achieve reasonable accommodation, to their mutual benefit. For example, where an employee requests reassignment to another position in the company,

> [t]he employers will not always know what kind of work the worker with the disability can do, and conversely, the worker may not be aware of the range of available employment opportunities, especially in a large company. Thus, the interactive process may often lead to the identification of a suitable position.[23]

By enabling effective accommodation, the interactive process allows the employee to go to work and avoids drawing the parties into unnecessary litigation. As one corporate manager admitted at trial, engaging the employee in a dialogue to investigate her abilities was "a step that [the employer] could have taken to avoid some of what we're going through here today."[24]

The interactive process can also help prevent unnecessary litigation in cases where reasonable accommodation is ultimately not possible. Though the employer may be able to quickly determine that no effective accommodation would be reasonably affordable, the employee may lack the necessary information to reach that conclusion. Absent an interactive dialogue, the employee may be inclined to pursue litigation, only to find after a resource-intensive discovery process that no reasonable accommodation could be identified that would not impose an undue hardship on the employer's business. Such an approach leads to inefficient use of the judicial system. In contrast, an interactive process would have enabled the parties to avoid the expense of litigation by bringing the relevant information together, earlier in the game, in an informal collaborative setting. The employee could thus understand why the employer refused a particular accommodation request. Rather than being left to think that her employer was illegally refusing her request, the employee would be able to understand

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[22] Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), *vacated on other grounds*, 535 U.S. 391 (2002).
[23] Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997).
[24] Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894, 903 (8th Cir. 2006).

the reasons why the employer could not devise a feasible accommodation for her disability. If the interactive process does not occur, the only real discussion of the relevant issues may come much later, at significant expense, through adversarial legal proceedings.

In a similar way, the interactive process may also have a therapeutic value. An employee is more likely to be angry at an employer who simply ignored her accommodation request, than if the employer had engaged in a meaningful attempt to identify accommodations.[25] Absent an interactive dialogue, the employee may feel hurt by the employer's apparently stubborn or unreasonable refusal of her request. The stress and anxiety of experiencing a disability may alone be severe;[26] the added feelings of rejection and abandonment by one's employer would literally add insult to injury. After engaging in an interactive process to discuss the possibilities, the employee will be able to understand the rational basis for the decision and therefore will be less likely to feel hurt or angry.

III. EXISTING MODELS TO PROMOTE THE INTERACTIVE PROCESS

As discussed above, a dialogue with the disabled employee can be an important step in arranging appropriate accommodation. The interactive process allows employers and employees to identify potential accommodations and to address concerns if particular accommodations might impose an undue hardship on the employer. The Equal Employment Opportunity Commission (EEOC) has recognized this value, issuing regulations stating that an interactive process "may be necessary" to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[27] But despite the practical, sensible appeal, the only existing legal mechanisms to encourage employers to engage in the interactive process are inconsistent and

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[25] I do not mean to imply that the employee will not feel angry or frustrated in latter case, only that anger and frustration are more likely when the decisionmaking process is opaque rather than transparent.

[26] National Institute of Neurological Diseases and Stroke, National Institute of Aging, and National Institute of Mental Health, *Cognitive and Emotional Aspects of Parkinson's Disease: Working Group Meeting*, http://www.ninds.nih.gov/news_and_events/proceedings/cognitive_meeting_2001.htm (noting that "the psychosocial stress of having a chronic disease and disability may cause depression.")

[27] 29 C.F.R. §1630.2(o)(3) (2006).

weak. Courts have pondered imposing independent liability, but there is no clear legal mandate and, even if there were, the results would be problematic. Courts should therefore seek a new approach to promote the interactive process.

A. Liability for Failure to Accommodate Creates an Inconsistent Incentive For Employers to Engage in the Interactive Process

The threat of liability for failure to accommodate provides one incentive to engage in the process. To the extent that an interactive dialogue will help employers develop satisfactory accommodation strategies, the interactive process can benefit both the employer and employee by enabling successful accommodation in the first instance, thus avoiding the need for litigation. In contrast, an employer who fails to engage in the interactive process runs a risk that it will overlook an opportunity to accommodate a disabled employee, and thereby violate the ADA.[28] This appears to be the original conception of the interactive process -- as a method to achieve reasonable accommodation, rather than an end in and of itself. However, the indirect incentive of achieving an accommodation does not consistently promote the interactive process. The interactive process imposes some transaction costs, and represents only one way for an employer to avoid liability on a failure to accommodate claim. Other mechanisms that allow the employer to avoid liability, without actually providing any accommodation, limit the effectiveness of accommodation liability as an incentive to engage in the interactive process.

First, an employer obviously avoids liability if the employee does not to sue for the failure to accommodate. A disabled employee who was denied an accommodation may decide not to sue for various reasons (such as cost, delay, stress, or lack of legal expertise) unrelated to the merits of the claim.[29] In such cases, the employer has no visible incentive to engage in the interactive process as a

[28] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 772 & n.16 (3d Cir. 2004).
[29] *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33

result of the failure to accommodate. Moreover, the employer's failure to engage in the interactive process may contribute to the employee's decision not to sue. An employee who has little or no information about the employer's reasons for refusing an accommodation request may be unable to recognize the merits of her own claim, let alone convince an attorney to represent her on a contingent basis. They may assume, not entirely unreasonably, that the employer must have had some good reason for refusing the request. In contrast, if an adequate interactive process had occurred, the employee would have at least some information to assess the reasoning behind the denial of her request, and thus a basis to decide whether to sue. Thus, some meritorious accommodation claims may be thwarted by the employer's failure to engage in the interactive process. Such a possibility suggests that the ADA, as presently interpreted, does not create a strong incentive for employers to engage in the interactive process.

Second, an employer can escape liability for failure to accommodate by demonstrating 'undue hardship' on its business. Thus, in cases where the employer properly determines that it cannot accommodate the employee without undue hardship, there is no enforceable penalty for the failure to engage in the interactive process. As discussed above, the employer's refusal to interact under such circumstances increases the likelihood that the employee will be emotionally harmed by the employer's refusal to provide information. But existing interpretations of reasonable accommodation liability provide no real incentive for the employer to interact in this scenario.

Third, under existing interpretations of the interactive process duty, the employer can escape liability for its failure to accommodate by showing that the employee failed to engage in the interactive process.[30] This defense would logically seem to require the employer to show that it made at least some attempt to engage the employee in a dialogue, which might in theory create a meaningful incentive for employers to do so. However, the equally plausible (and far less helpful) result is that

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LAW & SOC'Y REV. 67 (1999) (describing comparable litigation choices facing victims of sexual harassment).

[30] *See, e.g.*, Jackson v. City of Chicago, 414 F.3d 806, 814 (7th Cir. 2005).

accommodation cases will devolve into bickering over who was at fault for the failure of the interactive process. Courts are still struggling with this issue, as there is no "hard and fast rule" for assigning responsibility when a "breakdown" in the interactive process occurs.[31] As long as employers can plausibly view the failure of the interactive process as improving their chance of avoiding reasonable accommodation liability, such liability will be insufficient to effectively promote the process.

Finally, the lingering confusion surrounding the role of the interactive process, discussed further below, indicates that the threat of reasonable accommodation liability is not a sufficient incentive to promote the interactive process. To believe that the reasonable accommodation duty adequately encourages interaction, we would need to assume that all employers are so conscious and diligent in providing accommodations that they would exceed their duties under the statute by instituting precautionary procedures to avoid the possibility of wrongly denying an accommodation request. While some employers may indeed follow such an approach, the steady stream of accommodation cases in the courts suggests that many do not. The continued development of jurisprudence regarding the interactive process suggests that there is a need to further promote the process, beyond the existing incentive to avoid failure-to-accommodate liability.

B. Damage Limitation under §1981a Offers a Limited Incentive For Employers to Engage in the Interactive Process

Congress has created a statutory incentive for employers to engage in the interactive process. Engaging in the interactive process effectively shields an employer from damage liability on disability accommodation claims. However, this statutory mechanism is limited in several respects that prevent it from significantly affecting employers' behavior.

42 U.S.C. §1981a(a)(3) bars a plaintiff from recovering compensatory or punitive damages on a claim for an employer's failure to accommodate under the ADA, if the defendant can show that it made

[31] *Id*. at 813.

"good faith efforts, in consultation with the person with the disability ... to identify and make a reasonable accommodation."[32] The statutory reference to the employer's good faith efforts, in consultation with the disabled employee, essentially refers to the same sort of interactive process as recommended in EEOC's guidance.[33] §1981a(a)(3) thus enables employers in reasonable accommodation cases to escape damage liability by showing that they engaged in an interactive process with the employee, even if the employer is ultimately found liable for the denial of reasonable accommodation. However, for two reasons, §1981a(a)(3) provides only a weak incentive for employers to engage in the interactive process.

First, the §1981a(a)(3) protection applies only narrowly to the plaintiff's accommodation claim; the employee may still be able to recover damages for related claims such as retaliation or harassment, which are not affected by the §1981a(a)(3) defense.[34] Plaintiffs' attorneys typically include several related claims and causes of action in a lawsuit against an employer for failure to accommodate a disability, and the basis for damages often overlaps among the claims. Thus, if an employer is found liable for the failure to accommodate, it will often be held liable for the same total damages under a separate legal theory, even if §1981a(a)(3) technically operates to preclude the plaintiff from recovering damages on the accommodation claim.

Second, the §1981a(a)(3) protection is not a complete affirmative defense to the accommodation claim; the statutory defense applies only to compensatory and punitive damages. The employer who establishes the defense may still be found liable for the accommodation violation, and the statute does not prevent a plaintiff from obtaining other remedies. Injunctive relief including reinstatement may be available, and the court may award backpay and frontpay to the aggrieved

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[32] 42 U.S.C. §1981a(a)(3); *see also* Rascon v. U.S. West Communs., 143 F.3d 1324, 1336 (10th Cir. 1998).

[33] EEOC Compliance Manual, *A Technical Assistance Manual On The Employment Provisions (Title I) Of The Americans With Disabilities Act*, Section 3.7: How Does an Employer Determine What Is a Reasonable Accommodation?

[34] See Foster v. Time Warner Entm't Co., L.P., 250 F.3d 1189, 1198 (8th Cir. 2001)(approving trial court's decision not to instruct the jury on the §1981a(a)(3) defense, because plaintiff claimed retaliation rather than failure to accommodate); United States EEOC v. AIC Sec. Investigations, 55 F.3d 1276, 1285 (7th Cir. 1995)(upholding damage award over employer's assertion of good faith consultation defense, where plaintiff alleged discriminatory termination, not failure to accommodate).

employee. A court may also award attorney's fees and costs on a failure to accommodate claim.

These limitations leave §1981a(a)(3) as only a weak incentive for employers to engage the interactive process. And while the ADA offers this slight incentive for employers to engage in the process, it provides no corresponding disincentive for failing to do so. A more effective solution would put employers at a disadvantage in litigation in response to their failure to engage in the interactive process, adding a stick to complement the §1981a(a)(3) carrot.

C. Independent Liability: Though Some Courts Have Considered Imposing Liability For the Failure to Engage in the Interactive Process, Separate From Accommodation Liability, Such a Regime Would be Problematic in Practice.

1. *The Jurisprudence Regarding Independent Liability is Unclear*

The statutory text of the ADA does not explicitly mention an interactive process; under federal law, the duty to engage in an interactive dialog is based on EEOC's guidance documents interpreting the accommodation requirement. And the language of the pertinent regulations is not clear enough to be binding. The EEOC guidance only says that "it may be necessary" for an employer to engage in an interactive process with a disabled employee, without specifying what circumstances would make it necessary, or what the remedy should be for an employer's failure to engage.[35] Moreover, EEOC's guidance on the subject states that "EEOC regulations require, when necessary, an informal, interactive process to find an effective accommodation."[36] The redundant statement that an act is required 'when necessary' fails to clarify the matter.

Much of the language courts have used in describing the interactive process has been vague and non-committal. The typical formulation is that the ADA "envisions" an interactive process to

[35] 29 CFR §1630.2(o)(3) (2006).
[36] EEOC COMPLIANCE MANUAL, *supra* note 19.

determine disability accommodations.[37] Courts using such terminology have offered little guidance in how to treat a failure of the 'envisioned' process.

Several cases suggest that there may be a basis for independent liability under the ADA for the failure to engage in the interactive process. In the words of one First Circuit opinion, "[t]here may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA."[38] And a recent Tenth Circuit opinion appears to have upheld liability against the employer based primarily on the interactive process failure, without considering whether the plaintiff proved that reasonable accommodation was actually possible.[39] Such cases have often employed language indicating that the interactive process is mandatory, while not directly addressing what the remedy for the failure to engage. For example, according to a recent Eighth Circuit decision, an employer "must" engage in an interactive process to identify potential accommodations for the employee's disability.[40] Other decisions have acknowledged the possibility of independent liability under the ADA, but explicitly left the question open. A Second Circuit panel recently remanded a case to the district court for consideration of the independent liability issue, stating in an unpublished opinion that "[we] have yet to determine . . . whether an employer's failure to carry out such an interactive process gives rise to an independent cause of action."[41]

Some of the leading cases in this area reflect the reign of confusion regarding the interactive process. The Ninth Circuit opinion in Barnett v. U.S. Air, Inc. included language apparently supporting a theory of independent liability for failure to engage in the interactive process litigation context:

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37 *See, e.g.*, Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 218 (2d Cir. 2001).
38 Jacques v. Clean-Up Group, 96 F.3d 506, 515 (1st Cir. 1996).
39 Bartee v. Michelin North America, Inc., 374 F.3d 906, 916 (10th Cir. 2004).
40 Canny, 439 F.3d at 902.
41 Hartnett v. Fielding Graduate Inst., No. 05-6686-cv, 2006 U.S. App. LEXIS 24128 (2d Cir. 2006). Note that Hartnett is not an employment case, but rather a suit by a student against her graduate school. However, the ADA mandates that educational institutions reasonably accommodate students just as employers are required to accommodate employees; the interactive process duty should apply similarly in both contexts.

> Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended.[42]

The Barnett court further appeared to support an independent liability regime by holding that an employer cannot prevail at the summary judgment stage "if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process."[43] But Barnett did not in fact endorse independent liability for failure to engage in the interactive process. Rather, the Ninth Circuit's en banc opinion held that employers who failed to engage in the interactive process would face liability only "if a reasonable accommodation would have been possible."[44]

Other courts have sidestepped the interactive process analysis where doing so was procedurally convenient, suggesting that the question of independent liability remains unanswered. For example, one First Circuit panel, declining to address the interactive process issue, described it as an 'additional theory' that might have established 'an independent basis' for ADA liability.[45] The United States Supreme Court majority also appears to have consciously avoided the issue in Barnett, the most significant case involving the interactive process which it has thus far reviewed. Justice Stevens' concurrence in Barnett notes that the Ninth Circuit's holding regarding liability for failure to engage in the interactive process was 'untouched' by the high court's decision.[46]

However, the most common approach appears to be a curious construction that, while liability may result from an employer's failure to engage in the interactive process, this liability will only attach where a reasonable accommodation would otherwise have been possible. According to one Tenth Circuit decision applying this approach, "[e]ven if [the employer] failed to fulfill its interactive

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[42] Barnett, 228 F.3d at 1116.
[43] *Id*.
[44] *Id*.
[45] *See* Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 33 & n.4 (1st Cir. 2000).
[46] US Airways, Inc. v. Barnett, 535 U.S. 391, 407 (2002) (Stevens, J., concurring).

obligations to help secure a reassignment position, [the employee] will not be entitled to recovery unless he can also show that a reasonable accommodation was possible."[47] In the words of one Seventh Circuit opinion, if the employee cannot show that a reasonable accommodation would have been possible, "the breakdown of the interactive process would be academic."[48] Under this interpretation, interactive process liability is a strain of failure-to-accommodate liability, and ultimately requires the plaintiff to prove the existence of a reasonable accommodation that would not impose an undue hardship on the employer.

Though the jurisprudence has been inconsistent, a four factor test has emerged to assess interactive process claims. A plaintiff alleging that an employer failed to engage in an interactive process must show (1) the plaintiff was disabled, (2) the plaintiff requested accommodations, (3) the defendant did not assist in seeking accommodations, and (4) the plaintiff could have been reasonably accommodated but for the defendant's lack of good faith interaction.[49] Comparison to the elements of a failure-to-accommodate claim reveals that the interactive process liability under this approach depends on proving the underlying accommodation claim, and thus that interactive process liability will only be imposed where the defendant would also be liable for a failure to accommodate. To prove a failure-to-accommodate claim under the ADA, a plaintiff must show (1) he has a disability, (2) he is otherwise qualified for his position, and (3) the defendant refused to make a reasonable accommodation.[50] The interactive process claim thus relies on the exact factors considered in the failure-to-accommodate case, with an added inquiry regarding good faith interaction.

Other cases have recognized the confusion, noting that "there is no "hard and fast rule" for assigning responsibility when a "breakdown" in the interactive process occurs."[51] The First Circuit may have understated the problem, noting that "the scope of the employer's obligation in this

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47 Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174 (10th Cir. 1999).
48 Hansen v. Henderson, 233 F.3d 521, 523 (7th Cir. 2000).
49 *See* Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1021 (8th Cir. 2000).
50 *See* Smith v. Ameritech, 129 F.3d at 866 (6th Cir. 1997).
51 Jackson v. City of Chicago, 414 F.3d 806, 813 (7th Cir. 2005).

interactive process is not crystal clear."[52] In addition, various scholars have observed the jurisprudential disarray regarding the ADA's interactive process and the EEOC guidelines.[53] Autry concludes that "the vocabulary chosen by the courts to articulate the employer's relationship to the interactive process is pervasively confusing."[54]

The existing jurisprudence contains a striking incongruity with regard to the interactive process. While, as demonstrated above, courts have not clearly determined the result of the employer's failure to participate in the process, there seems to be a consensus that the employee's failure to engage in the interactive process is fatal to a failure-to-accommodate claim.[55] This approach has obvious intuitive appeal; it seems unfair to require an employer to provide accommodations for an employee who refuses to provide information about the limitations caused by her disability. But, applied equitably, this logic also supports the view that the employer's failure to engage in the interactive process should have some effect on subsequent litigation. If an employer will not be subject to independent liability for the failure to engage, fairness suggests that its refusal to share pertinent information should at least be taken into account in assessing liability for the failure to accommodate.

In this context, courts, litigants, and employers may be understandably confused about the role that the interactive process plays in disability accommodation cases. In the face of such uncertainty, we should consider whether independent liability is desirable, and if not, what an appropriate alternative would be.

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[52] Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 109 (1st Cir. 2005)

[53] *See* Alysa M. Barancik, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process"* 30 LOY. U. CHI. L.J. 513, 527-28 (1999) (noting the "confusion surrounding the interpretation" of the ADA's interactive process and the EEOC guidelines); Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 941 (2003) (noting that the circuit courts are "divided with respect to the appropriate consequences for failing to engage in the interactive process").

[54] John R. Autry, *Reasonable Accommodation under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No,"* 79 CHI.-KENT. L. REV. 665, 684 (2004).

[55] *See, e.g.*, Steffes v. Stepan Co., 144 F.3d 1070, 1073 (7th Cir. 1998) (holding that employer could not be held liable for failing to provide reasonable accommodation, where the employee "failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions.")

2. *Independent Liability Would Be Problematic*

Interpreting or amending the ADA to impose independent liability would be one way to resolve the confusion surrounding the interactive process.[56] However, such a mandate would likely raise more problems than it would solve. Examining the permutations of interaction and accommodation demonstrates that imposing independent liability would be generally either have no impact, or else would have problematic results. Consider the four general scenarios:

a. Employer Engages in Interactive Process, and Grants Requested Accommodation. (Yes Interaction/Yes Accommodation)

In this scenario, the employer and employee engage in an interactive process to identify and analyze possible accommodations. This process leads to implementation of a successful accommodation strategy which allows the employee to perform all necessary job duties. Both parties have complied with the law and are presumably satisfied; there is no cause to consider liability against the employer for an accommodation violation, and no basis for independent liability relating to the interactive process duty.

b. Employer Engages in Interactive Process, but Denies a Reasonable Accommodation. (Yes Interaction/ No Accommodation)

Here the employer and employee engage in an interactive process. Yet, despite good faith negotiation by both sides, they are unable to identify mutually acceptable accommodations. The employee may sue the employer for the failure to accommodate. There is no cause to consider an independent claim related to the interactive process because the employer has negotiated in good faith. And the employer's good faith interaction obtains the benefit of 1981a(a)(3), so the employee cannot recover compensatory or punitive damages for the failure to accommodate. However, the employer is

[56] At least one state, California, has enacted an explicit statutory requirement that employers engage disabled employees in an interactive process. CAL. GOVT. CODE § 12940(n) (2006). However, none of the reported cases applying this provision have addressed how to calculate damages or separate interactive process liability from accommodation liability. *See, e.g.*, Claudio v. Regents of the University of California, 35 Cal. Rptr. 3d 837 (Cal. Ct. App. 2005). Such concerns may be addressed in the near future; until then, litigants are left to their own devices in applying the statute.

not completely protected from liability for the failure to accommodate. If the employer's requested accommodation is found by the court to be reasonable, the employer may be ordered to reinstate the employee and pay any appropriate restitution not precluded by 1981a(a)(3).

c. Employer Fails to Engage in Interaction (No Interaction/No Accommodation).

In this scenario, the employer is informed of the employee's disability but declines to engage in an interactive process and refuses to provide a reasonable accommodation. In a suit against the employer for the failure to accommodate, the employee may recover all damages attributable by the employer's failure to accommodate; 1981a(a)(3) will not apply because the employer has not negotiated in good faith. Imposing independent liability in this case for the failure to engage in the interactive process appears unnecessary and redundant; damages for the employer's liability for the failure to accommodate will presumably compensate the employee fairly. It is difficult to imagine how a judge or jury could distinguish damages caused by the failure to engage from damages caused by the underlying failure to accommodate. Independent liability in this scenario would thus add no real incentive for the employer to engage in the interactive process.

d. Employer Fails to Engage in Interaction, but Provides Reasonable Accommodation (No Interaction/Yes Accommodation).

In this scenario, no interactive process occurs, but the employer manages to unilaterally select an effective accommodation. As the Tenth Circuit has recognized, "there may be occasions where a reasonable accommodation can be determined without an interactive process."[57] This may occur frequently in cases where the employee's disability is common and reasonable accommodations are obvious. There is no reason for the employee to be upset or to sue, nor are there any apparent damages. Imposing independent liability for the employer's failure to engage in the interactive process in this context would be illogical for two reasons. First, the result that we want to encourage (i.e. reasonable accommodation) has occurred; liability for the failure to engage would not advance the interests of the

[57] Midland Brake, 180 F.3d at 1172.

disabled employee. Second, there would be no logical way to quantify the employee's damages caused by the failure to engage. Imposing a standard penalty for the failure to engage (i.e. statutory damages) would be unsatisfactory because the amount would be arbitrary. But an individualized inquiry into the damages caused by the lack of interaction in each case, where accommodation was successfully provided, would be a fool's errand.

Consider an employee who works in a call center answering customer inquiries by telephone, and then loses her hearing. The employer unilaterally chooses to transfer the employee to a position in which she answers customer inquiries via email. The employer fails to engage the employee in an interactive process, but nevertheless manages to provide a perfectly reasonable accommodation. Imposing independent liability against the employer for the failure to engage in this situation would make little sense.

An independent liability rule would thus apparently create several problems. First, in the 'No Interaction/ No Accommodation' scenario there would be no logical way to assign damages for the interactive process failure, separate from the reasonable accommodation failure. Where the employer has denied a reasonable accommodation, the ADA clearly provides remedies for the aggrieved employee. The employee can recover economic damages for lost wages and emotional distress caused by the denial of reasonable accommodation, and may recover punitive damages if the employer's actions in refusing the accommodation are found to be malicious or reckless.[58] If we sought to impose independent liability for the procedural failure, what additional compensation would the plaintiff gain? If the plaintiff would not gain any additional compensation, what would the benefit be?

Second, independent liability would unfairly punish the employer in the 'No Interaction/Yes Accommodation Scenario.' As the Tenth Circuit recognized in Midland Brake, there may be circumstances where the employer can appropriately accommodate the employee's disability without

[58] 42 USCS § 1981a(b)(1) (2006).

an interactive process.[59] Imposing independent liability for the employer's failure to engage in the interactive process in such a situation, after the employer provided reasonable accommodation, would not logically promote the goals of the ADA. And assuming the accommodation is adequate, there would not be any apparent method to identify damages attributable to the interactive process failure.

Third, an independent liability rule would reward employees who make unreasonable accommodation requests, hoping to catch an employer in a failure to interact. In theory, imposing true independent liability for the failure to engage would result in employer liability even in cases where the employee requested unreasonable accommodations. Jurists are rightfully wary of a rule that would potentially encourage frivolous claims. The interactive process should not be construed to mean "that the employer has the unreasonable burden of raising and discussing every conceivable accommodation with the disabled employee."[60] Construing the interactive process inquiry as subordinate to the reasonable accommodation inquiry avoids this problem, as the employee still must demonstrate the reasonableness of her request accommodation in order to prevail.

D. Current Mechanisms are Inadequate to Promote the Interactive Process;

Current interpretations of the interactive process fail to accomplish the ADA's statutory goal of providing "clear, strong, consistent, enforceable standards" to address disability discrimination. Although the associated reasonable accommodation duty operates to encourage the interactive process, the underlying accommodation analysis is fraught with its own complexities and has not guided courts or litigants to any clear answers regarding the interactive process. §1981a(a)(3) seems like a logical starting place for encouraging the interactive process, but it does not go nearly far enough, creating only a limited incentive for employers to engage in the interactive process. And independent liability for failure to engage would seem to be going too far; the current statute does not explicitly impose

[59] Midland Brake, 180 F.3d at 1172.
[60] Tobin, 433 F.3d at 109 (1st Cir. 2005).

independent liability, and even if the ADA were amended to do so, such a requirement would be problematic in practice.

We should thus look for middle ground, seeking a mechanism to effectively promote the interactive process without creating unwarranted confusion or unintended results.

IV. A PATH OUT OF THE WOODS: AN EVIDENTIARY PRESUMPTION

The conclusion that the failure to engage in an interactive process should not result in independent liability need not end the inquiry regarding how to construe the process to best serve the statutory purpose of reducing disability discrimination. Our goal is to effectively promote the interactive process, without incurring the disadvantages of an independent liability regime. I propose that the employer's failure to engage in an interactive process, once an employee requests disability accommodation, should give rise to an evidentiary presumption that reasonable accommodation would have been possible without undue hardship on the employer's business. This presumption would in effect shift the burden from the plaintiff to the defendant to show whether accommodation was possible.

A. The Evidentiary Presumption Would Effectively Promote the Interactive Process

The proposed evidentiary presumption would effectively promote the interactive process, while avoiding the unintended consequences and perverse incentives that an independent liability regime would generate. This presumption would strike at the heart of the gap in existing disability discrimination jurisprudence: the employee's lack of information about the employer's business operations, which puts the employee at a disadvantage in identifying potential accommodations and thus in enforcing the right to accommodation. By increasing the likelihood of liability for failure to accommodate, the presumption would force employers to be more careful in responding to accommodation requests. Aggrieved employees, who otherwise may have simply decided not to sue,

will be more likely to try to enforce their rights if the employer's information advantage is weakened.

While the evidentiary presumption encourages employers to engage all disabled employees, it would avoid many of the harms of independent liability discussed above. First, there would be no need to attempt to assign independent damages for the interactive process failure; under the presumption, the aggrieved employee could recover only the damages traditionally associated with a failure to accommodate claim. Second, employers who manage to provide accommodations without an interactive process would be able to avoid liability despite the presumption. The presumption would have no effect on the outcome if the employer was confident that it could prevail on the merits of the reasonable accommodation claim regardless of the evidentiary burden. Third, employers would not face a threat of liability for failing to interact with employees regarding frivolous accommodation requests.

And this evidentiary presumption would neither conflict with nor frustrate the purpose of 42 U.S.C. §1981a(a)(3). Indeed, the two would serve as complementary mechanisms to encourage employers to engage in the interactive process. The statute applies in the employer's favor when it has engaged in an interactive process, and my proposed evidentiary presumption would apply against the employer when it failed to do so. As described above, the §1981a(a)(3) defense is limited in scope, and is therefore not alone sufficient to substantially change the way employers handle disability accommodation issues. A judicial approach that would put employers at a relative disadvantage for failing to engage in the interactive process could provide an added incentive to affect employers' behavior.

B. The Supreme Court Endorses Consideration of Procedures in Allocating Evidentiary Burdens.

As Sturm suggests, various judicial mechanisms can be applied to make an "administrative

problem-solving process a part of an employer's legal obligation."[61] Sturm notes that the Supreme Court has demonstrated such an approach in the sexual harassment context in *Burlington Industries, Inc. v. Ellerth*.[62] In *Ellerth*, the Court endorsed an approach to consider an employer's sexual harassment complaint procedure as part of an affirmative defense (the other part being that the employee failed to use the complaint procedure) to an employee's harassment claim.[63] As with the interactive process to determine disability accommodations, there is no independent legal requirement that private employers establish a formal procedure to address sexual harassment complaints, and thus no basis for independent liability for failure to offer such a process. Still, the Supreme Court held that the employer's offer of a complaint process can be considered in assessing liability in a sexual harassment claim. Similarly, despite the absence of a statutory command to engage in the interactive process, courts can and should consider the employer's willingness or refusal to engage in an interactive process in assessing liability on a reasonable accommodation claim.

As Sturm also notes, the Supreme Court endorsed the view that an employer's procedural approach to decisionmaking may be relevant to liability in disparate impact discrimination cases in *Watson v. Ft. Worth Bank & Trust* .[64] In *Watson*, the Court noted that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[65] The Court explained that "[i]f an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."[66] The Court's logic in *Watson* likewise makes sense in the disability discrimination context. If an employer uses an inadequate unilateral process to decide how to accommodate disabled employees, and the effects are the same as if the decisionmaking process were

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61 Sturm, *Second Generation Employment Discrimination*, supra note 2, at 482.
62 524 U.S. 742, 765 (1998).
63 *Id*.
64 487 U.S. 977, 990-991 (1988); Sturm, *Second Generation Employment Discrimination*, supra note 2, at 486.
65 Watson, 487 U.S. at 987.
66 *Id*. at 990-991

pervaded by intentional discrimination (i.e. the employer denies a reasonable accommodation), courts should be free to interpret the procedural inadequacy as evidence of discrimination, shifting the burden of proof from plaintiff to defendant.

The United States Supreme Court expressly adopted a burden-shifting approach *McDonnell Douglas Corp. v. Green*.[67] Interpreting the *McDonnell Douglas* burden shifting analysis, the Supreme Court has stated that "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."[68] Similarly, under the proposed evidentiary presumption, establishment of the employer's failure to engage in the interactive process creates a presumption that the employer violated the statute, and thus that the employer could have accommodated the employee without an undue hardship.

Following the Supreme Court's lead in *Ellerth*, *Watson*, and *McDonnell Douglas*, it is clear that courts are capable of considering companies' internal processes in the employment discrimination context and shifting burdens accordingly.

V. CONCLUSION

Current interpretations of the interactive process duty do not accomplish the ADA's statutory purpose of providing "clear, strong, consistent, enforceable standards" to address disability discrimination. And imposing independent liability for an employer's failure to engage in the interactive process is not a practical solution.

To effectively promote the interactive process while avoiding the problems associated with independent liability, courts should treat the employer's failure to engage in an interactive process as creating a presumption that reasonable accommodation was possible, shifting the burden of proof on this point from employee to employer. This evidentiary presumption would give employers an

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[67] 411 U.S. 792 (1973).

[68] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

appropriate incentive to engage all disabled employees in an interaction to determine accommodation, without stretching the ADA beyond its text.