

1-1-2003

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## Recommended Citation

Autry, John R., "Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "YES" But the Law Says "NO"" (2003). *Louis Jackson National Student Writing Competition*. 37.  
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REASONABLE ACCOMMODATION UNDER THE ADA: ARE  
EMPLOYERS REQUIRED TO PARTICIPATE IN THE  
INTERACTIVE PROCESS? THE COURTS SAY “YES” BUT  
THE LAW SAYS “NO”

JOHN R. AUTRY\*

INTRODUCTION

The Americans with Disabilities Act (“ADA”)<sup>1</sup> takes clear aim at a pervasive and enduring societal problem: prejudice against the disabled.<sup>2</sup> The Act reflects an unambiguous congressional intent to eliminate disability discrimination in all facets of society, including the workplace.<sup>3</sup> Before passage of the ADA, permanently disabled individuals had difficulty obtaining employment and those who became disabled while employed frequently were terminated.<sup>4</sup> These conditions resulted in high unemployment rates for the disabled, virtually guaranteeing that many lived out their lives trapped in cycles of poverty and social dependence.<sup>5</sup>

Title I of the ADA seeks to disrupt these cycles by mandating that employers take affirmative steps to employ and retain “quali-

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1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 *et seq.* (2000) (herein referred to as either the ADA or the Act).

2. *See* 42 U.S.C. § 12101(a)(2) (2000) (stating that “society has tended to isolate and segregate individuals with disabilities” and disability discrimination “continue[s] to be a serious and pervasive social problem”).

3. *See* 42 U.S.C. § 12101(b)(1) (2000) (stating that one purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

4. *See* H.R. Rep. No. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (“Two-thirds of all disabled Americans between the age of 16 and 64 are [not] working at all”); *see also* UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 29–31 (1983) (stating that “employer prejudices exclude handicapped persons from jobs” despite studies showing that disabled persons are “as productive” as their non-disabled co-workers).

5. *See* H.R. Rep. No. 101-485, *supra* note 4, at 32 (“Individuals with disabilities experience staggering levels of unemployment and poverty.”).

fied” disabled individuals.<sup>6</sup> An individual is “qualified” if, despite his disability, he can perform the “essential functions” of the at-issue job with or without reasonable accommodation.<sup>7</sup> Consequently, an employer must “reasonably accommodate” a “qualified” employee’s disability unless the proposed accommodation would inflict “undue hardship” on the employer.<sup>8</sup> An employer may be required to revise the non-essential functions of a position to fit an individual’s limitations, transfer an incumbent employee to a vacant position the core functions of which the employee can perform, or make its facilities accessible to disabled individuals.<sup>9</sup>

Thus, by imposing on employers a duty of “reasonable accommodation,” the ADA seeks to provide unemployed disabled persons the opportunity to work and disabled individuals already in the workforce the opportunity to stay there.<sup>10</sup> The apparent simplicity of this objective belies the dilemma courts have faced when attempting adequately and appropriately to implement a reasonable accommodation policy. Delineating the precise scope of an employer’s accommodation duty has proven particularly difficult.

Congress is at least partly to blame for this confusion, for lawmakers chose to superimpose upon workplace participants a quasi-“affirmative action” relationship without indicating how that relationship might function in practice.<sup>11</sup> For example, the ADA creates a reasonable accommodation substantive right for disabled individuals,<sup>12</sup> but Congress failed to provide any information regarding the proper method by which reasonable accommodations are fashioned.<sup>13</sup> There is simply no statutory commentary revealing the process an

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

7. 42 U.S.C. § 12111(8) (2000).

8. 42 U.S.C. § 12112(b)(5)(A) (2000).

9. 42 U.S.C. § 12111(9) (2000).

10. See Amy Renee Brown, Note, *Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process*, 8 WASH. U. J.L. & POL’Y 341 (2002) (stating that the ADA “promise[s] a bright future of inclusion and integration for individuals with disabilities” by “add[ing] them into the mainstream of American life”).

11. See Alysia M. Barancik, Comment, *Determining Reasonable Accommodations under the ADA: Why Courts Should Require Employers to Participate in an “Interactive Process”*, 30 LOY. U. CHI. L.J. 513, 524 (1999) (stating that lawmakers “failed to articulate many important details concerning reasonable accommodations”).

12. 42 U.S.C. § 12112(b)(5)(A) (2000).

13. See Barancik, *supra* note 11, at 524 (stating that “the ADA gives the employer little guidance about determining the reasonable accommodation, particularly the extent to which the employer must be involved in the process of finding the accommodation”).

employer should follow when attempting to accommodate its disabled employee.<sup>14</sup>

Armed with congressional authority to implement the ADA's employment provisions,<sup>15</sup> the Equal Employment Opportunity Commission ("EEOC") issued administrative rules that more specifically describe the method by which reasonable accommodation is to be achieved.<sup>16</sup> These regulations state that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."<sup>17</sup> The EEOC's Interpretative Guidance to its rules states (perhaps more emphatically) that "[t]he appropriate reasonable accommodation is *best* determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."<sup>18</sup>

Thus, the EEOC regulations endorse an interactive process, where both employer and employee strive to find a proper accommodation. Significant logical force underlies such a policy, for employment issues obviously are more easily resolved where employer and employees communicate and cooperate. However, the Supreme Court has yet to determine what level of deference, if any, courts must give to the EEOC Regulations and Interpretative Guidance under Title I.<sup>19</sup> Further, the EEOC statements utilize language that, contrary to the suggestion of some judges and commentators,<sup>20</sup> can

14. *See id.*

15. *See* 42 U.S.C. § 12116 (2000) (the EEOC "shall issue regulations . . . to carry out this [title]").

16. *See* 29 C.F.R. Pt. 1630 (1998).

17. 29 C.F.R. § 1630.2(o)(3) (1998).

18. 29 C.F.R. § 1630 app. ("Process of Determining the Appropriate Reasonable Accommodation") (emphasis added).

19. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999) ("Because both parties accept [the EEOC] regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any."); *cf.*, *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 194 (2002) ("Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due.").

20. *See* *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111–12 (9th Cir. 2000), *vacated on other grounds sub nom.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (citing the EEOC's Title I regulations and Interpretative Guidance and stating that "the EEOC views the interactive process as a mandatory obligation"); *see also* Sam Silverman, *The ADA Interactive Process: The Employer and Employee's Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 288 (1998) (stating that, based on the EEOC regulations, employers have "a duty to participate in an interactive process"); Christy M. Wheeler, Comment, *Employment—Barnett v. U.S. Air, Inc.: The Interactive Process and the ADA*, 29 U. MEM. L. REV. 883, 886–87 (1999) (stating that the EEOC regulations

hardly be considered unequivocal: the regulations state that it “may be necessary” for employers to interact,<sup>21</sup> while the Interpretative Guidance suggests that reasonable accommodations are “best determined” through the interactive process.<sup>22</sup> It is, therefore, unclear whether even the agency itself views the interactive process as mandatory. The Act is ultimately silent on the issue, prompting the following question: Is an employer *required* to participate in an informal, interactive process with its disabled employee to fashion a reasonable accommodation?

Answering this question requires posing two others: First, will an employer incur ADA liability for failing to interact with an employee who is concededly disabled but who cannot show that he is statutorily qualified and, thus, does not fall within the class protected by Title I? As demonstrated later, courts have unanimously rejected employer liability in this situation.<sup>23</sup> The second question is more complicated: Is an employer *required* to interact with an employee who can demonstrate that he is statutorily qualified and, thus, entitled to ADA protection?

The latter query has elicited a number of seemingly contradictory opinions from the U.S. circuit courts of appeals.<sup>24</sup> A majority of the circuits that have addressed the issue have looked to the EEOC regulations and explicitly imposed upon employers a duty to engage in the interactive process after the employee requests a reasonable accommodation.<sup>25</sup> Two circuits have refused to recognize such a requirement,<sup>26</sup> while two others claim to adjudicate the issue on a case-by-case basis.<sup>27</sup> Thus, the circuits appear to be (and believe themselves to be) split on the issue.<sup>28</sup>

Whether a circuit conflict over the issue of interactive process liability exists in practice is the central focus of this Note. Part I describes the basic statutory protections provided by ADA coverage, as well as employer defenses to these protections. Part II introduces the

“appear to *require* that both the employee and the employer cooperate in identifying an accommodation and evaluating its reasonableness”) (emphasis added).

21. 29 C.F.R. § 1630.2(o)(3).

22. 29 C.F.R. app. § 1630.9.

23. See *infra* notes 153–165 and accompanying text.

24. See *infra* notes 77–132 and accompanying text.

25. See *infra* notes 77–107 and accompanying text.

26. See *infra* notes 108–117 and accompanying text.

27. See *infra* notes 118–132 and accompanying text.

28. See, e.g., *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112–13 (9th Cir. 2000) (noting conflicting circuit opinions regarding interactive process requirement).

EEOC's interactive process, emphasizing its background in the Act's legislative history and its formal promulgation in the regulations implementing Title I. Part III surveys the various judicial responses to the EEOC regulations and notes the puzzling vocabulary with which some courts articulate the employer's duty to interact with its disabled employees.

Finally, Part IV concludes that no authority supports independent liability under the ADA for a failure to interact. The ADA's protections under Title I run only to those disabled individuals who are qualified within the meaning of the Act, and all courts refuse to impose liability for a failure to interact when the disabled individual is not statutorily qualified. Moreover, the EEOC's regulation and Interpretative Guidance are not written in mandatory terms and are best read as not imposing independent liability for a failure to interact, even when the disabled individual is qualified. Finally, despite some judicial language to the contrary, no circuit truly *requires* employers to interact with their disabled employees. Nor does the ADA, as currently drafted, *permit* the imposition of such a requirement.

Part IV does, however, specify two situations in which a failure to participate in the interactive process may have significant repercussions. When an employer moves for summary judgment, claiming that its disabled employee is not statutorily qualified, and/or when an employer claims that its good faith attempt to reasonably accommodate a disabled employee should immunize it against a claim for compensatory and punitive damages, the employer's failure to interact could influence the court's decision.

#### I. AN INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT

Responding to rampant discrimination against disabled individuals,<sup>29</sup> Congress enacted the ADA.<sup>30</sup> The Act "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" as well as "clear, strong, consistent, enforceable standards addressing discrimination against

29. See 42 U.S.C. § 12101(a) (1994 & 1999 supp.) (stating that "society has tended to isolate and segregate individuals with disabilities" and "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").

30. *Id.* at § 12101 *et seq.*

individuals with disabilities.”<sup>31</sup> Title I of the ADA prohibits employment discrimination against a “qualified individual with a disability.”<sup>32</sup> To fall within the ambit of Title I, a plaintiff must prove both that he has a disability and that he is qualified, as the Act defines those terms.<sup>33</sup>

### A. *Individual with a Disability*

An ADA plaintiff must first prove that he is disabled. The Act defines disability as

(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.<sup>34</sup>

Under this definition, a plaintiff is not required to establish that she is presently disabled. Rather, individuals who have a record of an impairment that substantially limits a major life activity fall within the statutory definition, regardless of whether those individuals are currently impaired.<sup>35</sup> Also included are individuals regarded as having a substantially limiting impairment, despite the fact that they are not actually impaired or their impairment is not substantially limiting.<sup>36</sup>

Thus, the statutory definition of disability contains several components. Individuals must either have a record of, or be regarded as having, a physical or mental impairment, which, according to EEOC regulations, includes both physiological and psychological disorders.<sup>37</sup> Further, that impairment must be substantially limiting; a person is

31. *Id.* at § 12101(b)(1) & (2).

32. *Id.* at § 12112(a).

33. *See id.*

34. *Id.* at § 12102(2); *see Cruz v. McAllister Bros., Inc.*, 52 F. Supp. 2d 269, 279 (D. P.R. 1999) (stating that an employee who “cannot establish that he has a disability . . . will not be protected by the ADA”).

35. 42 U.S.C. § 12102(2)(B); *see Valentine v. Am. Home Shield Corp.*, 939 F. Supp. 1376, 1391 (N.D. Iowa 1996) (noting that “disability” under the ADA is “broadly defined to include” having a record of a substantially limiting impairment); *see also Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 645–46 (2d Cir. 1998).

36. 42 U.S.C. § 12102(2)(C); *see Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 187–90 (3d Cir. 1999) (discussing the factual basis under which a plaintiff may be “regarded as” disabled by his employer); *E.E.O.C. v. United Parcel Serv., Inc.*, 149 F. Supp. 2d 1115, 1157 (N.D. Cal. 2000), *aff’d in part and rev’d and remanded in part* by 306 F.3d 794 (9th Cir. 2002) (concluding that plaintiffs were statutorily disabled because their employer “‘regarded’ them as having an impairment that substantially limited” a major life activity); *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d Cir. 1998) (noting that “even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual’s impairment can be sufficient to satisfy the statutory definition of perceived disability”).

37. 29 C.F.R. § 1630.2(h) (1998).

substantially limited if totally or significantly restricted in his ability to perform a major life activity when compared to the general population.<sup>38</sup> Finally, the life activity that is substantially limited by the impairment must be a major one. “Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty.”<sup>39</sup> The activity must be important or significant, but need not have a “public, economic, or daily aspect.”<sup>40</sup> Major life activities include seeing, hearing, speaking, walking, breathing, and learning.<sup>41</sup>

### B. *Qualified Individual with a Disability*

An ADA plaintiff must also prove that she is qualified.<sup>42</sup> A qualified individual with a disability is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>43</sup> Protection under Title I frequently turns on whether a job function is essential and whether the plaintiff can perform it “with or without reasonable accommodation.”

The ADA does not define the phrase “essential job functions;” however, EEOC regulations state that essential job functions are “the fundamental job duties of the employment position the individual

38. *Id.* at § 1630.2(j)(1)(i) & (ii); *see* *Brookins v. Indiana Power & Light Co.*, 90 F. Supp. 2d 993, 1001 (S.D. Ind. 2000) (noting that substantially limited under the ADA “means that the individual is either unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to an average person in the general population”).

39. 29 C.F.R. app. § 1630.2(i); *see* *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002) (concluding that major life activities refer “to those activities that are of central importance to daily life”).

40. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

41. 29 C.F.R. § 1630.2(i). Although the EEOC regulations state that “working” is a major life activity (albeit one of last resort), *see* 29 C.F.R. app. 1630.2(j), the Supreme Court has noted its “conceptual difficulty in defining major life activities to include work” and has declined to decide whether working is a major life activity. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (internal quotes omitted).

42. *See* *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 999 (S.D. Ind. 2000) (“In order to succeed in making an ADA reasonable accommodation claim, a plaintiff must establish first that he was a qualified individual with a disability.”) (internal quotes omitted).

43. 42 U.S.C. § 12111(8) (1994 & 1999 supp.); *see* *Dayoub v. Penn-Del Directory Co.*, 48 F. Supp. 2d 486, 490 (E.D. Penn. 1999) (“The ADA does not apply to individuals who are totally disabled and unable to work.”).



with a disability holds or desires.”<sup>44</sup> The Act does state that “consideration shall be given to the employer’s judgment as to what functions of a job are essential,” with written job descriptions being “evidence of the essential functions of the job.”<sup>45</sup> When deciding whether a function is essential, judges may inquire how often the function is performed, how much of the employee’s job time is occupied by the performance of the function, how much expertise or skill is required to perform the function, and how many past and current employees have performed or do perform the function.<sup>46</sup>

If the court deems a job function essential, the plaintiff must prove that he can perform it, with or without reasonable accommodation.<sup>47</sup> Employers are liable for failing to accommodate “the known physical or mental limitations of an otherwise qualified individual with a disability . . . .”<sup>48</sup> One court defines “accommodation” as a change “in [the employer’s] ordinary work rules, facilities, terms, and conditions” of employment that will “enable a disabled individual to work.”<sup>49</sup> Reasonable accommodations include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations. . . .”<sup>50</sup> Similarly, an employer reasonably may be expected to modify its existing facility to permit greater use by disabled persons.<sup>51</sup>

44. 29 C.F.R. § 1630.2(n)(1); *see also* 29 C.F.R. § 1630.2(o) app. (essential job functions “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”).

45. 42 U.S.C. § 12111(8); *see Cruz v. McAllister Bros., Inc.*, 52 F. Supp. 2d 269, 281 (D. Puerto Rico) (stating that a judicial inquiry into which functions of an employee’s job are essential “should not second guess the employer’s business judgment regarding qualitative or quantitative standards” and the employer is entitled to “substantial leeway in defining the essential functions of a position”).

46. *See* 29 C.F.R. § 1630.2(n); *Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1332 n.6 (N.D. Iowa 2000) (noting influential factors in determining whether job function is essential); *Emerson v. Northern States Power Co.*, 256 F.3d 506, 512–13 (7th Cir. 2001) (same); *see also* Rebecca Hanner White, *EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS*, 107 (1998) (same).

47. *See* 42 U.S.C. § 12112(a) (employers “shall not discriminate against a *qualified* individual with a disability”) (emphasis supplied).

48. *Id.* at § 12112(b)(5)(A).

49. *Vande Zande v. State of Wisconsin*, 44 F.3d 538, 542 (7th Cir. 1995).

50. 42 U.S.C. § 12111(9)(B).

51. *Id.* at § 12111(9)(A).

### C. Employer Defenses to Accommodation

The ADA requires employers to make only those accommodations that are reasonable;<sup>52</sup> thus, where a disabled employee cannot be accommodated in a reasonable manner, employers are free to discriminate against that individual despite his disability.<sup>53</sup> If a plaintiff points to an accommodation that will render her statutorily qualified, her employer has the opportunity to show that the proposed accommodation is unreasonable.<sup>54</sup>

Employers may also show that accommodating the plaintiff in the suggested manner would inflict undue hardship.<sup>55</sup> The Act defines undue hardship as “an action requiring significant difficulty or expense.”<sup>56</sup> The following non-determinative factors may be considered when deciding whether a proposed accommodation exposes an employer to excessive hardship: (1) “the nature and cost of the accommodation”; (2) the financial resources of the at-issue facility, including the number of persons employed and any impact the accommodation would have on facility operations; (3) “the overall financial resources” of the employer, including its size and “the number, type, and location of its facilities”; and (4) the type of operations performed by the employer and the relationship of the employer to the at-issue facility.<sup>57</sup>

52. *Id.* at § 12111(8) (defining qualified individual with a disability as “an individual with a disability who, with or without *reasonable* accommodation, can perform the essential functions of the employment position that such individual holds or desires”) (emphasis supplied).

53. *See Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 576 (8th Cir. 2000) (observing that “[t]he ADA does not prevent employer from terminating a disabled person” who cannot be reasonably accommodated).

54. *See Dayoub v. Penn-Del Directory Co.*, 48 F. Supp. 2d 486, 492 (E.D. Pa. 1999) (noting that a defendant seeking to avoid ADA liability “bears the burden of proving, as an affirmative defense, that the accommodations requested by the plaintiff are unreasonable . . .”).

55. 42 U.S.C. § 12112(b)(5)(A); *see Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 749 (N.D. Ill. 1998) (stating that employers must reasonably accommodate the known physical or mental limitations of an otherwise qualified individual “unless the employer demonstrates that the accommodation would impose an undue hardship on the operation of the employer’s business”) (internal quotes omitted).

56. 42 U.S.C. § 12111(10)(A).

57. *Id.* § 12111(10)(B); *see also Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139–40 (2d Cir. 1995) (stating that undue hardship inquiry is one of degree, with the employer undertaking a “common-sense balancing of the costs and benefits [of the proposed accommodation] in light of the factors listed in the regulations”).

## II. A LEGISLATIVE AND REGULATORY INTRODUCTION TO THE EEOC'S INTERACTIVE PROCESS

The preceding Part presented a general framework for ADA litigation. Included in that presentation was a discussion of an employer's responsibility to provide reasonable accommodations to those disabled individuals who qualify for ADA protection. The Act does not specify the process for determining an appropriate accommodation.<sup>58</sup> The legislative history of the ADA, however, reveals that Congress intended the proper accommodation to be determined through a process of dialogue between the employer and its employee. Further, the Equal Employment Opportunity Commission ("EEOC") has issued regulations and interpretative guidance that countenance interaction to arrive at a reasonable accommodation. A discussion of these legislative materials and regulations follows.

### A. *ADA Legislative History and Determination of Reasonable Accommodation*

The legislative history of the ADA strongly suggests that Congress intended employers and employees to work together to find a reasonable accommodation. Senate Report No. 101-116, which accompanied ADA passage, states "employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation."<sup>59</sup> Later in the report, the Senate notes its vision of the nature of an employer's interaction with its employees:

[E]mployer[s] should consider four informal steps to identify and provide an appropriate accommodation. The first informal step is to identify barriers to equal opportunity. This includes identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s). . . . Having identified the barriers to job performance caused by the disability, the second informal step is to identify possible accommodations. . . . Having identified one or more possible accommodations, the third informal step is to assess the reasonableness of each in terms of effectiveness and equal opportunity. . . . The final informal step is to implement the accommodation that is most appropriate for the employee and the employer and that does not impose an undue hardship on the employer's operation or to permit the employee to provide his or her own accommodation if it does not

58. See Barancik, *supra* note 11, at 524 (noting that Congress "failed to articulate many important details concerning reasonable accommodations").

59. S. Rep. No. 101-116, at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 348.

impose an undue hardship. . . . The expressed choice of the applicant or employee shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity.<sup>60</sup>

Note specifically the Senate report's choice of vocabulary: employers "will consult" with their disabled employees to find the appropriate accommodation, and the "expressed choice" of the employee is given priority. The committee's problem-solving approach, including employer/employee consultation, forms the basis for the EEOC's Title I regulations.

### B. EEOC Regulations Regarding the Interactive Process

The EEOC has issued both regulations and interpretative guidelines designed to facilitate the accommodation of disabled employees.<sup>61</sup> Comporting with congressional sentiment,<sup>62</sup> these regulatory statements specifically endorse an interactive process through which the appropriate accommodation is determined.<sup>63</sup>

According to EEOC regulations, "it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."<sup>64</sup> The process "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."<sup>65</sup> Although the regulations state that the employer should initiate the interactive process,<sup>66</sup> the employee bears responsibility for triggering the employer's obligation to interact by providing the employer with certain information.<sup>67</sup>

60. *See id.* at 66–67.

61. *See* 29 C.F.R. Pt. 1630 (1998).

62. *See supra*, Part II.A.

63. 29 C.F.R. § 1630.2(o)(3).

64. *Id.*

65. *Id.*

66. *See id.*

67. *See* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 656–57 (S.D.N.Y. 2001) (observing that "the initial burden of requesting an accommodation [under the ADA] is on the employee and it is only after such a request has been made that the employer must engage in the 'interactive process' of finding a suitable accommodation"); *cf.* Hansen v. Henderson, 233 F.3d 521, 523 (7th Cir. 2000) (stating that, under the Rehabilitation Act, an employer has "the burden of exploring with the worker the possibility of a reasonable accommodation" once the worker "has communicated his disability to his employer and asked for an accommodation so that he can continue working"); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001) (noting that an employer must engage in an interactive process after employee provides notice of his disability).

The EEOC has also issued an Interpretative Guidance to its regulations regarding the ADA's interactive process.<sup>68</sup> The Interpretative Guidance states that reasonable accommodation is "best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."<sup>69</sup> In some instances, the appropriate accommodation may be apparent without resorting to a step-by-step procedure.<sup>70</sup> However, when fashioning an accommodation requires the consideration of significant information, "it may be necessary for the employer to initiate a more defined problem solving process."<sup>71</sup> The EEOC suggests the following steps if a reasonable accommodation is not obvious:

- 1) Analyze the particular job involved and determine its purpose and essential functions;
- 2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- 3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- 4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.<sup>72</sup>

An analysis of the EEOC's regulation and its Interpretative Guidance reveals one noteworthy semantic distinction. Speaking of employer attempts to accommodate, the regulation states that "it *may* be necessary" for employers to engage in an interactive process.<sup>73</sup> By contrast, the Interpretative Guidance uses language that some courts have read as *requiring* employer participation in the interactive process: the employer "*must* make a reasonable effort" to determine the appropriate accommodation, accommodation is "*best* determined" through interaction, and the employer "*should*" follow a four-step process if accommodating the individual is tricky.<sup>74</sup> The incongruity between the regulation's permissive tone and the more conclusory characterizations included in the Interpretative Guidance has

68. See 29 C.F.R. Pt. 1630 app. (Interpretative Guidance on Title I of the Americans with Disabilities Act).

69. *Id.* at § 1630.9 app.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at § 1630.2(o)(3) (emphasis supplied).

74. *Id.* at § 1630.9 app.

spawned a circuit split over whether the ADA requires or merely encourages the interactive process.<sup>75</sup>

### III. REQUIRING “INTERACTION”

The previous Part described the origins of the ADA’s interactive process, including its foundation in congressional intent and its formal endorsement by the EEOC. This Part analyzes judicial responses to the EEOC’s position by posing a preliminary, but primary, question: Is an employer *required* to participate in an interactive process with its disabled employee to find a reasonable accommodation? As this Part will illustrate, the circuits have answered that question in a perplexing number of ways.

#### A. Courts in Conflict

Fully harmonizing the various appellate court characterizations of the interactive process is analytically impossible. Only one statement can be made with any certainty: all circuits agree that the employer has “at least some responsibility” for fashioning the proper accommodation.<sup>76</sup> Beyond this rather obvious platitude, courts tend to divide into three categories. Most circuits categorically that employers are required to engage in the interactive process. Two circuits hold that employers are not required to participate. Two others evaluate interactive process liability on the facts of each case. These three separate categories are considered in turn.

##### 1. Circuits that Require Employer Participation in the Interactive Process

A majority of the circuit courts of appeals require employers to engage in the interactive process when reasonably accommodating disabled employees. While the circuits have characterized the employer’s obligation differently, the essential message remains consistent: reasonable accommodation necessarily implies employer interaction.

75. See *infra* Part III.A; compare *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (holding that the ADA requires employers to interact with their disabled employees to fashion a reasonable accommodation), with *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (holding that employers are not required to interact).

76. See, e.g., *Beck v. Univ. of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996); *Salmon v. West Clark Cmty. Sch.*, 64 F. Supp. 2d 850, 860 (S.D. Ind. 1999).

In *Beck v. University of Wisconsin Board of Regents*,<sup>77</sup> the Seventh Circuit proffered one of the earliest opinions addressing the interactive process. There, the plaintiff claimed her employer violated the ADA by failing to accommodate her osteoarthritis and depression.<sup>78</sup> The employer countered that the plaintiff provided little information regarding the nature of her disability and potential accommodations. According to the court, “the crux of this dispute is one not clearly answered by the ADA: does the employer or the employee bear the ultimate responsibility for determining exactly what accommodations are needed?”<sup>79</sup> The Seventh Circuit held that, while “[t]he employer has at least some responsibility in determining the necessary accommodation” and the EEOC regulations “envision an interactive process that requires participation by both parties,”<sup>80</sup> the *Beck* employer had interacted. Rather, the court concluded that the plaintiff’s refusal to provide pertinent information thwarted the employer’s accommodation attempts.<sup>81</sup>

*Beck* hardly offers a ringing endorsement of an employer’s obligation to engage in the EEOC-recommended interactive process as the court concluded that the defendant-employer did interact.<sup>82</sup> Thus, because it was not asked to resolve a dispute between the litigants as to whether the ADA requires interaction, the Court’s statements are arguably *dicta*. Further, while the court stated that employers have “at least some responsibility” for determining the appropriate accommodation,<sup>83</sup> the court does not assert that the responsibility necessarily entails the interactive process suggested by the EEOC. Finally, the court’s use of the word “envision” when discussing the EEOC regulations<sup>84</sup> raises at least the possibility that interaction is permissive rather than mandatory. Despite this apparent lack of foundation, *Beck* spurred a wave of judicial precedent requiring employers to engage in the interactive process.

77. 75 F.3d 1130.

78. *Id.* at 1130–31.

79. *Id.* at 1134.

80. *Id.* at 1135.

81. *Id.* at 1137; *see also* Templeton v. Neodata Serv., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (holding that an employee’s failure to provide relevant medical information defeated her claim that her employer failed to reasonably accommodate her disability).

82. *Beck*, 75 F.3d at 1135.

83. *Id.*

84. *Id.*

In *Taylor v. Phoenixville School District*,<sup>85</sup> the Third Circuit concluded that an employer must interact with its disabled employee to determine a reasonable accommodation.<sup>86</sup> There, the plaintiff alleged that her employer failed adequately to engage in the interactive process, and thus failed to reasonably accommodate her disability.<sup>87</sup> Citing *Beck* and the EEOC regulations, along with its decision in *Mengine v. Runyon*,<sup>88</sup> which held that the Rehabilitation Act<sup>89</sup> requires employers to participate in a similar interactive process, the Third Circuit held that “both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.”<sup>90</sup> The court adopted a four-part proof scheme allowing plaintiffs to show that a defendant had failed to engage in the interactive process. The plaintiff must show: (1) the employer knew about the employee’s disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer’s lack of good faith.<sup>91</sup>

In *Barnett v. U.S. Air, Inc.*,<sup>92</sup> the Ninth Circuit indicated its agreement with the interactive process jurisprudence of the Third and Seventh Circuits. There, an injured employee filed suit under the ADA, claiming specifically that his employer failed to engage in the interactive process and denied him reasonable accommodation.<sup>93</sup> Citing both *Beck* and *Phoenixville School District*, the *Barnett* court concluded that the interactive process “is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working” and is essential to accomplishing the goals of the ADA.<sup>94</sup> Placing on the employee the “entire burden” to identify the appropriate reasonable accommodation “risks shutting out many workers simply because they do not have the superior

85. 184 F.3d 296 (3rd Cir. 1999).

86. *Id.* at 314.

87. *Id.* at 301–02.

88. 114 F.3d 415 (3d Cir. 1997).

89. 29 U.S.C. § 701 *et seq.* (1995).

90. *Phoenixville*, 184 F.3d at 312–13.

91. *Id.* at 165 (citing *Mengine*, 114 F.3d at 420; *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 165 (5th Cir. 1996).

92. 228 F.3d 1105 (9th Cir. 2000).

93. *Id.* at 1108.

94. *Id.* at 1112–13, 1115.



knowledge of the workplace that the employer has.”<sup>95</sup> Thus, the court “join[ed] explicitly with the vast majority of [its] sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation. . . .”<sup>96</sup>

The Fifth Circuit has also indicated its willingness to impose liability for failing to interact. In *Taylor v. Principal Financial Group, Inc.*,<sup>97</sup> the plaintiff alleged that his employer failed to reasonably accommodate his bipolar disorder. The defendant moved for summary judgment, which the District Court granted, holding that the plaintiff had not requested an accommodation for his disability.<sup>98</sup> Affirming the district court, the Fifth Circuit concluded that “responsibility for fashioning a reasonable accommodation is shared between the employee and the employer,” but only after an accommodation has been “properly requested.”<sup>99</sup> Had the plaintiff appropriately requested accommodation, the employer’s duty to interact would have been triggered.<sup>100</sup>

In *Brown v. Chase Brass & Copper Co.*,<sup>101</sup> an unpublished opinion, the Sixth Circuit appeared to endorse the concept of employer liability for failure to interact. There, in now familiar fashion, the District Court rejected the plaintiff’s failure to accommodate argument, determining instead that the plaintiff had not identified an accommodation that would have enabled him to perform the essential functions of his job.<sup>102</sup> On appeal, the plaintiff argued that the defendant had not engaged in the interactive process.<sup>103</sup> Citing *Beck*, the court deemed interaction an “obligation” for employers; if an employer’s unwillingness to participate in the process leads to a failure to accommodate its employee, “the employer might be liable under the ADA.”<sup>104</sup> However, because the plaintiff did not request that the employer provide accommodation, the employer’s duty to interact “never arose.”<sup>105</sup> While these comments are arguably *dicta*,<sup>106</sup> they

95. *Id.* at 1113.

96. *Id.* at 1114.

97. 93 F.3d 155 (5th Cir. 1996).

98. *Id.* at 157.

99. *Id.* at 165 (citing 29 C.F.R. § 1630.9 app. (1995)).

100. *Id.*

101. 14 Fed. Appx. 482 (6th Cir. 2001) (unpublished opinion).

102. *Id.* at 484.

103. *Id.* at 487 n.2.

104. *Id.*

105. *Id.*

nonetheless represent the Sixth Circuit's propensity to join with its sister circuits in holding that employers are required to participate in the interactive process.<sup>107</sup>

## 2. Circuits that Do Not Require Employer Participation in the Interactive Process

Certain courts have stated that, although employers will incur liability where they fail to reasonably accommodate a qualified individual with a disability, and the EEOC-recommended interactive process is an excellent method by which to find the appropriate accommodation, employers are not *required* to comply with the EEOC guidelines. Both the Tenth and Eleventh Circuits take this position.

In *White v. York International Corp.*,<sup>108</sup> the Tenth Circuit concluded that employers were not obligated to engage in the EEOC's interactive process. The plaintiff in *White* brought suit against his employer when he was terminated from his job after injuring his ankle. The district court granted summary judgment for the employer, finding that the plaintiff presented no evidence of a reasonable accommodation that would have rendered him statutorily qualified. On appeal, the plaintiff argued that the employer's failure to initiate the interactive process operated as "a per se preclusion to summary judgment" on the issue of whether the plaintiff could have been accommodated. The Tenth Circuit concluded that the plaintiff had "misconstrued an EEOC *recommendation* as a statutory *requirement*."<sup>109</sup> The court further noted that employers must make a "threshold determination" that a disabled individual can be accommodated and is therefore statutorily qualified before the recommended process is even triggered.<sup>110</sup>

The Eleventh Circuit faced the interactive process issue in *Moses v. American Nonwovens, Inc.*,<sup>111</sup> and, like the Tenth Circuit, declined to impose on employers a duty to interact. In *Moses*, the employer

106. The Sixth Circuit was not asked to decide whether the ADA requires employers to engage in the EEOC-recommended interactive process. Instead, the Court ruled that the plaintiff had failed properly to request an accommodation, thus making the question of whether the defendant was required to interact to find that accommodation moot. *Id.*

107. *See also* Lockard v. GMC, 52 Fed. Appx. 782, 788 (6th Cir. 2002) (unpublished opinion) (noting that it is "possible that an employer may violate the terms of the ADA by failing to engage in . . . an interactive process in good faith").

108. 45 F.3d 357 (10th Cir. 1995).

109. *Id.* at 363 (emphasis in original).

110. *Id.*

111. 97 F.3d 446 (11th Cir. 1996).

admitted that it terminated the plaintiff because of his epilepsy but claimed that the condition threatened the health and safety of the plaintiff.<sup>112</sup> The plaintiff sued, claiming that his employer violated the ADA by failing to engage in the interactive process.<sup>113</sup> The Eleventh Circuit held that the ADA did not recognize a cause of action based solely on a failure to interact.<sup>114</sup> While it was “troubled” by the defendant’s failure to investigate potential accommodations, the court noted that the EEOC regulations did not mandate employer interaction before a disabled employee was terminated.<sup>115</sup> Moreover, said the court, disabled employees have the burden of proving that an available accommodation would render them statutorily qualified, and, in that case, the plaintiff had not shown that such an accommodation existed.<sup>116</sup> A contrary holding would confer on the employee an ADA cause of action even when accommodating the employee’s limitations was impossible, and, thus, the employee was demonstrably outside the ADA’s protected class.<sup>117</sup>

### 3. Circuits that Determine Interactive Process Liability on a Case-by-Case Basis

Certain courts adjudicate the possibility of a duty to interact based on an individualized, fact-intensive analysis of each case. Both the First and Eighth Circuits subscribe to this ideological stance to varying degrees.

In *Jacques v. Clean-Up Group, Inc.*,<sup>118</sup> the First Circuit adopted the “case-by-case” approach. There, an epileptic employee alleged that his employer failed to engage in the interactive process to find an accommodation that would have enabled him to remain employed.<sup>119</sup> The plaintiff specifically argued that employers have a duty to interact even where “there is no proof that any informal interactive process would have actually borne any fruit.”<sup>120</sup> The First Circuit disagreed. Surveying the disparate interpretations of the EEOC’s

112. *Id.* at 447–48.

113. *Id.* at 448.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*; see also *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (holding that a “punitive” view of the interactive process is inconsistent with the remedial policies that support ADA liability).

118. 96 F.3d 506 (1st Cir. 1996).

119. *Id.* at 509–10, 512–13.

120. *Id.* at 512–13.

interactive process regulations, the court stated “[t]he regulations’ use of the word ‘may’ clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to.”<sup>121</sup> The court noted that “cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties’ behavior”; “[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.”<sup>122</sup> However, on the facts presented in *Jacques*, the employer could not be held liable for its failure to interact.<sup>123</sup>

The Eighth Circuit has developed an analytical approach to the interactive process obligation that incorporates elements of other judicial approaches. In *Fjellestad v. Pizza Hut of America, Inc.*,<sup>124</sup> the plaintiff accused her employer of failing to reasonably accommodate injuries suffered during an auto accident.<sup>125</sup> The District Court granted summary judgment for the defendant, but the Eighth Circuit reversed. Citing both *Willis v. Conopco, Inc.*,<sup>126</sup> and *White v. York International Corp.*,<sup>127</sup> the Court of Appeals noted its tendency “to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process.”<sup>128</sup> However, in an approach modeling the fact-based analysis advocated by the First Circuit,<sup>129</sup> the court found that, “for purposes of summary judgment, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.”<sup>130</sup> Thus, while employers will not be liable if accommodation was not possible, “a factual question exists as to whether the employer has *attempted* to provide reasonable accommodation as required by the

121. *Id.* at 513.

122. *Id.* at 515; *see also* *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (noting that accommodation inquiries require “difficult, fact intensive, case-by-case analyses” and are “ill-served by per se rules or stereotypes”).

123. *See Jacques*, 96 F.3d at 515.

124. 188 F.3d 944 (8th Cir. 1999).

125. *See id.* at 947–48.

126. 108 F.3d 282, 285 (11th Cir. 1997).

127. 45 F.3d 357, 363 (10th Cir. 1995).

128. *Fjellestad*, 188 F.3d at 951–52.

129. *See Jacques*, 96 F.3d 506, 509 (1st Cir. 1996).

130. *Fjellestad*, 188 F.3d at 952.

ADA.”<sup>131</sup> The court then adopted the Third Circuit’s four-factor proof scheme for demonstrating that an employer has violated the ADA by failing to engage in the interactive process.<sup>132</sup>

### B. *Incomprehensible Expression*

The previous discussion surveys the current state of the interactive process jurisprudence in most of the circuit courts of appeals. While the controlling legal principles in each of the cases discussed eventually emerge, the vocabulary chosen by the courts to articulate the employer’s relationship to the interactive process is pervasively confusing. An inspection of these frequently strange judicial pronouncements reveals two important points. First, the judiciary has had an extremely difficult time formulating a coherent interactive process jurisprudence.<sup>133</sup> Second, when courts are as confused as the discussion below suggests, it is unsurprising that many ADA litigants have little idea how to deal with the interactive process and its potential requirements.<sup>134</sup>

*Beck*<sup>135</sup> is once again an excellent place to begin this discussion, not only because of its demonstrated influence on other courts that have confronted the interactive process issue,<sup>136</sup> but also because *Beck* arguably initiated the language “malaise” that now pervades the circuit opinions dealing with the interactive process. Recall that the *Beck* court concluded employers bear “at least some responsibility” for finding the appropriate reasonable accommodation, and that the ADA regulations “envision” an interactive process that ultimately results in reasonable accommodations for qualified disabled individuals.<sup>137</sup> As previously noted, at no point in the opinion does the court state that employers are *required* to interact, only that the employer

131. *Id.* (emphasis supplied).

132. *Id.* (adopting the reasoning of *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 165 (3d Cir. 1999)).

133. See Barancik, *supra* note 11, at 527–28 (noting the “confusion surrounding the interpretation” of the ADA’s interactive process and the EEOC guidelines); see also *Taking the ADA Interactive Process Seriously Can Help Employers Terminate Lawsuits Before They Go to Trial*, 16 No.17 EMPLOYMENT ALERT 4 (West 1999) (stating that “courts have had an unexpectedly difficult time dealing with [the interactive process]”).

134. See *Third Circuit Tempers its Aggressive Stance on the ADA Interactive Process*, 4 No.19 EEO UPDATE 2 (West 2000) (noting that employers often have problems knowing when to interact and “when it’s okay to walk away from the process”).

135. *Beck v. Univ. of Wis.*, 75 F.3d 1130 (7th Cir. 1996).

136. See *supra* notes 77–107 and accompanying text.

137. *Beck*, 75 F.3d at 1135.

has “at least some responsibility” and that the regulations “envision” that responsibility to include the EEOC process.<sup>138</sup> Nonetheless, courts in at least four other circuits cite *Beck* for the proposition that employers are required to engage in the interactive process.<sup>139</sup>

The second of the *Beck* court’s two statements—that the EEOC regulations envision an interactive process<sup>140</sup>—merits individual consideration. Significantly, a large number of circuit and district court opinions expressly adopted the *Beck* terminology. Opinions from the First, Second, Seventh, and Tenth Circuits cite *Beck* and specifically use the word “envision” to describe the employer’s relationship to the interactive process.<sup>141</sup> However, as confirmed above, these circuits assume vastly contradictory positions on whether employers are *required* to interact. The First Circuit resolves employer liability on a case-by-case basis.<sup>142</sup> The Second Circuit has not resolved whether employers are required to interact.<sup>143</sup> Other opinions from the Seventh Circuit have construed *Beck* to require employer interaction,<sup>144</sup> whereas the Tenth Circuit cites *Beck* when concluding that employers have no obligation to interact.<sup>145</sup>

It is entirely possible that the *Beck* court did not intend to clarify its stance on employer requirements under the EEOC regulations and that the court would be amused and somewhat mystified at the proliferation of divergent interpretations of the regulations, all of which claim some precedential connection to *Beck*. At the very least, the term “envision” has proven to be a confusing and unworkable

138. See *supra* notes 82–84 and accompanying text.

139. See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir. 1999); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114–15 (9th Cir. 2000); *Brown v. Chase Brass & Copper Co.*, 14 Fed. Appx. 482, 487 n.2 (6th Cir. 2001).

140. *Beck*, 75 F.3d at 1135.

141. See, e.g., *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 514 (1st Cir. 1996); *Jackan v. N.Y. State Dep’t of Labor*, 205 F.3d 562, 566 (2d Cir. 2000); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171 (10th Cir. 1999).

142. See *Jacques*, 96 F.3d at 515; see also *Kvorjak v. Maine*, 259 F.3d 48, 52 (1st Cir. 2001).

143. See *Jackan*, 205 F.3d at 568 n.4 (noting that the EEOC regulations and “some of the cited decisions” impose an “obligation upon an employer to take affirmative steps to assist an employee in identifying potential accommodations,” but declining to decide “whether an employer bears a legal duty to assist an employee in identifying appropriate vacant positions”); see also *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219 (2d Cir. 2001) (declining to decide whether a defendant “had an independent duty to institute and engage in an interactive process with the plaintiff to attempt to find a reasonable accommodation the breach of which is itself a violation of the ADA”) (internal quotes omitted).

144. See, e.g., *Rehling*, 207 F.3d at 1015–16; *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998).

145. See, e.g., *Midland Brake*, 180 F.3d at 1172.

descriptor, leaving litigants puzzled as to the status of interactive process liability in their circuits.

Other courts have contributed their own inconsistent or confusing statements to the interactive process linguistic fiasco. For instance, in *Jensen v. GTE Northwest, Inc.*,<sup>146</sup> the Ninth Circuit noted that the interactive process was crucial to the reasonable accommodation determination under the ADA. In *Brookins*, the Southern District of Indiana held that the ADA “contemplates” employer/employee interaction to find the appropriate accommodation.<sup>147</sup> In *Smith v. Midland Brake, Inc.*, the Tenth Circuit stated that the interactive process is “frequently an essential component” of the pursuit for a reasonable accommodation.<sup>148</sup>

The First Circuit, in *Lessard v. Osram Sylvania, Inc.*,<sup>149</sup> noted that employers are “encouraged” to participate in the interactive process. In *Sieberns v. Wal-Mart Stores, Inc.*,<sup>150</sup> the Seventh Circuit, which had issued the *Beck* opinion during its previous term, stated that the ADA “foresees” an interactive process, but that process is not “an end in itself.” Finally, in *Deane v. Pocono Medical Center*,<sup>151</sup> the Third Circuit notes that employers who fail to engage in the interactive process run “a serious risk” that an opportunity to accommodate a disabled employee will be overlooked.

These examples highlight the judiciary’s perplexing terminology choices when analyzing the EEOC regulations. Courts have had difficulty articulating their own reactions to the EEOC interpretations, issuing opinions that conflict with the approaches of other circuits and, in some cases, with previous statements issued in the same circuit or made by the same court. This lack of clarity leaves bewildered employers unable accurately to discern their duties when searching for a reasonable accommodation.

One wishes the Supreme Court finally would speak to the issue of employer liability for failure to interact. The Court has declined to

146. 7 Fed. Appx 778 (9th Cir. 2001) (unpublished opinion). Under Ninth Circuit precedent, as settled by *Barnett v. U.S. Air, Inc.*, the interactive process is a “mandatory rather than a permissive obligation.” See 228 F.3d 1105, 1114 (9th Cir. 2000).

147. *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 1005 (S.D. Ind. 2000).

148. 180 F.3d at 1172 n.10. While this statement is not necessarily inconsistent with Tenth Circuit precedent, see *White v. York Int’l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995), it is nonetheless confusing because it at least raises the possibility that employers could be obligated to interact in some situations. The scope of that potential obligation is not defined.

149. 175 F.3d 193 (1st Cir. 1999).

150. 125 F.3d 1019 (7th Cir. 1997).

151. 142 F.3d 138 (3d Cir. 1998).

resolve the issue on several occasions, most recently when it granted a petition for certiorari in *Barnett*.<sup>152</sup> There is, however, at least one plausible explanation for the Supreme Court's refusal to arbitrate the fate of the interactive process. The next Part discusses this theory.

#### IV. THE TRUE STATUS OF EMPLOYER LIABILITY FOR A FAILURE TO INTERACT

The previous Part highlighted various judicial approaches to employer liability for a failure to engage in the EEOC's interactive process. The contrasting positions taken by the circuit courts of appeals were surveyed and the ambiguous language employed in some opinions was explicated. This Part returns to the question posed at the beginning of the previous one: Is an employer *required* to participate in an interactive process with its disabled employee to find reasonable accommodation?

Some of the circuit courts have imposed upon employers a duty to engage in the interactive process. However, this Part argues that, because the ADA protects only those disabled persons who are statutorily qualified, and because ADA liability attaches for a failure to accommodate an employee's disability, not a failure to interact with the employee regarding the accommodation, there are *no* circuits that currently *require* employers to interact, nor is any court *permitted* to impose such a requirement unless the ADA is amended.

##### A. "Independent" Liability and Proving Qualification

In assessing the validity of this argument, one must first be familiar with the concept of independent employer liability. Independent liability would attach in all situations where employers have failed to interact with a disabled employee. That is, an employer could be "independently" liable under the ADA for failing to engage in the interactive process, regardless of whether the at-issue employee is statutorily qualified, and, thus, a member of the ADA's protected class. Opinions from virtually every circuit, including those that require employers to engage in the interactive process, have soundly rejected this argument.

152. See *U.S. Airways, Inc. v. Barnett*, 532 U.S. 970 (2001).



For example, in *Kvorjak v. Maine*,<sup>153</sup> the First Circuit rejected the concept of independent liability for failure to interact. In *Kvorjak*, the plaintiff claimed that his former employer “wrongfully failed to accommodate his disability” by refusing to allow him to work from home.<sup>154</sup> The plaintiff specifically alleged the employer “violated the ADA by failing to utilize an informal, interactive process to make an individualized assessment of his needs and abilities.”<sup>155</sup> The First Circuit affirmed a grant of summary judgment for the employer. Addressing the plaintiff’s interactive process argument, the court stated that liability for failure to interact “depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job’s essential functions.”<sup>156</sup> Where the employer fails to engage in the interactive process, “such an omission [is] ‘of no moment’ if the record forecloses a finding that the plaintiff could perform the duties of the job, with or without reasonable accommodation.”<sup>157</sup> Thus, where the plaintiff is not statutorily qualified, the employer is not required to interact.

The Ninth Circuit, whose mandatory obligation approach to the ADA’s interactive process is arguably the most rigorous of the approaches taken by the circuits,<sup>158</sup> rejected the concept of independent employer liability in both *Barnett*<sup>159</sup> and *Humphrey v. Memorial Hospitals Association*,<sup>160</sup> its leading interactive process opinions. Both *Barnett* and *Humphrey* involved disabled plaintiffs who had been denied accommodation by their employers.<sup>161</sup> Both courts were reviewing grants of summary judgment in favor of employers, and both took the opportunity to hold that the EEOC’s interactive process is “a mandatory rather than a permissive obligation.”<sup>162</sup> However, each court expressly dismissed the notion of independent employer liability for a failure to interact. The *Barnett* court held that “employers, who fail to engage in the interactive

153. 259 F.3d 48 (1st Cir. 2001).

154. *Id.* at 50.

155. *Id.* at 52.

156. *Id.* (citing *Humphrey v. Mem Hosps. Ass’n*, 239 F.3d 1128 (9th Cir. 2001); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000)).

157. *Id.* at 53 (quoting *Soto-Ocasio v. Fed. Exp. Corp.*, 150 F.3d 14, 19 (1st Cir. 1998)).

158. *See id.* at 52.

159. *Barnett*, 228 F.3d at 1116.

160. 239 F.3d 1128, 1137 (9th Cir. 2001).

161. *Barnett*, 228 F.3d at 1108; *Humphrey*, 239 F.3d at 1130–33.

162. *Barnett*, 228 F.3d at 1108, 1114; *Humphrey*, 239 F.3d at 1137.

process in good faith, face liability for the remedies imposed by the statute *if a reasonable accommodation would have been possible.*<sup>163</sup> Similarly, in *Humphrey*, the court held that the defendant had an “affirmative duty under the ADA to explore further methods of accommodation before terminating” the plaintiff; however, this affirmative duty to interact arose only after the court assumed that the plaintiff “*was a qualified individual with a disability.*”<sup>164</sup> Thus, according to both courts, an employer is not liable under the Act even where it refuses to interact unless its refusal also led to a failure to accommodate and a reasonable accommodation was available to render the plaintiff statutorily qualified.

The conclusions reached in these opinions are representative of the sentiments shared by all of the circuits that have commented on the interactive process requirement.<sup>165</sup> For those circuits that claim to require employer interaction where the plaintiff is statutorily qualified, the next question is a difficult one: When will the employer be liable if it doesn’t participate?

### B. Accommodation or Interaction?

The previous section established that an employer will not be held liable for failing to engage in the interactive process when the disabled individual seeking accommodation is not statutorily qualified. The corollary to that statement is simple: If liability is the mechanism that insures interaction, then employers are required to interact only with qualified individuals. However, the question remains: Are employers required to interact with those disabled persons who *are* statutorily qualified?

Courts that require employers to interact contend that they are assigning ADA liability for a failure to engage in the process.<sup>166</sup> On

163. *Barnett*, 228 F.3d at 1116 (emphasis supplied).

164. *Humphrey*, 239 F.3d at 1137, 1139.

165. *See, e.g.*, *Rehling v. City of Chicago*, 207 F.3d 1009, 1015–16 (7th Cir. 2000) (citing *Beck v. Univ. of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996)), and concluding that, when assigning ADA liability to employers, it is insufficient for plaintiffs to show that the employer simply failed to engage in the interactive process; rather, the plaintiff must show “that the result of the inadequate interactive process was the failure of the [defendant] to fulfill its role in ‘determining what specific actions must be taken by an employer’ in order to provide the qualified individual a reasonable accommodation”).

166. *See, e.g.*, *Barnett*, 228 F.3d at 1116 (threatening the imposition of ADA liability for a failure to engage in the interactive process); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (same); *Taylor v. Phonixville Sch. Dist.*, 184 F.3d 296, 317–18 (3d Cir. 1999) (same); *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (same); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 165 (5th Cir. 1996) (same).

closer inspection, however, this contention is manifestly false. For instance, in *Barnett*, the court held that it could not impose employer liability unless the interactive process would have disclosed a reasonable accommodation that allowed the plaintiff to perform the essential functions of his job.<sup>167</sup> Thus, the court looks for evidence of appropriate accommodations that the defendant failed to discover when it did not interact. The key to liability, then, is the defendant's failure to implement one of the available appropriate accommodations, *not* the failure to interact with the plaintiff. On this basis, courts will *never* impose liability on an employer for its failure to engage in the interactive process, only for its failure to accommodate. This is consistent with the text of the Act, which requires employers to reasonably accommodate disabled individuals, not to interact with them.<sup>168</sup>

The distinction is more than semantic. Consider the following hypothetical: An employee alerts his employer to the status of his disability, which will limit his job performance as his position is currently constituted. The employee requests an accommodation for his disability, triggering the employer's obligation to engage in the interactive process. The employee's job functions are complicated, and his disability interferes in differing ways with those functions; thus, the employee is expecting a complex dialogue regarding the potential accommodations. However, no such dialogue occurs; there are no meetings, no conversations, no medical evaluations, nothing that a court could label "interaction." Instead, the employee receives notice via registered mail that his disability will be accommodated in a certain manner; the notice identifies the relationship between the employee's limitations and the specific accommodations proposed by the employer. Apart from his initial request for an accommodation, this letter is the employee's one and only communication with his employer on the matter.

Assume that the accommodations described by the employer are reasonable and allow the employee to perform the essential functions of his job, thus making him statutorily qualified, but the employee is, nonetheless, dissatisfied with them. Could the employee successfully allege that the employer had failed to engage in the interactive pro-

167. 228 F.3d at 1116.

168. See 42 U.S.C. § 12112(b)(5)(A) (stating that employers may be held liable for "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

ess? Phrased differently, can the means justify employer liability where the end is demonstrably within the law?

While the answer to this question is ultimately unclear, it seems very unlikely that any of the opinions discussed in this Note could be interpreted as imposing employer liability under these circumstances. Even those circuits that require employers to interact would have difficulty justifying the imposition of liability on these facts. The plaintiff's limitations have been reasonably accommodated, and the foremost purpose of the ADA's accommodation provisions, keeping disabled persons in the workforce, has been accomplished. Thus, a court imposing liability for failure to interact on these facts would be following a path that all courts have expressly repudiated—imposing employer liability independent of the circumstances.

There is, then, no situation (and no circuit) in which an employer is *required* by law to engage in the interactive process. Liability attaches under the ADA if the employer fails to reasonably accommodate the limitations of an employee's disability.<sup>169</sup> The scenario described above demonstrates that fashioning a reasonable accommodation under the ADA certainly is not dependent upon interacting with the disabled employee. In fact, a failure to interact may be quite irrelevant to the reasonable accommodation inquiry. This conclusion is statutorily compelled: ADA liability attaches only where the employee could have been reasonably accommodated but was not. If the employee *has* been reasonably accommodated, ADA liability cannot attach, regardless of whether the accommodation was produced without employee input. Thus, those courts that recognize an interactive process participation requirement are fooling themselves and their litigants; the ADA, as currently drafted, permits no such requirement.

### C. *The Continued Relevance of Employer Participation in the Interactive Process*

From the previous discussion, an employer could conclude that it will receive no benefit from participating in the EEOC-recommended interactive process, indeed that the interactive process is virtually irrelevant in the ADA litigation context. That conclusion, however, is inaccurate and reliance on it may prove detrimental. The final portion of this Note briefly analyzes two situations in which an employer's failure to interact could be damaging.

169. *See id.*

## 1. Employer Motions for Summary Judgment

Once a disabled employee has filed suit claiming that her employer has failed to reasonably accommodate her limitations, the employer may move for summary judgment. Several allegations supporting summary judgment are available to employers at this stage in the litigation; however, for purposes of this discussion, the most important of these is an employer allegation that the employee is not statutorily qualified and, therefore, does not fall within the ADA's protected class.

As previously discussed, a disabled individual must be able to demonstrate his ability to perform, with or without reasonable accommodation, the essential functions of the at-issue position to be deemed statutorily qualified and, therefore, subject to ADA protections.<sup>170</sup> In reasonable accommodation cases, most courts impose upon the plaintiff the burden of identifying a facially reasonable accommodation that renders him statutorily qualified.<sup>171</sup> If a plaintiff cannot identify an accommodation that will enable him to perform the essential functions of the at-issue position, the court likely will conclude that the plaintiff is not a member of the ADA's protected class and grant the employer's motion for summary judgment.<sup>172</sup>

However, an employer's failure to communicate with its disabled employee regarding the possibility of reasonable accommodation can deal a significant blow to the employer's summary judgment motion. Where it is clear that the employer made no effort to aid the employee's search for accommodation, courts have been reticent to grant summary judgment, even if the employee is unable to identify an accommodation that would render them qualified. In fact, several

170. *Id.* at § 12111(8).

171. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 950 (8th Cir. 1999) (noting that employees are "required to make a facial showing that reasonable accommodation is possible"); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996) (noting that plaintiff could defeat employer motion for summary judgment only "by producing probative evidence that reasonable accommodations were available"); Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1286 (11th Cir. 1997) (noting that "the burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable"); Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 1000 (S.D. Ind. 2000) (noting that the plaintiff bears the burden of proving that he is a qualified individual with a disability); *see also* Weiler v. Household Fin. Corp., 101 F.3d 519, 525 (7th Cir. 1996) ("Recovery under the ADA . . . requires a plaintiff to establish she is a qualified individual with a disability.").

172. *See* Kvorjak v. Maine, 259 F.3d 48, 58 (1st Cir. 2001) (holding that summary judgment is appropriate where plaintiff cannot prove membership in the ADA's protected class).

circuits have held that a failure to interact in good faith operates as a *per se* bar to an employer's obtaining summary judgment in cases where its employee is unable to identify a reasonable accommodation.

In *Phoenixville School District*,<sup>173</sup> the Third Circuit adopted this approach. The plaintiff there claimed that her employer failed to reasonably accommodate her mental illness. The employer moved for summary judgment, contending that its employee had failed to identify an accommodation that would have rendered her statutorily qualified. The district court granted summary judgment for the employer, but the Third Circuit reversed.<sup>174</sup> Discussing the issue of reasonable accommodation, the court noted that employers were required to "make a good-faith effort to seek accommodations."<sup>175</sup> While the employer will not be held liable at trial if there is no evidence that a reasonable accommodation existed, the court stated: "When an employee has evidence that the employer did not act in good faith in the interactive process, . . . we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect."<sup>176</sup> The court concluded that validating summary judgment in this situation would "effectively eliminate the requirement that employers must participate in the interactive process."<sup>177</sup> "Thus, where there is a genuine dispute about whether the employer acted in good faith, summary judgment will typically be precluded."<sup>178</sup>

It remains the ADA plaintiff's burden to demonstrate the existence of a reasonable accommodation, and a plaintiff's inability to identify an accommodation at trial will result in a verdict for the employer.<sup>179</sup> However, most courts will not adjudicate the reasonable

173. *Taylor v. Phonixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999).

174. *Id.* at 320.

175. *Id.* at 317.

176. *Id.* at 318.

177. *Id.*

178. *Id.*; see also *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (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"), *judgment vacated by* 535 U.S. 391 (2002); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 953 (8th Cir. 1999) (same); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 700 (7th Cir. 1998) (refusing to grant summary judgment where employer may not have interacted in good faith); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 634 (7th Cir. 1998) (same).

179. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (noting that, even where an employer overtly fails to interact, the plaintiff will not be entitled to recover "unless . . . a reasonable accommodation was possible").

accommodation issue at the summary judgment stage if the plaintiff has evidence that his employer acted in bad faith. This provides a powerful incentive for employers to fully participate in the interactive process; trials are time-consuming and especially frustrating where the employer could have obtained the same outcome at significantly less expense.

Thus, failing to interact could remove the potency of summary judgment, one of an employer's most powerful litigation tools. While that consequence is certainly not trivial, the ultimate outcome at trial remains the same, as demonstrated by the analysis above. Employers will not incur ADA liability simply because they fail to participate in the interactive process; therefore, the interactive process is not *required*. As the preceding commentary suggests, however, employers should carefully consider the ramifications of choosing not to interact.

## 2. Employee Claims for Compensatory and Punitive Damages

Employers face one other specter that should motivate them to engage in the interactive process: the availability of compensatory and punitive damages under the ADA. While case law on this point is scant, it appears that an employer who makes a good faith effort to reasonably accommodate its disabled employee but ultimately fails to accomplish this goal may be able to avoid a judicial imposition of compensatory and punitive damages, even where the employee can point to an accommodation that is reasonable.

Section 107(a) of the ADA, when read in concert with section 1981a(a)(2) of the Civil Rights Act of 1964, gives a plaintiff who proves intentional discrimination because of his disability the right to recover both compensatory and punitive damages.<sup>180</sup> With regard to reasonable accommodation claims, however, the possibility of compensatory and punitive awards is limited by the language of section 1981a(a)(3):

damages may not be awarded under this section where the [employer] demonstrates good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.<sup>181</sup>

180. See 42 U.S.C. § 12117(a); 42 U.S.C. § 1981a(a)(2).

181. *Id.* at § 1981a(a)(3).

Thus, if an employee presents evidence of an accommodation that would have rendered her statutorily qualified, her employer will incur ADA liability if it did not provide an accommodation. This remains true even when the employer engaged in an extensive interactive process about which the employee had no complaints. In a sense, then, ADA liability for failure to accommodate is strict: If an employer could have accommodated its disabled employee but failed to do so, liability attaches despite the employer's good faith efforts.

However, an employer's good faith attempt to provide accommodation can greatly limit the type of relief available to an ADA plaintiff. If an employer is deemed to have pursued in good faith a reasonable accommodation for its employee, but failed in that pursuit, the employer will incur ADA liability if an accommodation existed but may be immunized from claims for compensatory and punitive damages. Interaction in the manner recommended by the EEOC should constitute strong evidence that an employer responded to a request for accommodation in good faith. By contrast, the court could characterize a failure to follow the EEOC guidelines as evidence of the employer's bad faith. That characterization may deprive the employer of an opportunity to avoid compensatory and punitive damages.

*Howell v. Michelin Tire Corp.*<sup>182</sup> illustrates the application of the good faith standard found in section 1981a(a)(3) to an ADA plaintiff's claim for compensatory and punitive damages. In *Howell*, the plaintiff claimed that his employer acted in bad faith when it failed to reasonably accommodate his disability. The employer moved for summary judgment, contending that it had attempted in good faith to reasonably accommodate the plaintiff and should therefore be immunized from compensatory and punitive assessments. The court denied the employer's motion, holding that summary judgment was inappropriate because each party presented sufficient evidence of its claims.<sup>183</sup> Whether the employer's attempts to accommodate its employee met the good faith substantive standard of section 1981a(a)(3) was an issue correctly decided by the fact-finder.<sup>184</sup> However, the court did imply a willingness to decide the issue of good faith at the summary judgment stage in the appropriate case. Thus, *Howell* arguably stands for the proposition that an employer that has gone to great lengths to

182. 860 F. Supp. 1488 (M.D. Ala. 1994).

183. *Id.* at 1494.

184. *Id.*



accommodate a disabled employee may be able to obtain summary judgment on the issue of compensatory and punitive damage awards.<sup>185</sup>

Again, an employer will be held liable under the ADA if it could have reasonably accommodated a disabled employee but failed to do so. Thus, as previously discussed, ADA liability is not affected by employer participation in the interactive process, even if the scope and intensity of the employer's interaction are regarded as exemplary by all parties. A good faith attempt to accommodate the employee will, however, immunize the employer from claims for compensatory and punitive damages and the EEOC's interactive process may constitute one manner in which to demonstrate good faith section 1981a(a)(3). The opportunity to avoid compensatory and punitive awards should persuade employers to participate in the EEOC-recommended interactive process.

#### CONCLUSION

Formulating an adequate judicial response to the ADA's reasonable accommodation provision has proven to be quite a daunting task. Congress failed even to comment on many of the specific details arising from the accommodation substantive right; the process by which reasonable accommodation should be achieved is not explained anywhere in the Act. As demonstrated by this Note, the EEOC statements endorsing an "informal, interactive process" as the "best" avenue for arriving at reasonable accommodation have failed to settle the issue. Some courts have interpreted the EEOC guidelines as requiring employers to participate in an interactive process, while other courts cite the same EEOC language in support of a conclusion that the ADA does not require employer interaction. In short, the interactive process jurisprudence arising out of the circuits appears to be a confused mess.

This Note attempts to provide some clarity to the interactive process issue. All of the federal appeals courts agree that employers *should* participate in some type of interactive process with their disabled employees. The circuits believe themselves to be in conflict over whether the employer *must* engage in that process. However, a

185. See also *Szedlock v. Tenet*, 139 F. Supp. 2d 725, 732 (E.D. Va. 2001) (noting that good faith attempts to accommodate a disabled individual will immunize an employer from a compensatory damages claim under the Rehabilitation Act, 29 U.S.C. § 701 *et. seq.*, but refusing to disturb a jury determination that the defendant had not acted in good faith).

close inspection of their opinions reveals no actual conflict. ADA liability attaches for the failure to accommodate where accommodation would have been possible. If an accommodation was possible but not provided, the fact that the employer sincerely tried to provide an accommodation will not shield it from liability. If accommodation was not possible, the fact that the employer did not attempt to find it will not render the employer liable. Thus, the failure or success of the interactive process is ultimately irrelevant to the imposition of ADA liability for failure to reasonably accommodate. Despite some grandiose pronouncements to the contrary, all of the appeals courts that have confronted the issue have at least implicitly recognized this fact and have refused to impose ADA liability independent of the circumstances.

That is not to say that employer interaction is wholly unimportant. Employer motions for summary judgment on the ground that an employee is not statutorily qualified likely will be precluded if the employer did not make reasonable attempts to find an appropriate accommodation for its disabled employee. Further, as discussed above, a failure to interact may deprive an employer of the opportunity to avoid compensatory and punitive damages. These consequences are certainly not insignificant; however, neither ultimately influences the inquiry into ADA liability for a failure to engage in the interactive process.

Thus, the status of the EEOC-recommended interactive process remains unsettled. Undoubtedly, problems in the employment context are best solved through interactive communication. That generalization, however, does not help us answer the real question posed by this Note: In the specific context of fashioning a reasonable accommodation, is the *best* way necessarily the *required* way? Because the ADA will not permit the imposition of liability for a failure to interact, this Note concludes that the answer is no.