TOWARD A STANDARD FOR A FAILURE TO ACCOMMODATE CLAIM UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION

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I. INTRODUCTION

In *Victor v. State*, the New Jersey Supreme Court was called upon to decide whether a claim of failure to accommodate a disability under the New Jersey Law Against Discrimination ("LAD") required the plaintiff to prove, as part of the prima facie case, that he suffered an adverse employment consequence as a result of his employer failing to accommodate the disability, or whether simply failing to accommodate the disability was sufficient to warrant an actionable claim under the LAD.[1]

The plaintiff, Roy Victor, brought a claim against the State of New Jersey, the New Jersey State Police, and certain individual defendants, alleging, *inter alia*, failure to accommodate under the LAD.[2] Victor's case involved an unusual set of circumstances; namely that Victor, after returning from disability leave for a back injury, claimed to have re-aggravated his injury, rendering him unable to fulfill his duties as a state trooper on road patrol.[3] As a result, Victor requested an accommodation in the form of performing administrative tasks rather than his normal duties.[4] Because Victor had been medically cleared for full duty status, his supervisor required him to undertake his normal duties.[5] The result was a four-hour period during which Victor was required to perform full duties despite his request for an accommodation.[6] Victor was not discharged or demoted, nor did he claim constructive discharge.[7] Thus, the question arose as to whether

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[1] *See* Victor v. State, 203 N.J. 383 (2010).

[2] *Id.* at 389–90.

[3] *Id.* at 391–92.

[4] *Id.* at 392.

[5] *Id.*

[6] *Id.* at 393.

[7] *See generally Victor*, 203 N.J. 383.

this four-hour period, during which Victor was required to perform his full duties without an accommodation, constituted an actionable claim under the LAD for failure to accommodate, even though he did not suffer an adverse employment consequence.

The Appellate Division reversed the trial court's ruling that an adverse employment consequence "is presumed by the failure to accommodate or that plaintiff's claimed psychological suffering unequivocally qualifies."[8] Instead, the Appellate Division held that the jury charge, which failed to "require a finding that plaintiff suffered an adverse employment action," was insufficient because an adverse employment consequence must be found in order to establish a claim of failure to accommodate under the LAD.[9] The New Jersey Supreme Court was set to provide a definitive answer to the question yet failed to do so, holding instead that Victor could establish neither that he was disabled on December 11, 2003 nor that he sought a reasonable accommodation.[10] Thus, the question remains unresolved. Importantly, the court included *dicta* which strongly suggested that no additional adverse employment consequence would be needed to state a *prima facie* case.[11]

After the New Jersey Supreme Court's ruling in *Victor*, there has been considerable disagreement among courts in New Jersey as to how to apply the *prima facie* case for failure to accommodate under the LAD. This disagreement stems from the court's failure to decide the core question while offering *dicta* that no adverse employment consequence would be necessary to state a *prima facie* case. As will be discussed *infra*, some courts have continued to require proof of an adverse employment consequence, while others have relied on the court's suggestion in *dicta* and have omitted the adverse employment consequence element entirely.

This Comment examines the divergent lines of cases stemming from the *Victor* decision and argues that under the proper construction of the LAD, and as a matter of public policy, the court in *Victor* was correct to suggest that no adverse employment consequence should be necessary to support a claim of failure to accommodate under the LAD. Part II of this Comment examines the New Jersey Law Against Discrimination in the context of disability discrimination. This section

[8] Victor v. State, 401 N.J. Super. 596, 617 (App. Div. 2008), *aff'd as modified*, 203 N.J. 383 (2010).

[9] *Id.*

[10] *Victor*, 203 N.J. at 422–23.

[11] *See id.* at 421–22. .

also examines the failure to accommodate issue under the Americans with Disabilities Act ("ADA"), to which New Jersey courts look for guidance.[12] Part II concludes with a more thorough analysis of the New Jersey Supreme Court's decision in *Victor* and its conflict with the Appellate Division. Part III examines *Victor*'s effect on failure to accommodate jurisprudence under the LAD. It surveys two divergent lines of cases that have developed since the *Victor* decision, one of which views an adverse employment consequence as necessary and one of which, relying on the Supreme Court's language in *dicta*, omits this element. Part IV begins by urging the New Jersey Supreme Court to grant certification to decide this important question, because courts have struggled with the issue of how to articulate the *prima facie* case after *Victor*. It also considers the remedy to which the employee should be entitled if no adverse employment consequence is necessary. Further, Part IV argues that interpreting the LAD to require an adverse employment consequence restricts the duty to accommodate to those accommodations necessary to perform the job. Such an interpretation is out of line with prevailing interpretations of the LAD and, additionally, with the ADA. Part V concludes that failing to accommodate the disability, even without an adverse employment consequence, should be an actionable claim under the LAD.

II. THE LAD, THE ADA, DISABILITY DISCRIMINATION, AND FAILURE TO ACCOMMODATE IN LIGHT OF *VICTOR*

A. The LAD

> In passing the LAD, the New Jersey Legislature found that:
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> [P]ractices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State[.][13]

The New Jersey Supreme Court has stated that it is "the clear public policy of this State . . . to abolish discrimination in the work place.

[12] *Victor*, 401 N.J. Super. at 612.

[13] N.J. STAT. ANN. § 10:5-3 (2007).

Indeed, the overarching goal of the Law is nothing less than the eradication 'of the cancer of discrimination.'"[14]

The New Jersey legislature enacted the LAD in 1945, which, at the time, did not provide protections for those with disabilities; such protections did not appear until 1972.[15] In that year, a new subsection of the LAD was enacted to extend the statute's reach to cover persons with physical disabilities.[16] It stated that the provision was to be construed to "prohibit any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment."[17] Thus, at the outset, people with disabilities were given their own statutory protection rather than being added as a protected class under the more general provisions of the statute.[18] Moreover, protection for disabled persons was limited by the individual's ability to perform the functions of his or her employment.[19] In *Victor*, the court explained that "unlike other protected classes, a person's physical disability might interfere with full and unfettered equal treatment."[20] Since the time that protection for disabled persons was recognized, the statute has been amended to include additional protections.[21] For example, in 1978, the Legislature expanded the statute by eliminating the requirement of a physical disability and by including certain mental and psychological disabilities.[22]

It was not until 2003 that the LAD was expanded to include "disability" as a protected status akin to the original protected classes.[23] Under the LAD, the legislature defined disability to include physical disabilities, "mental, psychological, or developmental" disabilities, and AIDS or HIV infection.[24] Despite defining the term "disability," and

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[14] Fuchilla v. Layman, 109 N.J. 319, 334 (1988) (quoting Jackson v. Concord Co., 54 N.J. 113, 124 (1969)).

[15] *Victor*, 203 N.J. at 398 (citing 1972 N.J. Laws Ch. 114).

[16] *Id.*

[17] N.J. STAT. ANN. § 10:5-4.1 (2004).

[18] *Victor*, 203 N.J. at 399.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 400.

[22] 1978 N.J. Laws Ch. 137 § 3; *see also Victor*, 203 N.J. at 400.

[23] 2003 N.J. Laws Ch. 180 § 4.

[24] N.J. STAT. ANN. § 10:5-5(q) (2010). The statute provides greater clarity by defining disability as:

> physical disability, infirmity, malformation or disfigurement which is

despite the ADA's earlier recognition of failure to accommodate as a subset of disability discrimination, the LAD itself does not include the term "failure to accommodate." Rather, that term appears in the regulations supplementing the statute.[25]

N.J.A.C. 13:13-2.5(a) provides, in pertinent part, that "[a]ll employers shall conduct their employment procedures in such a manner as to assure that all people with disabilities are given equal consideration with people who do not have disabilities for all aspects of employment . . . ."[26] The term "all aspects of employment" includes "hiring, promotion, tenure, training, assignment, transfers, and leaves on the basis of their qualifications and abilities."[27] The reasonable accommodation language appears in N.J.A.C. 13:13-2.5(b), which states that "[a]n employer must make a reasonable accommodation to the limitations of a[n] employee . . . who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business."[28] The

> caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

Id.

[25] *See* Potente v. Cnty. of Hudson, 187 N.J. 103, 110–11 (2006).

> Administrative regulations set out the specific requirements of the reasonable accommodation process mandated by the LAD. In brief, unless it would impose an undue hardship on the operation of the business, N.J.A.C. 13:13–2.5(b) requires an employer to make a 'reasonable accommodation to the limitations of an employee . . . who is a person with a disability.' However, an employer is not required to take action 'where it can reasonably be determined that an . . . employee, as a result of the individual's disability, cannot perform the essential function of the job even with reasonable accommodation.'

Id.

See also Tynan v. Vicinage 13 of the Superior Court of N.J., 351 N.J. Super. 385, 396 (App. Div. 2002) ("The LAD does not specifically address reasonable accommodation, but our courts have uniformly held that the law nevertheless requires an employer to reasonably accommodate an employee's handicap.")

[26] N.J. ADMIN. CODE § 13:13-2.5 (2012).

[27] *Id.*

[28] *Id.*

determination of whether an employer failed to make a reasonable accommodation is made on a case-by-case basis.[29]

To determine whether an accommodation would impose an undue hardship on the employer, the following factors must be examined:

> The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; [t]he type of the employer's operations, including the composition and structure of the employer's workforce; [t]he nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and [t]he extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.[30]

Such is the general statutory framework regarding a claim of failure to accommodate under the LAD. Before examining New Jersey case law under the LAD, it is instructive to first undertake an inquiry of the pertinent ADA provisions.

B. The ADA and Failure to Accommodate

When the LAD is unclear, New Jersey courts will "rely on the federal courts and their construction of federal laws for guidance."[31] Under the ADA:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[32]

This rule has been interpreted to require an "adverse employment action" for a violation of the statute because "the general rule established in section (a) qualifies the word 'discriminate' with the phrase 'in regard to' and then lists several forms of employment-related actions."[33] Thus, the statute suggests that there is a link between the discrimination and the adverse employment

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[29] *Id.*

[30] *Id.*

[31] Victor v. State, 203 N.J. 383, 398 (2010).

[32] 42 U.S.C. § 12112(a) (2012).

[33] *Victor*, 203 N.J. at 411.

consequence.[34] This interpretation has not been universally accepted, however.[35]

The statute continues, in 42 U.S.C. § 12112(b), to define the phrase "discriminate against a qualified individual on the basis of disability" as:

> [N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.[36]

The term "disability" under the ADA is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[37]

The statute explains that "reasonable accommodation" may consist of "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" or "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[38]

Federal courts have interpreted the language of the ADA to require an employer to engage in an interactive process. For example, the Third Circuit in *Taylor v. Phoenixville School District*, relying on a federal regulation interpreting the ADA,[39] reasoned that an employer must engage in an interactive process.[40] The court created a four-factor

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[34] Marshall v. Fed. Exp. Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997) ("As the language of § 12112(a) makes clear, for discrimination (including denial of reasonable accommodation) to be actionable, it must occur *in regard to* some adverse personnel decision or other term or condition of employment.").

[35] Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong has no Place in a Failure to Accommodate Disability Claim*, 36 HAMLINE L. REV. 497, 504–05 (2013) (explaining the different interpretations of the ADA's language and concluding that "a more straightforward reading of the ADA leads to the conclusion that no separate adverse action is necessary.")

[36] 42 U.S.C. § 12112(b)(5)(A) (2012).

[37] § 12102.

[38] § 12111.

[39] 29 C.F.R. § 1630.2(o)(3) (2012) ("To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of the accommodation.").

[40] Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 318–19 (3d Cir. 1999).

test to determine whether the employer properly engaged in an interactive process, which requires the plaintiff to show that

> (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for 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."[41]

Importantly, however, the court did not suggest that the four factors "created the entirety of the proofs that a plaintiff must advance in order to recover under the ADA for a failure to accommodate. Rather, the opinion established its overall framework by identifying the elements of the prima facie case for ADA discrimination that all plaintiffs must prove, including an adverse employment consequence."[42] Thus, despite introducing the four-factor test for an interactive process into the analysis, it is not, on its own, legally significant in that the same overarching framework applies, which requires the plaintiff to show that:

> (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.[43]

As the court in *Victor* explained, "[t]he *Taylor* decision . . . did not divorce failure to accommodate from the essential elements of all other disability discrimination claims; rather, the elements of the failure to accommodate claim appear as a subset of the second prong of the ordinary prima facie case."[44]

Despite the articulation in *Taylor* of the prima facie case for failure to accommodate, the question of whether an adverse employment consequence is needed remains unsettled among the circuits, namely the question of whether, under the statute, failing to accommodate a disability, even without an adverse employment consequence, is itself actionable because a failure to do so necessarily contravenes the statute. As one author explained:

> To establish a failure to accommodate claim, the plaintiff

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[41] *Id.* at 319–20.

[42] Victor v. State, 203 N.J. 383, 415–16 (2010).

[43] *Taylor*, 184 F.3d at 306.

[44] *Victor*, 203 N.J. at 416.

> must show he: (1) is disabled within the meaning of the ADA; (2) the employer is subject to the ADA and on notice of the disability and need for the accommodation; and (3) that the employee could perform the essential functions of the position with a reasonable accommodation. However, there is a split amongst the courts regarding the remaining elements. Some courts only require one additional element – a showing that the defendant failed to reasonably accommodate the plaintiff. On the other hand, certain courts mandate that the plaintiff also prove that he suffered an adverse employment action. In other circuits, it remains unclear whether an adverse action is necessary to state a claim. The dispute and confusion is attributable, at least in part, to parties and courts failing to clearly differentiate between disparate treatment and failure to accommodate claims. Although disparate treatment and the failure to accommodate may sometimes coexist, they are different types of discrimination. Sometimes this critical distinction gets lost in the analysis.[45]

For example, in *Williams v. Philadelphia Housing Authority Police Department*, the court articulated the *prima facie* case, including the adverse employment consequence element, but then went on to state that "[a]dverse employment decisions in this context include refusing to make reasonable accommodations for a plaintiff's disabilities."[46] Thus, the court stated that refusal to make an accommodation for an employee would itself be an adverse employment consequence, and therefore that no additional adverse employment consequence would be needed in order to satisfy the *prima facie* case. It is important to note that Williams was terminated, clearly an adverse employment consequence, thereby rendering the adverse employment consequence discussion *dicta*.[47]

The Seventh Circuit has similarly articulated that no adverse employment consequence would be necessary under the ADA. In *Stevens v. Illinois Department of Transportation*, the court stated the *prima facie* case as requiring plaintiff to prove: "(1) that she is disabled; (2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer took an adverse job action against her because of her

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[45] Brennan, *supra* note 35, at 500–02.

[46] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 761 (3d Cir. 2004).

[47] *Id.* at 758.

disability *or failed to make a reasonable accommodation.*"[48] Finally, an Illinois district court also rejected any need for proof of an adverse employment consequence for a claim of failure to accommodate under the ADA.[49] The court stated that the ADA cannot be read to create "employer liability only if the employee suffered an adverse employment action because of his disability. Under this construction an employer would not be liable in situations where known disabilities are not accommodated simply for management's laziness or cost benefit analysis."[50] The court concluded that an employer "cannot escape liability under the ADA just because its failure to accommodate did not result in an adverse employment action."[51] Other circuits, however, have continued to require proof of an adverse employment consequence.[52]

C. New Jersey Case Law Leading up to the Victor Decision

Prior to *Victor*, published opinions in New Jersey recited three elements of a *prima facie* case for failure to accommodate: "(1) the plaintiff had a LAD handicap; (2) was qualified to perform the essential functions of the job, with or without accommodation; and (3) suffered an adverse employment action because of the handicap."[53] Thus, New Jersey case law prior to *Victor* included the adverse employment consequence element in the analysis. In *Tynan v. Vicinage 13 of Superior Court*,[54] the Appellate Division adopted the *Taylor* court's requirement that an employer must engage in an interactive process.[55] The court implemented the four-factor test articulated in *Taylor*.[56] Thus, the analysis under the LAD is very similar to that under the ADA.

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[48] Stevens v. Ill. Dep't of Transp., 210 F.3d 732, 736 (7th Cir. 2000) (emphasis added).

[49] Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 723 (N.D. Ill. 2003).

[50] *Id.* at 724.

[51] *Id.*

[52] *See, e.g.*, Fenney v. Dakota, Minn. & R.R. Co., 327 F.3d 707, 716 (8th Cir. 2003) (a plaintiff must demonstrate he or she suffered from an adverse employment consequence in order to "overcome . . . initial burden of establishing a prima facie case").

[53] Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91 (App. Div. 2001).

[54] Tynan v. Vicinage 13 of Super. Ct., 351 N.J. Super. 385, 400 (App. Div. 2002).

[55] *Tynan,* 351 N.J. Super. at 400–401; *see also* Victor v. State, 401 N.J. Super. 596, 613 (App. Div. 2008).

[56] Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 319 (3d Cir. 1999).

D. Victor v. State

As aforementioned, *Victor* presented facts in which the failure to accommodate was unaccompanied by any other adverse employment consequence. The plaintiff, Roy Victor, a New Jersey State Trooper, suffered a back injury in 1995 and, because of complications with his back and a stress-related disorder, was on and off of medical leave for lengthy periods between 1995 and 2003.[57] In December of 2003, Victor returned to "full-duty" status, which as a "Trooper I" required him to be "on road patrol" and wear a protective vest.[58] When Victor returned to work on December 11, he told his Assistant Station Manager, Sergeant O'Rourke, that he had re-injured his back between being cleared for "full-duty" status and returning for work.[59] Victor told O'Rourke that he wanted to perform administrative tasks instead of his normal duties because he believed the protective vest would aggravate his back injury.[60] The Station Commander, to whom the matter was ultimately referred, confirmed that Victor had been cleared for full duty status and required Victor to undertake his normal duties.[61] Victor did not "request sick leave, ask that he be permitted to visit the division doctor, or produce anything to document his claim that he was injured, but instead put on his protective vest and went out on road patrol."[62] Victor took sick leave for the final two hours of his shift and later saw two division doctors. Victor was later placed on off-duty status due to depression and stress, but no documentation was produced to support his claim of a back injury.[63] The issue was the four-hour period during which Victor claimed he was not accommodated and forced to undertake his normal duties.[64]

During the trial, the parties took opposing stances as to whether an adverse employment consequence was needed to state a failure to accommodate claim, and the issue was brought before the trial court in the charge conference.[65] Defendants sought to include an adverse employment consequence element as part of the *prima facie* case, but the trial court refused to so instruct the jury.[66] The trial court reasoned

[57] Victor v. State, 203 N.J. 383, 390 (2010).
[58] *Id.* at 391.
[59] *Id.*
[60] *Id.* at 392.
[61] *Id.*
[62] *Id.*
[63] *Victor*, 203 N.J. at 392.
[64] *Id.* at 388.
[65] *Id.* at 393.
[66] *Id.*

that if all the other elements are proven, failure to accommodate a disability is in and of itself an adverse employment action.[67] The trial court re-affirmed this position in denying a post-verdict motion for a new trial.[68]

Defendants appealed, arguing that the jury charge omitting the adverse employment consequence element was flawed.[69] The Appellate Division reversed the trial court and held that an adverse employment consequence was necessary to establish a *prima facie* case for failure to accommodate a disability under the LAD.[70] Moreover, the court specified what may qualify as an adverse employment consequence, holding that

> [A]n employer's adverse employment action must rise above something that makes an employee unhappy, resentful or otherwise cause an incidental workplace dissatisfaction . . . actions that affect wages, benefits, or result in direct economic harm qualify . . . [as do] noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment.[71]

The court remanded for a new trial, stating that "the [jury] charge was legally insufficient as it incorrectly stated the applicable law by failing to require a finding that plaintiff suffered an adverse employment action."[72]

The New Jersey Supreme Court granted the petition for certification,[73] presumably to provide a definitive answer to whether an adverse employment consequence is a necessary element of failure to accommodate under the LAD. But, the court held that even assuming *arguendo* that no adverse employment consequence was needed, Victor still could not establish a *prima facie* case of failure to accommodate because he could establish neither that he was disabled on the date in question nor that he had sought a reasonable accommodation.[74] Instead of resolving the issue, the court stated:

> In spite of our recognition that the broad remedial sweep of our LAD demands vigilance in our protection of the rights

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[67] *Id.* at 395.
[68] *Id.* at 393.
[69] *Victor*, 203 N.J. at 393.
[70] Victor v. State, 401 N.J. Super. 596, 617 (App. Div. 2008).
[71] *Id.* at 616.
[72] *Id.* at 617.
[73] Victor v. State, 199 N.J. 542 (2009).
[74] *Victor*, 203 N.J. at 422–23.

> of persons with disabilities, and as compelling as their plight is in facing workplace challenges that are uniquely theirs, we are constrained to refrain from resolving today the question of whether a failure to accommodate unaccompanied by an adverse employment consequence may be actionable.[75]

The court was careful to note that it did not rule "based on [the] conclusion that there can be no claim for failure to accommodate absent an adverse employment consequence, because we have found this record an inappropriate one on which to decide that important question."[76] Moreover, in *dicta*, the court stated that the "LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted."[77] The court declined to "entirely foreclose the possibility of circumstances that would give rise to a claim for failure to accommodate even without an identifiable adverse employment consequence."[78] After providing this lengthy analysis in *dicta*, the Court concluded that "regardless of whether or not there is room in the LAD's strong protective embrace of persons with disabilities to recognize that there may be circumstances in which a failure to accommodate in and of itself gives rise to a cause of action, this plaintiff's claim for failure to accommodate cannot meet the proofs required on his prima facie case."[79]

Thus, *Victor* created tension by foreshadowing a change in the law without making a definitive determination on the issue. This has led to difficulties in interpretation by courts facing claims of failure to accommodate in later cases.

III. APPLICATION OF *VICTOR* IN LATER NEW JERSEY CASES ALLEGING FAILURE TO ACCOMMODATE

After *Victor*, two competing lines of cases developed in interpreting the requirements for a *prima facie case* of failure to accommodate under the LAD. Some of the cases rely on the published opinions in New Jersey issued before the *Victor* decision which include the adverse employment consequence element in the *prima facie* case.

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[75] *Id.* at 422.
[76] *Id.* at 424–25.
[77] *Id.* at 421.
[78] *Id.* at 422.
[79] *Id.* at 425.

Others, however, have relied on the language in *Victor*, suggesting that no additional adverse employment consequence is necessary. The latter line of cases interprets *Victor* as a *de facto* elimination of the adverse employment consequence element.

A. Adverse Employment Consequence Required

The first line of cases has read the language in *Victor* as *dicta* and has continued to apply the adverse employment consequence element. For example, in *Zack v. State*,[80] the Appellate Division considered a case in which the plaintiff left her position voluntarily and had to rely on a theory of constructive discharge to meet the adverse employment consequence element of the *prima facie* case.[81] In *Zack*, the plaintiff, after striking her head on a metal cabinet, suffered from post-concussion syndrome and hypersensitivity to light and certain odors, in addition to cognitive impairment and migraines.[82] The employer accommodated the plaintiff by relocating her workstation away from the windows and removing the light fixture from her cubicle.[83] The plaintiff was ultimately moved to a new floor, where she complained that a cubicle about twelve feet from her workspace was reconfigured, which caused additional light to enter her cubicle.[84] Plaintiff's continued opposition to lighting in the office space was deemed unreasonable, causing her to ultimately submit her resignation.[85]

The trial court granted summary judgment in favor of defendants, holding that "defendants had reasonably accommodated plaintiff's disability [and that] the plaintiff suffered no adverse employment action."[86] The Appellate Division considered two issues on appeal, namely "whether defendants provided a 'reasonable accommodation' to plaintiff; and . . . whether plaintiff suffered the adverse employment action of 'constructive discharge.'"[87] The Appellate Division, in its analysis, stated that the New Jersey Supreme Court, in *Victor*, left open the "important question" of "whether an adverse employment consequence is an essential element of a plaintiff's claim that his employer discriminated against him by failing to accommodate his

[80] No. A-3414-09T3, 2012 WL 832611 (App. Div. Mar. 14, 2012).
[81] *Id.*
[82] *Id.* at *1.
[83] *Id.*
[84] *Id.* at *3.
[85] *Id.*
[86] *Zack*, 2012 WL 832611, at *3.
[87] *Id.* at *4.

disability."[88] Importantly, the court stated that "[d]espite *Victor's* legacy of uncertainty,[89] under prevailing legal standards, the third element of a prima facie for employment discrimination based on disability requires plaintiff to show she suffered an adverse employment action due to her handicap."[90] Thus, because the court required the plaintiff to prove that she suffered an adverse employment consequence, plaintiff had to rely on a theory of constructive discharge.[91] A claim of constructive discharge creates a high bar for the plaintiff, requiring her to prove "not merely 'severe or pervasive' conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it."[92] As another court explained, constructive discharge contemplates "outrageous," "coercive," and "unconscionable" acts.[93]

The court first held that the defendants routinely complied with plaintiff's reasonable accommodation requests except when plaintiff's "requests conflicted with work-safety issues."[94] In light of defendants' repeated compliance with plaintiff's requests, with only a few, legitimate exceptions, the court ultimately held that "no rational jury could find defendants failed to provide plaintiff with a reasonable accommodation to enable her to perform the essential function of her job."[95] Importantly, despite the fact that the court's initial conclusion was sufficient to uphold the grant of summary judgment, the court, in the alternative, also held that "[b]ecause plaintiff's adverse employment action is directly related to establishing this element of her prima facie case—that defendants created an intolerable work environment by failing to provide a reasonable accommodation—this part of her case likewise fails."[96]

Zack is significant because it is an example of the court applying

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[88] *Id.* at *3 (citing Victor v. State, 203 N.J. 386, 388 (2010)).

[89] *See also* Nead v. Union Cnty. Educ. Servs. Comm'n, No. A-3149-09T1, 2011 WL 166245, at *9 (App. Div. Jan. 20, 2011) (acknowledging that the court in *Victor* "strongly suggested that such a claim may not necessarily require anything more than the failure to engage in an interactive dialogue with the employee," but conceding that "the Court itself noted that this comment was dicta, and left for another day the ultimate determination").

[90] *Zack*, 2012 WL 832611, at *4.

[91] *Id.*

[92] Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (citing Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001)).

[93] *Jones*, 339 N.J. Super. at 428.

[94] *Zack*, 2012 WL 832611, at *5.

[95] *Id.* at *5.

[96] *Id.*

the adverse employment consequence element after *Victor*, requiring the plaintiff to rely on constructive discharge, a high bar, in order to establish a *prima facie* case of failure to accommodate. Presumably, had it been the case in *Zack* that the plaintiff's requests for accommodations were reasonable, the adverse employment consequence element would have been the dispositive factor denying her claim for relief.

The next significant case is *Alotto v. ECSM Utility Contractors, Inc.*[97] In *Allotto*, the plaintiff was a utility locator, and as part of her job she was required to respond to emergencies beyond regular business hours.[98] Plaintiff suffered from insomnia, and as a result of her insomnia medication she could not drive a vehicle and could not be on-call.[99] Plaintiff requested to be removed completely from on-call duty.[100] Plaintiff, via e-mail, left her position when her employer requested a doctor's note indicating that she could fulfill her obligations as a utility locator, including the on-call requirement.[101]

In its analysis, the court included the adverse employment consequence element, stating that in order to establish a *prima facie* case for failure to accommodate, a plaintiff "must make out the first three elements of the disability discrimination case" and introduce evidence that they engaged in an interactive process as required by the court in *Taylor*.[102] Moreover, in a footnote, the court noted that:

> [i]n *Victor v. State,* the New Jersey Supreme Court considered at length when a plaintiff may bring a failure to accommodate claim where there was no adverse employment action apart from the failure to accommodate. Despite its lengthy analysis of the issue and its recognition of the broad remedial sweep of the NJLAD, the court ultimately declined to decide the issue. Therefore, an adverse employment action remains a required element of a prima facie failure to accommodate case.[103]

In *Alotto*, the lack of an adverse employment consequence was a key inquiry in the court's analysis. Much like the plaintiff in *Zack*,[104] the

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97 No. 09-1144, 2010 WL 5186127, at *1 (D.N.J. Dec. 15, 2010).

98 *Id.*

99 *Id.*

100 *Id.* at *2.

101 *Id.*

102 *Id.* at *3.

103 *Alotto*, 2010 WL 5186127, at *3 n.10 (internal citations omitted).

104 *Zack*, 2012 WL 832611, at *11–12.

plaintiff in *Alotto* had to rely on a theory of constructive discharge.[105] Also like the plaintiff in *Zack*, the plaintiff could not meet her burden to establish a constructive discharge. The court held that "Plaintiff told Defendants that she considered herself fired after Defendants requested a doctor's note indicating that Plaintiff could perform the requirements of her job. No reasonable fact-finder could conclude that this request amounts to an adverse employment action against Plaintiff or involves outrageous, coercive or unconscionable conduct."[106] The court ultimately concluded that "[b]ecause Plaintiff cannot demonstrate that she suffered an adverse employment action, a required element for . . . failure to accommodate claims, summary judgment will be granted to Defendants."[107]

Moreover, in *White v. University of Medicine & Dentistry of N.J.*,[108] the Appellate Division recognized the current confusion with regard to the proper articulation of the *prima facie* case for failure to accommodate when it stated that an adverse employment consequence is part of a plaintiff's proofs; the court, however, noted in a footnote that *Victor* "suggested, without deciding, that a plaintiff might be able to establish a failure-to-accommodate claim without showing a resulting adverse employment action."[109] The ambiguity was not dispositive in the case, as it was undisputed that the plaintiff in the case did in fact suffer an adverse employment consequence.[110] Significantly, the court's confusion over the requirements could have been problematic if the adverse employment consequence element were in dispute, as seen in *Alotto* and *Zack*.

Such a case arose before District Court for the District of New Jersey in *Bull v. UPS*.[111] In *Bull*, the plaintiff alleged, in part, disability discrimination under the LAD for being terminated after being assigned to light duty by her doctor after she sustained an injury in the workplace.[112] The plaintiff testified at trial that she arrived at work one morning and was told that she would no longer be an employee at

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[105] *Alotto,* 2010 WL 5186127, at *3.

[106] *Id.*

[107] *Id.*

[108] No. A-6333-11T4, 2013 N.J. Super. LEXIS 2169, at *6 (App.Div. Aug. 30, 2013).

[109] *Id.* at *6 n.3.

[110] *Id.*

[111] Bull v. UPS, No. 07-2291 (KM) (MCA) 2014 U.S. Dist. LEXIS 89077 (D.N.J. July 1, 2014)

[112] *Id.* at *7–8.

UPS.[113] The jury found in favor of UPS.[114] The verdict form, however, indicated that the jury believed that Bull suffered from a disability, that she was performing her job prior to her alleged termination date, that she was able to perform the essential functions of her position, that UPS was aware of her need for an accommodation, that a reasonable accommodation existed, and that UPS "wrongfully did not make such a reasonable accommodation."[115] The jury, however, did *not* find that Bull was terminated, and as such she could not have been terminated on the basis of her disability.[116] Bull challenged the verdict, via a motion for new trial, on the grounds that the jury verdict sheet was inadequate.[117] Thus, the court was set to confront the issue of "whether any error in the verdict sheet here affected Ms. Bull's substantial rights by inadequately or incorrectly guiding the jury's findings as to essential issues."[118] Underlying this question was the issue left unresolved in *Victor*; namely, whether a jury finding of an adverse employment action was necessary, because if not, plaintiff could succeed on a theory of failure to accommodate. Indeed, the court recognized that Ms. Bull's "arguments boil down to a contention that termination of employment . . . is a superfluous consideration . . . [and that] [f]ailure to accommodate . . . is itself sufficient to make her case."[119]

The district court relied on a pre-*Victor*, 1998 case, *Seiden v. Marina Associates*,[120] for the recitation of the *prima facie* case for failure to accommodate, which required an adverse employment consequence.[121] The court stated that "at least thus far, the New Jersey courts have never merged the two elements of failure to accommodate and adverse employment action."[122] The court then addressed *Victor*, and explained that the New Jersey Supreme Court "acknowledged the possibility of an actionable failure to accommodate despite the lack of any 'identifiable' adverse action . . . [but] did not rule affirmatively."[123] Therefore, the court concluded that "[a]bsent a state Supreme Court decision, the case law cited above [i.e. *Seiden]*, which is contrary to

[113] *Id.* at *8.
[114] *Id.* at *1.
[115] *Id.* at *3.
[116] *Id.*
[117] *Bull*, 2014 U.S. Dist. LEXIS 89077 at *15.
[118] *Id.* at *17.
[119] *Id.* at *23.
[120] 315 N.J. Super. 451 (1998)
[121] *Bull*, 2014 U.S. Dist. LEXIS 89077 at *18.
[122] *Id.* at *30.
[123] *Id.*

plaintiff's position, is my best guide. I can discern no trend that would allow me to predict confidently that the New Jersey Supreme Court would decide this issue in a manner favoring plaintiff here."[124] The court then went on to address other weaknesses in plaintiff's argument on its way to denying plaintiff's motion for a new trial.[125]

Thus, *Zack* and *Alotto* are significant cases because each continued to apply the adverse employment consequence element, despite the language in *Victor* strongly suggesting that no additional adverse employment consequence would be necessary. In *Alotto*, the plaintiff's case hinged on proof of an adverse employment consequence and, in both *Zack* and *Alotto*, the plaintiff could not carry the high burden of a constructive discharge. Moreover, the district court's opinion in *Bull* directly addressed the tension resulting from *Victor*'s ambiguity, and took the position that despite the New Jersey Supreme Court's strong suggestion in *dicta*, an adverse employment consequence is still a required proof as part of plaintiff's *prima facie* case.

B. Adverse Employment Consequence Not Required

Since the *Victor* decision, several courts have interpreted the decision as separating the need for an adverse employment consequence from the *prima facie* case of failure to accommodate. For example, in *Whalen v. New Jersey Manufacturer's Insurance Co.*, the court stated that "[i]n *Victor,* the Court recognized that a plaintiff could bring a failure-to-accommodate claim where there was no adverse employment action apart from the failure to accommodate."[126] This language in *Whalen* is significant because the court read *Victor* as dispensing with the third element of the *prima facie* case for failure to accommodate. While the plaintiff in the case suffered an adverse employment consequence, rendering the issue moot, the court still acknowledged, albeit in *dicta*, that *Victor* stood for the proposition that no adverse employment consequence is necessary. Similarly, in *Fronczkiewicz v. Magellan Health Services, Inc.*, the court made a similar error in stating that *Victor* allows "plaintiffs 'to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted.'"[127]

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[124] *Id.* at *30–31.

[125] *Id.* at *34–35.

[126] 2012 WL 3166601, at *19 n.4 (N.J. App. Div. Aug. 6, 2012).

[127] No. 11-7542, 2012 WL 2357484, at *2 n.5 (D.N.J. June 20, 2012) (quoting Victor

Some courts have simply omitted the adverse employment consequence element in their articulation of the prima facie case. For example, in *Schellenberger v. BJ's Wholesale Club, Inc.*, the court, citing *Victor*, articulated the *prima facie* case as follows: "A claim for failure to accommodate under the NJLAD requires that the plaintiff establish both that he was disabled within the meaning of the statute, and sought a reasonable accommodation that would to allow him to perform the essential functions of the position."[128] Conspicuously missing in the courts articulation of the prima facie case was the adverse employment consequence element.[129]

Thus, in this line of cases, two of the courts, to wit, the *Whalen* and *Fronczkiewicz* courts, cited *Victor* as standing for the proposition that a claim of failure to accommodate required no additional adverse employment consequence. Other decisions, by contrast, omit the adverse employment consequence element, citing *Victor*. Thus, each of these decisions relies on *Victor* for the proposition that no adverse employment consequence is necessary to establish a *prima facie* case for failure to accommodate under the LAD.

IV. AN ARGUMENT FOR THE COURT TO TAKE A DEFINITIVE STAND AND DECLARE THAT FAILURE TO ACCOMMODATE REQUIRES NO ADVERSE EMPLOYMENT CONSEQUENCE

As the discussion of the case law in Part III illustrates, there is uncertainty in application of the court's decision in *Victor*. This ambiguity stems from the court's strong suggestion in *dicta* that under the right factual circumstances no adverse employment consequence would be necessary, while at the same time failing to make a definitive ruling on the issue. This inconsistency demands that the court grant certification to provide a definitive answer to the question. The lack of a uniform standard has already led to inconsistent application and divergent results.[130] While the courts that have misapplied the holding in *Victor* have done so only in *dicta*,[131] namely in cases in which there was an adverse employment consequence, there is danger in misapplication in future circumstances. The need for clarity in the law

v. State, 203 N.J. 383, 421 (2010)).

[128] No. 10-2398, 2011 WL 5416432, at *8 (D.N.J. Nov. 4, 2011).

[129] *See also* St. Cyr v. Brandywine Senior Living, LLC, No. 10-5868, 2012 WL 2344858 (D.N.J. June 20, 2012) (similarly omitting the adverse employment consequence element and citing *Victor*, 203 N.J. 383); Del Vecchio v. Twp. of Bridgewater, 2014 N.J. Super. LEXIS 2039, at *19 (App. Div. Aug. 15, 2014) (same).

[130] *See supra* Part III.

[131] *See e.g.*, *Whalen*, 2012 WL 3166601, at *1; *Fronczkiewicz*, 2012 WL 2357484, at *1.

extends beyond just the confines of the courtroom: the *Victor* decision has implications for employers' human resources departments, as the *Victor* decision can be read to impart greater significance on the interactive process, which has not heretofore been sufficient, on its own, to impose liability on the employer.[132] The *Victor* decision, given its lengthy analysis of an otherwise moot issue in the case, while failing to definitively provide binding precedent, has left judges, employers, and employees in a difficult predicament, namely whether to rely on the longstanding requirement of an adverse employment consequence, or, to read the proverbial tea leaves, and plan for the likely outcome that an adverse employment consequence will not be required.[133] Thus, the question of what the correct standard is requires immediate attention. The decision has implications for employers, employees, and courts. While there are strong arguments for both approaches, this comment argues that due to the broad construction of the LAD, and as a matter of public policy, the court in *Victor* was correct to suggest that no additional adverse employment consequence should be necessary.

In *Victor*, the court stated that "we . . . cannot entirely foreclose the possibility of circumstances that would give rise to a claim for failure to accommodate even without an identifiable adverse employment consequence."[134] While Victor's case was "a poor vehicle in which to find the definitive answer"[135] to the question, the court was correct to leave the possibility open that such factual circumstances

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[132] *See* 21 No. 12 ADA Compliance Guide Newsletter (explaining that "[e]mployers in New Jersey may be held liable for failing to engage in the interactive process of finding an accommodation for an employee with a disability, even if the employee is not subject to an adverse action. . . .")

[133] *See, e.g.*, 19 No. 1 N.J. Emp. L. Letter 4.

> [The *Victor*] decision is striking because of the court's willingness to analyze in thorough detail an issue that it eventually decided was moot. While the outcome was a victory for the state police, the decision is likely to make failure-to-accommodate claims more difficult to defend against in the future. While the New Jersey Supreme Court felt it couldn't deliver a binding decision on whether failure-to-accommodate claims must include an adverse employment action, it left little question that it believes an adverse action is necessary. Given that all of the justices joined in the opinion, any New Jersey court addressing the issue will likely follow the nonbinding but forceful opinion delivered in this case. As a result, you should be all the more careful in considering of your employees' reasonable accommodation requests and engaging in the interactive process with them.

Id.

[134] *Victor*, 203 N.J. at 422.

[135] *Id.*

may exist.

A. Legislative Intent and Supporting Case Law

The legislative intent of the LAD is best served by allowing an employee "whose requests are not addressed or are denied, and who continue[s] nonetheless to toil on"[136] to have a proper remedy. As mentioned above, in passing the LAD, the New Jersey Legislature found that "practices of discrimination against any of its inhabitants, because of . . . disability . . . are matters of concern to the government of the state."[137] Moreover, the New Jersey Supreme Court has stated that it is the "clear public policy of th[e] State . . . to abolish discrimination in the work place" and that the overarching goal of the LAD is the "eradication 'of the cancer of discrimination.'"[138] The *Victor* court noted that while the question of whether a failure to accommodate without an adverse employment consequence is unsettled at the federal level, "our LAD's broad remedial purposes and the wide scope of its coverage for disabilities as compared to the ADA support an expansive view of protecting rights of persons with disabilities in the workplace."[139] The court went on to make a more definitive statement that "[t]he LAD's purposes suggest that we chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted."[140] Various courts prior to the *Victor* decision had emphasized the broad scope of the LAD in comparison with the ADA.[141]

Thus, as the legislative findings and case law suggest, the LAD was intended to cast a wide net and provide broad protections against discrimination. The broad, remedial nature of the LAD supports the court's suggestion that an employer's failure to accommodate the disability of an employee contravenes the legislature's intent. A rule

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[136] *Id.* at 421.

[137] *See* text *supra* accompanying note 13.

[138] Fuchilla v. Layman, 109 N.J. 319, 334 (1988).

[139] *Victor*, 203 N.J. at 420–21.

[140] *Id.*; *see* Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. 472, 483 (App. Div. 1978) ("Since the inception of the Law Against Discrimination . . . our courts have repeatedly recognized its humanitarian concerns, its remedial nature and the liberal construction to be accorded it.")

[141] *See, e.g.*, Soules v. Mount Holiness Mem'l Park, 354 N.J. Super. 569, 574 (App. Div. 2002) ("LAD's definition of handicap, and its scope, is not comparable to the definitions and scope of handicap or disability under the ADA").

allowing no cause of action for an employee who is not accommodated but suffers no adverse employment consequence would create a situation in which the employer may choose not to provide an accommodation to the employee so long as the failure to do so does not rise to the level of a constructive discharge[142] or hostile work environment.[143] As the *Victor* court noted, there may be "circumstances in which such an employee's proofs, while falling short of [the hostile work environment] standard, would cry out for a remedy."[144] The LAD seeks "to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount."[145] Thus, allowing this additional, albeit narrow, protection for employees would be consistent with the purposes and construction of the LAD because it would further eradicate discrimination against disabled individuals. Even if a handicapped employee suffers no adverse employment consequence, if his or her disability is not reasonably accommodated by the employer, he or she would nonetheless be precluded from enjoying "full and equal access to society."[146]

B. The Scope of the LAD and ADA

Under the ADA, an employer is required to provide not only an accommodation to "enable an individual with a disability who is qualified to perform the essential functions of that position,"[147] but also "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[148] This includes "making the workplace readily

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[142] *See* text *supra* accompanying note 92 (noting the high bar for constructive discharge).

[143] New Jersey courts have "specifically adopted the 'severe or pervasive' test as part of its comprehensive standard," which conforms to the Title VII analysis at the federal level. Taylor v. Metzger, 152 N.J. 490, 498 (1998) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 606 (1993)); *see* Dorfman v. Pine Hill Bd. of Educ., 346 F. App'x 825, 828–29 (3d Cir. 2009) (articulating the test for hostile work environment under the LAD: "employee must show that the employer's conduct: (1) would not have occurred but for the employee's protected characteristic; and the conduct was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.").

[144] *Victor*, 203 N.J. at 421–22.

[145] Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 492 (1982).

[146] *Id.*

[147] 29 C.F.R. § 1630.2(o)(1)(ii) (2014).

[148] § 1630.2(o)(1)(iii).

accessible to and usable by people with disabilities."[149] The employer is responsible under Title I "for making facilities accessible to qualified applicants and employees with disabilities as a reasonable accommodation . . . ."[150] Thus, the reasonable accommodation requirement under the ADA goes beyond just simply providing an accommodation to perform one's job; it also requires accessibility to the facilities in the building,[151] even if not providing such accessibility would not rise to the level of a constructive discharge.

The language in the regulation supplementing the LAD also states that a reasonable accommodation includes "[m]aking facilities used by employees readily accessible and usable by people with disabilities."[152] It follows that a claim of failure to accommodate should not have to be linked to an adverse employment consequence in order to be actionable. Taking, for example, a hypothetical situation of the HIV-positive reporter who was using an electric scooter because of fatigue from walking:[153] a failure to provide the ramp would likely be an actionable claim, regardless of whether or not there was an adverse employment consequence attached to it. The same principles apply to the LAD, which endeavors not only to provide disabled employees with the minimum required accommodation to allow them to perform the functions of the position, but also to allow equal access to society.[154] Thus, a mandated link between the failure to accommodate and an adverse employment consequence undercuts the goals of the LAD and prevents disabled persons from receiving equal treatment.

Moreover, as the court in *Nawrot v. CPC International* suggested in the context of the ADA, requiring an adverse employment consequence "creates employer liability only if the employee suffered an adverse employment action because of his disability," shielding the employer from liability "where known disabilities are not

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[149] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER, *available at* http://www.eeoc.gov/facts/ada17.html (last modified Aug. 1, 2008).

[150] *Id.*

[151] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND PERSONS WITH HIV/AIDS, *available at* http://www.ada.gov/archive/hivqanda.txt (last visited Feb. 28, 2015) (citing as an example of a reasonable accommodation a situation where "[a]n HIV-positive newspaper editor who tired easily from walking began to use an electric scooter to get around. His employer installed a ramp at the entrance to the building in which the editor worked so that the editor could use his scooter at the office.").

[152] N.J. ADMIN. CODE § 13:13-2.5(b)(1)(i) (2015).

[153] *See supra* note 151.

[154] Lasky v. Borough of Hightstown, 426 N.J. Super. 68, 75 (App. Div. 2012).

accommodated simply for management's laziness or cost benefit analysis."[155] Again, such a scheme would cut against the goals of the LAD and would serve only to shift the burden to the party least able to guard against abuse. If an employee has no cause of action where his or her employer's failure to accommodate does not rise to the level of a constructive discharge, the employer has no incentive to provide a reasonable accommodation so long as no other adverse employment consequence follows. In contrast, allowing such a cause of action would leverage the risk of litigation against the employer, who would then be more compelled to offer the accommodation where it is needed.

C. The Interactive Process

A major possible implication of the *Victor* decision is that if, indeed, no adverse employment consequence is required, the interactive process becomes more significant. As discussed *supra*,[156] the interactive process was not an independent source of liability under the LAD; instead, it was a consideration of the second prong of the prima facie case looking to the employee's ability to perform the essential functions of the position. The interactive process requires the employer to consider whether a reasonable accommodation would be possible before terminating or failing to hire an employee.[157] In *Tynan*, the Appellate Division, looking to the ADA for guidance, concluded that an employer's bad faith in failing to engage in an interactive process with an employee may impose liability on the employer.[158] Combining the *Tynan* decision with the possible implications of *Victor*, an employee may prevail on a claim of failure to accommodate when an employer knows about an employee's disability and fails to engage in an interactive process.

Consider, for example, the facts of *Victor*. If no adverse employment consequence was necessary, and the facts were such that Victor could establish that he was disabled, the determination of whether his employer engaged in an interactive process becomes an important, dispositive question.[159] Indeed, had Victor established that he was disabled, it is possible that the case would have been decided in

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[155] Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 724 (N.D. Ill. 2003); *see supra* note 49 and accompanying text.

[156] *See supra* Part II.B.

[157] N.J. ADMIN. CODE § 13:13-2.5(b)(2).

[158] Tynan v. Vicinage 13 of Super. Ct., 351 N.J. Super. 385, 400–04 (App. Div. 2002).

[159] *See generally* Victor v. State, 203 N.J. 383 (2010).

his favor, as he made his request for an accommodation clear to his employer and his supervisor did not examine possible accommodations, but rather required Victor to perform his normal duties in spite of his disability.[160]

D. The Remedy Issue

The question remains that even if a cause of action is allowed for failure to accommodate absent an adverse employment consequence, what remedy would the employee be entitled to? Normally, an employee may file a complaint with the New Jersey Division of Civil Rights ("DCR") or in the Superior Court.[161] The legislature has authorized compensatory and punitive damages,[162] in addition to damages for emotional distress.[163] The legislature held that:

> [B]ecause of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.[164]

Moreover, the New Jersey Supreme Court, in *Lehmann v. Toys 'R' Us*, explained that a plaintiff need not demonstrate serious psychological

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[160] *Id.* at 391–92.

[161] N.J. STAT. ANN. § 10:5-13 (1990).

[162] Lehmann v. Toys 'R' Us, 132 N.J. 587, 610 (N.J. 1993); *But see* Maczik v. Gilford Park Yacht Club, 271 N.J. Super. 439, 453 (App. Div. 1994) (explaining that punitive damages may not be awarded in administrative proceedings, but qualifying that "while common law punitive damages are not available, the Director can award treble economic damages for certain discriminatory conduct and can assess statutory penalties").

[163] *See* Tarr v. Ciasulli, 181 N.J. 70, 76–78 (2004) (explaining that the "LAD permits a lower evidentiary threshold" than Intentional Infliction of Emotional Distress, allowing emotional distress damages even without expert testimony).

[164] N.J. STAT. ANN. § 10:5-3 (2007).

harm in order to recover, nor must a plaintiff establish economic loss, all that is required is a plaintiff prove that he or she was discriminated against.[165] Punitive damages are awarded under the LAD only when the conduct is egregious; i.e., "only in the event of actual participation by upper management or willful indifference."[166] The court will look for wanton and reckless conduct when deciding whether punitive damages are appropriate.[167]

In a case of failure to accommodate absent an adverse employment consequence, many of the aforementioned damages will not be applicable. The employee will not have lost his or her position, will not have been demoted, and will not have suffered any permanent change in employment. Thus, there will be no real occasion to award compensatory damages for economic loss. It is possible that damages for emotional distress may be applicable. As aforementioned, a claim of emotional distress under the LAD is not as burdensome as a claim of intentional infliction of emotional distress.[168] The New Jersey Supreme Court has stated that "[u]nderlying the LAD's expansive language advocating the elimination of discrimination is also the directive that we compensate victims for economic *and noneconomic* injuries attributable to an employer's discriminatory conduct."[169] The court has recognized that to "suffer humiliation, embarrassment and

[165] *Lehmann*, 132 N.J. at 610 ("The plaintiff's injury need be no more tangible or serious than that the conditions of employment have been altered . . . . Although the LAD provides for compensatory and punitive damages, it is not primarily a tort scheme; rather, its primary purpose is to end discrimination. Because discrimination itself *is* the harm that the LAD seeks to eradicate, additional harms need not be shown in order to state a claim under the LAD.")

[166] Rendine v. Pantzer, 141 N.J. 292, 313–14 (1995) (citation omitted) (internal quotation marks omitted).

[167] *See* Levinson v. Prentice-Hall, Inc., 868 F.2d 558, 562 (3d Cir. 1989) (citations omitted) (reviewing the LAD and concluding that "we feel certain that the court would in some cases find that employment discrimination was wantonly reckless or malicious conduct reflecting intentional wrongdoing in the sense of an evil-minded act or a disregard of the rights of another, the type of conduct which it has held may justify an award of punitive damages").

[168] *See Tarr*, 181 N.J. at 82 (holding that "compensatory damages for emotional distress, including humiliation and indignity resulting from willful discriminatory conduct, are remedies that require a far less stringent standard of proof than that required for a tort-based emotional distress cause of action. We hold that in discrimination cases, which by definition involve willful conduct, the victim may recover all natural consequences of that wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries.").

[169] *Id.* at 80 (emphasis added).

indignity is by definition to suffer emotional distress"[170] and that the victim of discrimination should be allowed to recover "without corroborative proof, permanency of response, or other physical or psychological symptoms rendering the emotional distress severe or substantial."[171] Thus, the remedy for a claim of failure to accommodate can result in a recovery for emotional distress. The court has made clear that noneconomic injuries are compensable under the LAD and that the broad, remedial nature of the statute seeks to provide a remedy to victims of discrimination, even if the claim does not rise to the level of a tort-based claim for emotional distress.[172] Also, punitive damages may result if the failure to accommodate the disability is done maliciously or wantonly.[173]

As *Lehmann* made clear, it is important to separate the damages inquiry from the question of liability. A plaintiff must decide whether, given the circumstances of his or her case, bringing suit is in his or her best interest. Given the broad, protective embrace of the LAD and its desire to eliminate all forms of discrimination, however, it seems counterintuitive to bar these claims from moving forward simply because, in some cases, there may not be extensive damages to collect.

E. Protections for Employer

A possible counterargument to dispensing with the adverse employment consequence element is that allowing a cause of action for failing to accommodate a disability would open the floodgates to increased litigation and tenuous claims in what is already a very litigious area of law.[174] While it is true that such a holding would open up more potential liability for the employer, the regulations, as well as procedural mechanisms, offer the employer sufficient protection from liability. Moreover, as the court in *Victor* suggested, most cases involving a claim of failure to accommodate will have some sort of adverse employment consequence attached to them.[175] Thus, the fear

[170] *Id.* at 81 (citation omitted).

[171] *Id.*

[172] *Id.* at 82.

[173] *Lehmann*, 132 N.J. at 610.

[174] *See, e.g.*, Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N. Y. TIMES (Jan. 11, 2011), http://www.nytimes.com/2011/01/12/business/12bias.html?_r=0; *see also Disability-related employment discrimination claims increased in 2012*, THE ARC (Feb. 4, 2013), http://insider.thearc.org/2013/02/04/disability-related-employment-discrimination-claims-increased-in-2012/.

[175] Victor v. State, 203 N.J. 383, 421 (2010) ("Such cases would be unusual, if not rare, for it will ordinarily be true that a disabled employee who has been unsuccessful

of increase in litigation if a cause of action is permitted for employees who are not accommodated absent an adverse employment consequence is tempered by the reality that such a factual circumstance will be rare, and that most cases involving a claim of failure to accommodate will involve an adverse employment consequence.

In addition, procedural safeguards have been established for employers. A plaintiff must make a threshold showing that he or she is disabled within the meaning of the statute. New Jersey courts have continuously made clear that the burden rests with the plaintiff to establish each element of the *prima facie* case in employment discrimination claims.[176] The employee must first prove that he or she is disabled within the meaning of the LAD.[177] In order to initiate the interactive process, a plaintiff must make the need for an accommodation known to his or her employer.[178] This proved to be an important factor in the *Victor* case itself. The fact that Victor could not prove that he was disabled on the date when he requested an accommodation shielded the defendants from liability and effectively rendered the adverse employment consequence element irrelevant.[179]

Second, New Jersey courts have made clear that in order to prevail on a claim of failure to accommodate, the employee must show that he or she was capable of performing the essential functions of his or her position.[180] As part of this analysis, the court will require a plaintiff to "make a facial showing that his proposed accommodation was possible, and that the costs associated with the accommodation were not clearly disproportionate to the benefits."[181] If a plaintiff makes this showing, the employer gets the opportunity "to prove as an affirmative defense

in securing an accommodation will indeed suffer an adverse employment consequence.").

[176] *Id.* at 408 ("All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a prima facie case.").

[177] Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91 (App. Div. 2001).

[178] *See* Tynan v. Vicinage 13 of Super. Ct., 351 N.J. Super. 385, 400 (App. Div. 2002).

[179] *Victor*, 203 N.J. at 422.

[180] *See id.* at 410 (noting that the second element of the prima facie case for a claim of disability discrimination requires the plaintiff to prove "that he or she is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation") (citation omitted).

[181] Boyce v. Lucent Techs., 2007 N.J. Super. Unpub. LEXIS 1680, at *14 (App. Div. June 21, 2007).

that the requested accommodation was unreasonable."[182]

For example, the New Jersey Supreme Court has held that a request for permanent light duty work rendered the employee unable to fulfill the essential functions of the position.[183] Moreover, New Jersey courts have held that "reasonably regular, reliable, and predictable attendance is a necessary element of most jobs. An employee who does not come to work cannot perform any of her job functions, essential or otherwise."[184] The employee may not proceed with a claim of failure to accommodate if he or she is unable to perform the essential functions of his or her particular position even with the requested accommodation.[185]

Third, the LAD similarly makes clear that the employer need not provide an accommodation that imposes an undue hardship on the employer.[186] The statute states that a determination of undue hardship is made on a case-by-case basis and points to several factors to guide the determination.[187] A defense of undue hardship is considered an affirmative defense, however, and the burden of proof rests on the employer.[188] Nevertheless, the employer retains the protection under the statute of demonstrating that an accommodation would impose an undue hardship, which would absolve the employer from liability for failing to accommodate. For example, in *Gaul v. Lucent Technologies,*

[182] *Id.* (citing Gaul v. Lucent Techs., 134 F.3d 576, 581 (3d Cir. N.J. 1998).

[183] Raspa v. Office of Sheriff of Cnty. of Gloucester, 191 N.J. 323, 327 (2007).

> We hold that an employee must possess the bona fide occupational qualifications for the job position that employee seeks to occupy in order to trigger an employer's obligation to reasonably accommodate the employee to the extent required by the LAD. In that context, we further hold that an employer may reasonably limit light duty assignments to those employees whose disabilities are temporary, and that the availability of light duty assignments for temporarily disabled employees does not give rise to any additional duty on the part of the employer to assign a permanently disabled employee indefinitely to an otherwise restricted light duty assignment.

Id.

[184] Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 78 (App. Div. 1999) (citations omitted).

[185] *See* Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352, 367 (App. Div. 1994) (finding that essential functions of the position, namely "apprehension and securing of suspects and prisoners" could not be completed by a police officer who was paralyzed after an accident).

[186] N.J. ADMIN. CODE 13:13-2.5(b) (2015).

[187] *See supra* note 30 and accompanying text.

[188] Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012).

Inc., the Third Circuit found that plaintiff's request to be transferred away from co-workers who caused "inordinate stress" was unreasonable because of the burden it would have on the ability of the employer to make personnel decisions.[189]

Thus, while removing the requirement of an adverse employment consequence as part of the prima facie case exposes employers to more potential liability, there are adequate safeguards that courts must faithfully apply to protect employers from frivolous complaints. The LAD, despite its broad scope, makes clear that an employee is not entitled to each and every conceivable accommodation.[190] As one author explained:

> [e]ven if the Court eventually decides that a disabled employee need not establish that he or she suffered an adverse employment consequence as part of the *prima facie* LAD case, that employee plaintiff will be hard-pressed to succeed where the evidence shows that the employer engaged in the interactive process and offered a reasonable accommodation, which the employee declined.[191]

The statute, therefore, only requires employers to act in good faith to accommodate an employee after becoming aware of an employee's disability. By eliminating the need for an adverse employment consequence, the interactive process becomes very important, as failure to engage in an interactive process may expose the employer to liability. An employer may shield itself from liability by engaging in an interactive process with the disabled employee upon becoming aware of the employee's need for an accommodation.

V. CONCLUSION

As the court in *Victor* suggested, an employee should be permitted to pursue a cause of action for failure to accommodate a disability even in the absence of an adverse employment consequence. The broad, remedial nature of the LAD and the legislature's goal to eradicate discrimination and provide disabled persons with full and equal access

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[189] Gaul v. Lucent Techs., Inc., 134 F.3d 576, 579 (3d Cir. 1998).

[190] *See* Tynan v. Vicinage 13 of Super. Ct., 351 N.J. Super. 385, 397 (App. Div. 2002) (citation omitted) (explaining that an "employer's duty to accommodate extends only so far as necessary to allow 'a disabled employee to perform the essential functions of his job. It does not require acquiescence to the employee's every demand.'").

[191] Trent S. Dickey & David H. Ganz, *Is An Adverse Employment Consequence A Necessary Element For A Failure To Accommodate Claim In New Jersey?*, THE METRO. CORPORATE COUNSEL 1, 34 (Nov. 2, 2010), http://www.metrocorpcounsel.com/pdf/2010/November/34.pdf.

to society bolsters the argument that a cause of action should be allowed where an employee is not accommodated but has not suffered an adverse employment consequence. In addition to dovetailing with the Legislature's purpose in enacting the LAD, allowing a cause of action absent an adverse employment consequence incentivizes employers to be vigilant and proactive in providing accommodations. By allowing a cause of action for failure to accommodate a disability, the employer will be faced with the prospect of litigation, yet will also be protected by procedural mechanisms in the statute, namely, that the requested accommodation cannot be unduly burdensome and that the plaintiff must be able to perform the essential functions of the position. These protections along with the relatively rare nature of these types of cases limit the scope of litigation and insulate the employer from excessive liability. Thus, because of the broad construction of the LAD, and as a matter of public policy, employees should be able proceed on a claim of failure to accommodate even absent an adverse employment consequence.